J241002

In the Competition Appeal Court of South Africa

Case 12/CAC/DEC01

In the matter between

American Soda Ash Corporation	**First Appellant**
CHC Global (Pty) Ltd	**Second Appellant**

and

Competition Commission of South Africa	**First Respondent**
Botswana Ash (Pty) Limited	**Second Respondent**
Chemserve Technical Products (Pty) Ltd	**Third Respondent**

Judgment

Malan AJA:

[1] This is an appeal from a decision of the Competition Tribunal dated 30 November 2001 holding that jurisdiction under s 3(1) of the Competition Act, 1998 (the "Act") can be based on any effect within South Africa, whether non-competitive or pro-competitive, and from an inter-related decision dated 27 March 2001 holding that any agreement among firms having any provision setting prices is per se unlawful under s 4(1)(b) of the Act regardless whether the provision is ancillary to the creation of a joint venture and regardless of the nature of the entity setting the prices, the

nature of its activities and any resulting pro-competitive efficiencies.

The history of the litigation between the parties is set out comprehensively in the decision of the Tribunal of 30 November 2001 and need not be repeated. The issues to be resolved will be dealt with under the headings referred to hereunder.

A Standing of intervening parties

[2] One of the issues in this appeal is whether the intervening parties have the required standing to seek an order against Ansac interdicting the continued performance in South Africa of an agreement concluded abroad in the absence of an allegation that they suffer harm in consequence of such performance. It seems logical to deal with this matter first since a negative finding could very well dispose of the matter altogether. The relief sought by Botash is the following:

a) an order declaring that [Ansac] is a party to an agreement, alternatively an arrangement, further alternatively, a decision to fix selling prices, trading conditions and to divide the market, according to customers and territory, for the export of soda ash in South Africa contrary to section 4(1)(b)(1) and (ii) … ("the prohibited practices");
b) an order that Ansac desist from engaging in the prohibited practices;
c) an order that [CHC Global] shall not act as the agent of [Ansac] whilst [Ansac] engages in the prohibited practices;
d) in the alternative to (b) above, an order that [Ansac] cease the supply of soda ash, directly or indirectly, to the South African market and desist from soliciting orders for soda ash in the South African market;

e) in the alternative to (c) above, that CHC Global shall not act as the agent of the first respondent to supply soda ash or solicit orders on behalf of the first respondent in the South African market …

Botash is the complainant in this matter (s 49B(2)(b)) and enjoys standing as an intervening party. This was formalized by the Tribunal on 7 September 2000.

[3] The pleadings filed by Botash do not contain an allegation that they are or were adversely affected by Ansac's conduct. The exception is based on the premise that an applicant at common law seeking an interdict for the breach of a statutory duty must allege and prove special damages where the duty was imposed in the public benefit unless he or she falls within the class of persons for whose benefit the statutory duty was enacted (*Patz v Greene and Another* 1907 TS 427 and subsequent cases). Basing its decision inter alia on Tribunal Rule 46(1) and ss 49B(2) and 53(1) of the Act, the Tribunal held that there is no requirement in the Act impeding an intervening party to from seeking relief or requiring it to show that it has suffered special damages and dismissed Ansac's exception to Botash's standing to apply for the relief sought with costs (Decision of 30 November 2001).

Ansac's submissions do not entail a repudiation of the agreement between the parties in which they consented to the participation of the intervening parties to the proceedings and they accept the binding effect of the Tribunal's consent order made. However, Ansac contends that the intervening parties cannot claim relief to which they are not entitled to in law.

[4] The Act, in regulating participation in the proceedings of the Commission and Tribunal identifies various participants. Section 49B(2) identifies a "complainant" as a person (a) who submits a complaint concerning an alleged prohibited practice to the

Commission in the prescribed form (s 1(1) (iv)). A complainant may apply to the Tribunal for an interim order in respect of the alleged practice (s 49C(1)) and has, to succeed, show serious or irreparable damage to him or herself (s 49C(2)(b)(ii)). The onus of proof in such an application would rest on the applicant for the interim relief (s 49C(3)).

No specific requirements are, however, set for complainants in general. Their rights to participate in the hearing are set out in s 53(1). The preamble to the subsection reads as follows: “The following persons may participate in a hearing, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing …”. It seems that “participate” indicates general involvement in the hearing as a party to the proceedings and that the rights to put questions and inspect books or items are illustrations of this right to participate. It follows that “to participate” also includes the right to address the Tribunal, make representations to it and to formulate and claim relief: the right to participate would be meaningless unless relief can be claimed.

However, the relief that may be claimed is not the interim order provided for by s 49C(1) but relief of a public nature and not specific to the person or particulars of the applicant or claimant. The Tribunal is empowered, as is provided for in s 27, to adjudicate on the conduct prohibited in chapter 2 and to provide a remedy provided for in the Act; adjudicate any other matter that may be considered and make a corresponding order; hear appeals from the Commission and make any other incidental ruling or order (s 27 as amended by s 11 of the Second Competition Amendment Act, 2000). The Tribunal is not empowered to make orders for the payment of damages to any particular person (s 62(5) and see s 65(5)). These remedies do not depend on the applicant’s having suffered harm or a likelihood of harm, but rather on the specific provisions of the Act, and are limited in scope. Essentially, as I have said, they are orders of a limited kind to be made in the public interest. They do not seek to vindicate private rights. Hence

there is no need for a participant at any hearing to show that he or she has suffered damages or that they may be exposed to them.

[5] It follows that the intervening parties need not show that any specific right has been infringed or that they require protection to prevent "serious or irreparable damage" so as to entitle them to an interim order (s 49C(2)(b)(ii)). They do not seek to vindicate a personal right. That they have the standing to do so hardly admits of any doubt: Botash has the right to participate in the hearing under s 53 (as well as under Rule 46) and, consequently, also the right to claim specific relief in accordance with the Act: it is both a "complainant" and a person falling under s 53(1)(a)(iv).

[6] It follows that the appeal based on the Botash's lack of standing should fail.

B Section 3(1)

[7] The first substantive issue on appeal concerns the construction of s 3(1) of the Act. Section 3 deals with the application of the Act and provides as follows:

> 1) This Act applies to all economic activity within, or having an effect within, the Republic, except –
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> (a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations act, 1995 (Act No 66 of 1995);
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> (b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;
>
> …
>
> (e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

The formulation of s 3(1) is simple and uncomplicated. The Act

applies to “all economic activity within, or having an effect within, the Republic”. The appeal concerns the meaning of the words “an effect within, the Republic”. This apparently straightforward expression disguises the true issue involved, viz that of the extra-territorial operation of the Act.

[8] The “economic activity” in this case includes the conclusion of the Ansac agreement, admittedly in the United States of America. Exception was taken by Ansac on the basis that, since neither the Commission nor Botash made the allegation of deleterious or negative effects within the Republic in their pleadings, the pleadings are excipiable. The wording of the exception is as follows: “Upon a proper construction of the Act, in order for economic activity occurring outside South Africa to have an ‘effect’ within South Africa for purposes of s 3, it must be alleged and proved that such activity has had [a] negative or … deleterious effect on competition within South Africa”. In the heads of argument “deleterious” is equated with “anti-competitive” so that the question before the Tribunal was whether the section should be construed so as to mean that only “economic activity having an anti-competitive effect within the Republic” was included.

[9] The Tribunal rejected the contentions presented on behalf of Ansac in their decision of 30 November 2001 holding as follows:

> “Not only is there no basis in international law to support Ansac’s reading, but also there is no practical foundation for it either. In effect it leads to a double inquiry. First, one will have to inquire into whether the Tribunal has jurisdiction. This entails a net balancing of pro- and anti-competitive effects. Then if a net harm is shown one proceeds with the substantive enquiry, which might in a rule of reason case involve extensive duplication of the evidence. In a per se contravention it would mean the leading of evidence in the jurisdiction enquiry, which is then inadmissible in the substantive enquiry …” (pages 29-30).
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> “The word ‘effect’ is used in our legislation in conjunction with the words ‘economic activity’. This language is itself neutral and indicated that what

the legislature sought to distinguish by the distinction between activity within and effects within was the distinction between conduct of an economic nature that took place within the Republic and conduct that took place outside the Republic and which has an 'effect' within the Republic such as a boycott" (page 30).

The Tribunal found:

"We find that on an ordinary interpretation the word effect in section 3(1) is not limited to adverse effects. Whilst the language may require some qualification it is not a qualification related to the nature of the 'effects' but their extent. What that extent should be we do not need to decide in this case save to suggest they should not be trivial.

"We further find that the interpretation contended for by Ansac is not predicated upon a sound policy approach and that even if we felt inclined to interpret the statute purposively that purpose contended for subverts rather than enhances the legislative intent.

"We further find, that in any event, that Ansac has failed to establish a rule of customary law that [it] supports its contentions as a matter of 'constant and uniform usage'" (at pages 30-1).

[10] Ansac's argument calling for a restrictive or limited interpretation of s 3(1) is based on two grounds: one, a presumption against the curtailment of the jurisdiction of the courts (cf *Special Investigating Unit v Nadasen* 2002 1 SA 605 (SCA) 610AC); and two, s 1(2) which calls for a purposive interpretation of the Act.

[11] "Ouster clauses", says Baxter *Administrative Law* (1984) at 727, "have no absolute meaning: they must be construed within

the context of the legislation in which they are enacted, as must the acts to which they refer". The Act contains provisions limiting the jurisdiction of the ordinary courts or reserving exclusive jurisdiction to the Tribunal and the Competition Appeal Court (ss 62 and 65) . However, before the presumption calling for a strict construction can be relied upon the context of the legislation must be considered. This was done in *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd and Others* 2001 2 SA 1129 (C) where at 1138F- 11341E the following was said:

> "[T]he jurisdiction conferred upon the tribunal and the Court is clear and unambiguous. Whatever kind of approach one adopts in interpreting a statute, one must bear in mind that the actual language of the statute cannot be ignored …
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> …
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> I am mindful of the fact that there is a strong presumption against the ouster or curtailment of the jurisdiction of the High Court … . However, although such presumption applies, it is in every case necessary to consider all the circumstances and then determine whether a necessary implication arises that the Court's jurisdiction is either wholly excluded or at least deferred until the domestic or extra-judicial remedies have been exhausted…
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> …
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> The subject-matter of the Act is actually or potentially monopolistic or anti-competitive agreements, practices or acts which are grouped under the headings restrictive horizontal practices, restrictive vertical practices, abuse of dominant position and mergers … . *Furthermore, if one considers the scope and language of the Act, it is apparent that the intention of the Legislature was that competition matters should be administered by structures other than courts of law. To that end 'independent institutions' were established to 'monitor economic competition'*(own italics)".

Given the purpose of the Act or the "intention" of the legislature

referred to, and mindful of the statutory command calling for a purposive interpretation (s1(2)(a)), the scope for the application of the presumption against the curtailment of the jurisdiction of the courts is very limited. It is not a matter of the Competition Tribunal "trespassing" on the sphere of the ordinary courts of the land. Rather, the Tribunal is given exclusive jurisdiction to adjudicate on any conduct prohibited in terms of Chapter 2 of the Act (ss 62(1)(b) read with 27(1)). Section 65(2) requires a civil court, when a party raises an issue concerning conduct prohibited by the Act, to decline from considering it and to refer it to the relevant competition authority. A hierarchy of institutions or *fora*, including the Competition Appeal Court is provided to administer and adjudicate upon the subject matter of the Act (see *Seagram* 1141F – 1142C). Effect must be given to this clear expression of the intention of the legislature. Whatever theory of interpretation is used, the words of the legislation cannot be ignored and is the starting point for any construction (*S v Zuma and Others* 1995 2 SA 642 (CC) 652H – 653A). The word "effect" is not ambiguous and its ordinary, grammatical meaning is in accordance with the purposes of the Act.

[12] The Act itself contains some guidelines for its interpretation. Its purpose is "to promote and maintain competition in the Republic" in order inter alia "(a) to promote the efficiency, adaptability and development of the economy"; "(b) to provide consumers with competitive prices and product choices"; (d) "to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic" (s 2). Section 1(2) requires the Act to be interpreted "(a) in a manner that is consistent with the Constitution and gives effect

to the purposes set out in section 2; and (b) in compliance with the international law obligations of the Republic".

[13] To return to the word "effect" used. The appellants have argued that only "anti-competitive economic activity" should be comprehended within it so that the word "effect' should be read as meaning "an anti-competitive effect" within the Republic. This interpretation is unsustainable. Not only does the clear wording of s 3 not support it but the following sections explicitly require an assessment whether the agreement or conduct complained of has the effect of substantially preventing or lessening competition. For example, s 4(1)(a) contains a prohibition against anti-competitive agreements between parties, ie competitors, in a horizontal relationship. Any agreement between them which has the effect of substantially preventing or lessening competition in a market will be prohibited unless a party can show some technological, efficiency or other pro-competitive gain, resulting from the agreement, that outweighs its anti-competitive effect. A firm may, therefore, on the appellant's argument, *justify* an agreement and avoid the prohibition, by showing that some pro-competitive benefit *in the Republic* flows from the agreement and that this benefit outweighs the anti-competitive effects of the agreement. The same reasoning applies to s 5(1) dealing with restrictive vertical practices. In other sections the word "effect" is used neutrally with the addition of the words "anti-competitive" (s 8(c) and (d)) or "of substantially preventing or lessening competition" (eg ss 9(1)(a), s 4(1)(a) and 12A(1)(a)(i)). This tends to show that "effect" is used in s 3(1) in the same neutral sense. This conclusion is strengthened when chapter 3 of the Act is considered. The Commission would have to consider whether a foreign merger has an anti-competitive effect in South Africa in order to establish whether the Act is applicable and before it could consider its anti-competitive effect under s 12A. It is highly unlikely that the legislature intended to adopt so uncertain a criterion for jurisdiction.

My conclusion is that the word "effect" in s 3(1) should be given its ordinary, grammatical, meaning. To import the words "anti-competitive" into the section is not justified by the wording of the Act.

[14] Sections 1(2)(a) and (b) require the Act to be interpreted in a manner that is consistent with the Constitution and gives effect to the purposes set out in s 2 as well as being in compliance with the international law obligations of the Republic. Submitting that a purposive approach be followed, the appellants argue that s 3(1) should be interpreted in such a way that only anti-competitive economic activity is brought within its purview. This would then permit an examination of the effect of the Ansac agreement and its by-laws in South Africa.

In *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 2 SA 797 (SCA) where the same s 3(1) had to be construed (as it read before its amendment by The Competition Second Amendment Act, 2000). Schutz JA said at 811H – 812A:

> "[21] Having regard to the authority and persuasiveness of what has gone before, I think the submission in Standard Bank's heads of argument that the 'semantic or literalist approach enjoys ever less support in modern legal theory' is cast rather high. However, as I have endeavoured to show, our law is an enthusiastic supporter of 'purposive construction' in the sense stated by Smalberger JA in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1 SA 925(A) at 943G-H:
>
> 'Mindful of the fact that the primary aim of statutory interpretation is to arrive at the intention of the Legislature, the purpose of the statutory provision can provide a reliable pointer to such intention where there is an ambiguity.'"

In *South African Raisins (Pty) Ltd and Another v SAD Holdings Ltd*

and Another 2001 2 SA 877 (SCA) at 886BC Melunsky AJA paraphrased the approach adopted by Schutz JA thus: “That it is permissible to give effect to the policy or object or purpose of the legislation, where there is an ambiguity, is clear… “.

The meaning of the word “effect” is that of “something caused or produced; a result or consequence” (*The Oxford Universal Dictionary*). There is no ambiguity in its use in s 3(1). Nor is there any reason why it should not be given its ordinary, unqualified meaning in s 3(1). As Harms JA said in *Abrahamse v East London Municipality and Another; East London Municipality v Abrahamse* 1997 4 SA 613 (SCA) at 632GH: “Interpretation concerns the meaning of words used by the Legislature and it therefore useful to approach the task by referring to the words used, and to leave extraneous considerations for later” (cited by Schutz JA in *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others supra* at 811H and see the other authorities referred to at 810-2).

[15] The appellants made a further attack on s 3(1) by invoking s 1(3) which allows a person interpreting or applying the Act to consider appropriate foreign and international law. Moreover, the provisions of s 1(2)(a) which calls for an interpretation in a manner that is consistent with the Constitution, refer to the provisions of s 232 of the Constitution:

> “Customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

This provision enshrines the common-law position that international law forms part of the municipal law. Dugard *International Law. A South African Perspective* (1964) at 46-7 observed:

> “Since customary international law is a species of common law, it must give way to legislation in the case of conflict. However, where there is an

ambiguity as to whether or not there is a conflict, an attempt should be made to reconcile the statute with the customary rule, since there is a statutory presumption that the legislature does not intend to violate international law."

See *Azapo and Others v Truth and Reconciliation Commission and Others* 1996 4 SA 562 (CPD) 574BC; *Alexander v Pfau* 1902 TS 155 159 and 164. Moreover, s 233 of the Constitution provides that

"[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

See *Dawood and Another v Minister of Home Affairs and Others* 2000 1 SA 997 (C) 1033H – 1034A; *Azanian Peoples Organisation & others v President of the Republic of South Africa & Others* 1996 4 671 (CC) 688-9 and s 1(2)(b).

[16] In most cases the exercise of the functions of a state by legislation, executive and enforcement action and judicial decrees is limited to the territory of the state. However, as Dugard 116 explained, "[i]nternational trade, migration, travel, and crime ensure that states will have an interest in extending their jurisdiction beyond their territorial limits to cover persons and property in other countries". The extra-territorial application of domestic competition laws is one of the ways to combat the operation of international cartels (see Klein "The War against International Cartels: Lessons from the Battlefront" paper presented at the Fordham Corporate Law Institute 14 October 1999 at page 9-10).

In the United States the "effects doctrine" was developed to deal

with practices outside the country but having “effects” within it. The “effects doctrine” was first applied in the context of the extra-territorial violation of the Sherman Act of 1890 (15 USC §§ 1-7) in the case of *United States v Aluminum Company of America (Alcoa)* 148 F 2d 416 (2d Cir 1945) where Judge Hand asserted jurisdiction over cartel arrangements made abroad by foreign companies and held them to be unlawful because “they were intended to affect imports and did affect them” and because “any State may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends” (at 443 cited by Cartoon “The Westinghouse Case: Collective Response to the Extra-territorial Enforcement of United States Antitrust Laws” (1983) 100 *SALJ* 731 at 733).

The wording of article 81 of the EC Treaty specifically prohibits agreements, decisions or concerted practices “which have as their object or effect the prevention, restriction or distortion of competition within the common market”.

[17] The appellants have to show that an interpretation giving the words “an effect” their ordinary grammatical meaning violates international customary law. It is not disputed that the Competition Act has extra-territorial application and it is not disputed that a state may, in certain cases, extend its jurisdiction beyond its territorial borders. In *The Lotus Case* (1927) PCIJ Reports Series A, No 110 it was said that

> “[t]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on a

permissive rule of international law. … Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion ….

"[I]t is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."

And in *Barcelona Traction, Light and Power Company Limited Case*1970 ICJ 3 (February 5, 1970) it was said in § 70 :

> "It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (and there are of course others-for instance in the fields of shipping, 'anti-trust' legislation, etc.), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits-though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."

See Dugard 117-8 and *Oppenheim's International Law* 9ed (1996) §140 at 478-9. In a sense territoriality also underlies the kind of case, such as the present, where foreign conduct has an effect at home (Oppenheim §137 at 460 and see *Barcelona Traction 1970 ICJ* 65 at 105). International law thus permits states to exercise their jurisdiction to promulgate rules, whether it be legislation or

administrative decrees, prohibiting conduct elsewhere having an "effect" within the state.

[18] In relying on United States cases the appellants have argued that jurisdiction required that there be an intended and substantial anti-competitive effect in South Africa. I have not been persuaded that this is correct. The appellants rely on the *Restatement (Third) of the Foreign Relations Law of the United States* (1987) where the basic principles of extra-territorial jurisdiction are set out:

> "(1) The conduct and its effect must be generally recognized as constituent elements of a crime or tort under the laws of states with reasonably developed legal systems (objective territoriality); or
>
> (2) The consequences within the territory must be substantial and occur as a direct and foreseeable result of conduct outside the territory; and
>
> (3) The law proscribing the effect must not be inconsistent with the principles of justice generally recognized by states with reasonably developed legal systems."

The question is not whether the consequences of the conduct is criminal or, for that matter, anti-competitive, but whether the conduct complained of has "direct and foreseeable" substantial consequences within the regulating country. In other words, the "effects" in the present case must be such that they fall within the regulatory framework of the Act, whether they are anti-competitive or not. This seems to be expressed by Oppenheim 468 where it is said that "[i]t is a matter for determination in each case to whether a direct and substantial connection exists which is sufficient to justify a state treating as criminal the conduct of aliens taking place within the area of another state's sovereign authority". In *Hartford Fire Insurance Company v California* 509 US 764 (1993) the court held that "[i]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce some substantial effect on the United States".

This inquiry does not involve a consideration of the positive or

negative effects on competition in the regulating country but merely whether there are sufficient jurisdictional links between the conduct and the consequences. The appellants have relied on numerous cases, inter alia, *American Banana Co v United Fruit Co* 213 US 347 (1909); *United States v Aluminum Company of America (Alcoa)* 148 F 2d 416 (2d Cir 1945); *Timberlane Lumber Company v Bank of America* 549 F 2d 597 (9th Cir 1976); *Mannington Mills Inc v Congoleum Corp* 595 F 2d 1287 (3d Cir 1979); *Hartford Fire Insurance Company v California* 509 US 764 (1993); *Matsushita v Zenith Radio* 475 US 574 (1986); *Continental Co v Union Carbide* 370 US 690 (1962); *Metro Industries Inc v Sammi Corporation* 82 F 3d 893 (9th Cir 1996). I am not convinced that they support the contention that only anti-competitive or deleterious effects would suffice to bring the conduct complained of within the jurisdiction of the regulating state. The question is rather one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory "net", concerns not only anti-competitive conduct but also conduct the import of which still has to be determined.

[19] Nor do I think will any of the principles of international comity will be infringed by the rejection of the interpretation contended for by the appellants. This elusive concept, "more an aspiration than a fixed rule, more a matter of grace than a matter of obligation" (*United States v Nippon Paper Industries Co Limited* 109 F 3d 1 (1997)), takes the matter no further. Ulrik Huber, writing on conflict of laws, based his system on three pillars of public international law: the first

> "dat de wetten van yder vry Landschap kracht moeten hebben binnen de palen des selven Landts, ende verbinden alle de onderdanen desselfs, sonder wijders"; secondly, "dat voor onderdanenen moeten gehouden alle Persoonen die in dat Landtschap worden bevonden, soo lange hun aldaer onthouden, het sy voor een tijdt of voor altoos"; and, thirdly, "de

> Hooge machten van yder Landt bieden elkander de handt, ten einde , de Rechten van yder, op elk zijn onderdanen, schoon elders zynde, zoo verre gelden, als het niet is strydig met de Macht of het Recht des anderen in syn bedryf" (cited by Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg*(1972) 19).

No concerns of comity or of the untoward assumption of jurisdiction over foreign territory arises in this case. The issue is simply one of "an effect within the Republic". There can be no question of comity defeating the exercise of jurisdiction since no conflict between US and South African law has been demonstrated. Ansac does not operate in the United States for it prohibited from doing so by s 1 of the Sherman Act. It may, however, operate outside of the United States under the Webb-Pomerene Act 15 USC 61-65 which provides a limited anti-trust exemption for the formation and operation of competitors for the purposes of engaging in collective export sales.

[20] The Webb-Pomerene Act, according to the *Anti-trust Enforcement Guidelines for International Operations* issued by the US Department of Justice and Federal Trade Commission, "does not apply to conduct that has an anti-competitive effect in the United States, or that injures domestic competitors of the members of the export association. Nor does it provide any immunity from prosecution under foreign anti-trust laws." It follows that no consideration of comity precludes South African competition authorities from exercising their jurisdiction in terms of the Act. The symbolic, "de Hooge machten van yder Landt bieden elkander de handt", allowing for the operation of foreign law in a country, does not exclude the exercise over the effects of foreign conduct within its own territory of its own laws which, in any event, are not forbidden by the foreign state (see further the reasoning in *Ahlstrom Osakeyhtio and others v Commission of the European Communities* [1988] CMLR 901 (ECJ) (the *Wood Pulp Case*) par 19 and 20).

[21] Article 81 of the European Community Treaty prohibits those agreements, decisions and concerted practices "which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". The reason for this formula is explained in the *Wood Pulp Case*: "If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions" (par 16). The "implementation test" does not involve a consideration of the positive and negative consequences of the agreement, decision or practice. *Gencor v Commission of the European Communities* Case T-102/96, 25 March is summarized as follows: "Application of Regulation No 4064/89 is justified under public international law when it is foreseeable that a proposed concentration between undertakings established outside the community will have an immediate and substantial effect within the Community" (par 3 and par 90ff of the judgment). The decisions of the European Court of Justice do not support the contentions of the appellants.

C Condonation and Section 4(1)(b)

[22] The appellants seek to appeal against the decision of the Tribunal dated 27 March 2001 relating to the interpretation of s 4(1)(b). Various grounds of appeal are set out in the notice of appeal. Essentially, the ruling of the Tribunal is that "evidence concerning any technological, efficiency, or other pro-competitive gain that might be admissible in terms of section 4(1)(a) is inadmissible in terms of section 4(1)(b)". The question is whether this ruling, which is interlocutory, may be appealed against.

Section 61 grants a right of appeal against a "decision by the Competition Tribunal" if, in terms of s 37, the Court has jurisdiction the appeal or review in the matter. Section 37 empowers the Competition Appeal Court to (a) review any decision of the Tribunal; or (b) consider an appeal arising from the Tribunal in respect of (i) any of its final decisions … or (b) any of its interim or interlocutory decisions that may, in terms of the Act, be taken on

appeal. The question then is whether the decision referred to have a *final* effect. In *Van Streepen & Germs v Transvaal Provincial Administration* 1987 4 SA 569 (AD) Corbett JA, as he then was, said that an interlocutory order which has final and definitive effect on the main action must be viewed as an appealable judgment or order (at 583 HJ). He continued that, where

> "the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed, then a somewhat different position arises, and indeed in that event the advantages of expense and convenience may favour a final determination of the question on appeal even though the proceedings in the Court a quo may not have been concluded."

In a sense the answer has been given by the Tribunal itself (compare *Steytler NO v Fitzgerald* 1911 AD 295 at 313; *Beinart v Wixley* 1997 3 SA 721 (SCA 729H-730A)): in motivating its decision the Tribunal said that its

> "finding on the nature of Section 4(1)(b) will, like the other points in issue here, have an important bearing on the nature of the future hearings in this matter. A finding in favour of the Commission and the interveners presupposes that if, indeed, we conclude that their opponents have engaged in the conduct specified in 4(1)(b) – that is, if they have fixed prices or any other trading condition, divided markets or tendered collusively – then the contravention is established and evidence concerned to demonstrate any pro-competitive gains said to accrue as a result of the transgression will not be relevant. If, on the other hand, we accept the view contended for by ANSAC, then, even in the event that we find a price fixing and/or market sharing arrangement as alleged by the Commission and BOTASH, ANSAC will still be entitled to put up evidence purporting to show that the consequences of the anti-competitive practice are countervailed by efficiency gains for which it is responsible."

In the circumstances the appeal against the decision of the tribunal of 27 March 2001 on this issue should now be entertained.

D Section 4(1)(b)

[23] The appellants appeal against that part of the decision of the Tribunal of 27 March 2001 relating to the interpretation of s 4(1)(b) of the Act. The grounds of appeal involve four aspects: holding that any setting of a resale price or assignment of responsibility to supply material is contrary to s 4(1)(b); holding that a per se rule ought to be applied in applying s 4(1)(b); holding that a contravention of s 4(1)(b) does not pre-suppose anti-competitive conduct; and holding that evidence may not be adduced to show that the appellants' alleged conduct resulted in efficiencies, cost savings, increased or more effective competition or was not anti-competitive.

[24] Section 4 as it was then operative reads as follows:

"(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if

a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

b) it involves any of the following restrictive horizontal practices:
    (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
    (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
    (iii) collusive tendering."

Section 4 has been amended to add to s 4(1) after the words "is prohibited if", the following: "it is between parties in a horizontal relationship and if" so as to make it clear that both subclauses (a) and (b) refer to agreements between parties in a horizontal relationship. If the structure of the Act before its amendment is considered, particularly ss 4 and 5, it is clear that there was an ambiguity in the legislation: s 4 deals with agreements between parties in a "horizontal relationship" and s 5 with agreements between parties in a "vertical relationship". The omission to qualify the word "it" with words such as "is between parties in a horizontal relationship" was rectified by the amendment and must necessarily be implied in the legislation as it stood before the amendment.

However, it not necessary to decide this issue since s 4(1)(b) refers to a "restrictive horizontal practice". This is defined as any practice listed in s 4. Although "horizontal practice" is not defined, a "horizontal relationship" is intended to mean a "relationship between competitors" (s 1(xiii)). The implication seems clear that "it" in s 4(1)(b), as it then read, refers the *agreement, concerted practice or decision* between *competitors*. "Competitors" are not defined but firms will be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitutable goods or services. Compare *JD Group Ltd v Ellerine Holdings Ltd* (78/lm/ju100) par 4.2.

[25] Ansac is an association of America soda ash producers that operates under the United States Export Trade Act 1918 (the "Webb-Pomerene Act"). The purpose of the Act is to exclude the operation of the Sherman Act to United States associations engaged solely in export trade ("solely trade or commerce in

goods, wares, or merchandise exported, or in the course of being exported from the United States or any territory thereof to any foreign nation") and whose activities do not restrain trade within the United States. In *United States v Concentrated Phosphate Export Association Inc et al* 393 US 199 Mr Justice Marshall said at 206: "The Webb-Pomerene Act was passed to 'aid and encourage our manufacturers and producers to extend our foreign trade' … Congress felt that American firms needed the power to form joint export associations in order to compete with foreign cartels. But while Congress was willing to create an exemption from the anti-trust laws to serve this narrow purpose, the exemption created was carefully hedged in to avoid substantial injury to domestic interests. Congress evidently made the economic judgment that joint export associations could increase American foreign trade without depriving American consumers of the main advantages of competition."

During the debates before passing the Act Senator Pomerene said bluntly: "[W]e have not reached that high plane of business morals which will permit us to extend the same privileges to the people of the earth outside of the United States that we extend to those within the United States." Congressman Webb declared: "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it" (see at 207-8).

[26] Ansac is an export cartel that avoids anti-trust liability in the United States by complying with the requirements of the Webb-Pomerene Act. The *Current Membership Agreement* provides that the Agreement relates to export sales only:

> “The purpose of ANSAC is to promote Export Sales and to improve the competitive position of United States-produced Soda Ash in foreign markets by creating a corporation for the sole and exclusive purpose of engaging in export trade and making Export Sales in strict conformity with the policy and provisions of the Webb-Pomerene Act. the goals of ANSAC will be to promote Export Sales, to strengthen its position in negotiations for Export Sales to foreign and governmental buyers, to provide for efficient shipment of its export sales, to contribute to an improved US balance of payments and, where possible, to increase the tonnage of United States-produced Soda Ash sold for export as provided herein. The members agree with the aforesaid purposes and each Member agrees to abide by the provisions of this Membership Agreement and to work with ANSAC to further these goals” (*Second: Scope, Purposes and Goals*).
>
> “The Member agrees that all Export Sales by the Member and any subsidiary or Affiliated Company will be made as provided herein …“ (*Third: Sales Nominations and Procedures (a) Exclusive Export Vehicle*).

The Board of Directors are obliged to establish such procedures as will provide

> “that each Member is entitled to a fair share of the total tonnage shipped by ANSAC” (*Third: Sales Nominations and*

Procedures (b) Supply Procedures).

"Marketing policy and pricing policy with respect to Export Sales shall be set the Board of Directors by affirmative vote of directors representing a majority of members… .the Board of Directors shall further establish by the affirmative vote of directors representing all of the members provisions for equitable price averaging or other adjustment among Members as the Board shall determine" (*Third: Sales Nominations and Procedures (c) Prices)*.

"The Member agrees that it will fulfill its tonnage supply commitments as determined pursuant to the procedures adopted by the Board of Directors …" (*Third: Sales Nominations and Procedures (e): Member Commitment).*

It is therefore no surprise that Ansac's activities attracted the attention of the European authorities (*OJL* 152 at 54).

[27] In the present case the appellants seek to place evidence before the Tribunal to show that Ansac is a legitimate joint venture whose purpose it is to pool costs and resources so as to make it possible for them to trade competitively within exports markets where there are barriers to entry and significant risks. They seek to demonstrate that by virtue of pooling costs and resources Ansac has been able to appoint independent sales and distribution staff dedicated solely to sales and services of customers, has been able

to negotiate and obtain decreased freight and stevedoring charges and has entered into a variety of cost–reducing overseas warehousing and distribution agreements. The result of this is that Ansac has achieved reductions in marketing and distribution costs and can undertake competitive sales to new countries and overseas markets including those with high logistical and political risks and offer customers world wide the enhanced reliability and efficiency made possible by increased volumes and the back-up supply commitments of US soda ash producers.

In respect of South Africa, the appellants intend to lead evidence that these efficiencies will lead to competitive prices and product choices. It was argued that the Ansac agreement could not be examined in isolation as one setting prices while its context and beneficial aspects were ignored. Recourse to evidence is thus necessary to determine whether the agreement contains a naked restraint and, if not, whether it is a legitimate means of establishing a joint venture for entering the market to trade on a competitive basis.

The issues thus are, as the tribunal defined them, whether, if a transgression of s 4(1)(b) is established, Ansac may raise an efficiency defence to show "in the phrase ubiquitously present in the statute, that the offending agreement produces 'technological, efficiency, or other pro-competitive gain resulting from it that outweighs that effect'".

[28] The Tribunal distinguished between the two classes of agreement prohibited by s 4: the first (s 4(1)(a) is concerned with the effect of the agreement, the second (s 4(1)(b) contains a direct prohibition:

> "Section 4(1)(a), on the other hand, specifically details the very content of the agreements that it seeks to proscribe these being agreements to

> fix price or any other trading condition, agreements to divide markets, and collusive tendering. But this is all that is specified. In plain contrast with the requirements of Section 4(1)(a), those who set themselves the task of impugning agreements thus described in Section 4(1)(a) do not have to establish any deleterious impact on competition. All that has to be established is the existence of an agreement embodying the features detailed in Section 4(1)(b)(i)-(iii). Quite plainly the Act requires no showing other than that the agreement in question conforms to the content specified in Section 4(1)(b)(i)-(iii).

In other words, sections 4(1)(a) and 4(1)(b) are distinguishable from one another by the requirement contained in the former to undertake an assessment of the balance between the anti- and pro-competitive consequences of the agreement. By arguing that s 4(1)9b) allows an efficiency defence – which of course implies a requirement to show the anti-competitive consequences without the which there would be nothing against which to balance the pro-competitive gains – Ansac effectively argues for obliterating the distinction between the two sections of the Act. …

Section 4(1)(b) unambiguously purports to prohibit, without recourse to further investigation, three categories of horizontal agreement. All other species of horizontal agreement only fall to be prohibited on a showing by the complainant that the agreement in question lessens or prevents competition and, then, only provide that the parties to the agreement cannot produce evidence of pro-competitive gains that outweigh the demonstrated diminution of competition. There is no ambiguity and, whether or not we deem this wise police, it is not within our power to remake the law."

[29] Sections 4(1)(a) and (b) therefore accord with a well known distinction in competitive jurisprudence between a "rule of reason" justification and a per se prohibition. The prohibitions contained in s 4(1)(a) are made subject to a "rule of reason" justification being any technological efficiency or other competitive gain that outweighs the anti-competitive effect. Section 4(1)(b) imposes a prohibition that cannot be avoided or validated by a justification. See Brassey et al *Competition Law* (2002) at 139-140.

[30] Following the same principles of interpretation referred to above it must be remarked that s 4(1)(b) contains no ambiguity.

The section makes it clear that the practices specified are "restrictive horizontal practices" and that they are prohibited. There is no ambiguity and therefore no room for the argument that, if the clear meaning is given to the words, the purposes of the Act would be subverted. The subsection contains a per se prohibition that formally defines the conduct prohibited.

South African law is not alone in its prohibition of the horizontal practices referred to. Whish *Competition Law* (1993) at 415-6 said:

> "Horizontal agreements between independent undertakings to fix prices, divide markets and to restrict output are perhaps the most obvious target for any system of competition law and they are prohibited by both EC and UK law. So too are horizontal agreements which are designed to foreclose competition from other firms in order to protect the privileged position of cartel members. … However if competition law is about one thing, it is surely about the condemnation of horizontal price fixing, market sharing and analogous practices: on both a moral and practical level, there is not a great deal of difference between price fixing and theft …".

Articles 81 and 83 of the EC Treaty deal with horizontal agreements or cartels and contain a similar provision. Although article 81(1) prohibits agreements that "have as their object or effect, the prevention, restriction or distortion of competition and in particular those which (a) directly or indirectly fix purchase or selling prices or any other trading conditions", article 81(3) sets out the grounds of exemption, inter alia, where the agreement has pro-competitive effects. Section 4(1)(b) contains no such provision but s 10 of the Act provides for a firm to apply for an exemption "from the application of this chapter" of an agreement or practice that meets the requirements of subsection (3). Arguably, the requirements of subsection (3) are too limited but that is not a matter we are called to decide upon.

[31] Section 4(1)(b) uses the words "directly or indirectly fixing a …

price"; "dividing markets" and "collusive" tendering. It may well be necessary, in so far as the words may be ambiguous and capable of different constructions, to interpret them so as to give them a meaning consistent with the context and purposes of the Act. This, however, is a matter of construction and not of evidence. Specific conduct is prohibited, to use the words, per se; not its consequences. The evidence the appellants seek to present is neither required nor permissible in order to arrive at the meaning of the words used.

In an able and instructive argument Mr Brassey, who appeared with Mr McNally and Mr Wilson on behalf of the appellants, have sought to persuade me to follow the approach of some United States courts to embark on a process of characterization or categorization to determine the conduct that has to be condemned outright. Reference has, for example, been made to Hovenkamp *Federal Antitrust Policy* (1999) 253 who said:

> "Once a court has properly characterized a practice as price fixing, it is per se illegal. However, determining when a practice has to be so characterized can be difficult, and may involve a fair amount of sophisticated economic enquiry."

See eg *Broadcast Music Inc v CBS Inc* 441 US 1 (1979) 8-9; *Appalachian Coals Inc v US* 288 US 344 (1933); *NCAA v University of Oklahoma* 468 US 85 (1984).

Attractive as it may seem, this approach is excluded by the very terms of s 4(1)(b) which condemns the conduct defined per se. The attempt to use comparative law to interpret an unambiguous provision of the Act reveals the caution that must be exercised in the employment of comparative law. Thus, Kahn–Freund "On Uses and Misuses of Comparative Law" (1974) *Modern Law Review* 1 at 27 warned that the comparative method requires "a knowledge not

only of the foreign law, but also of its social, and above all its political context." It is not sufficient to compare the texts of legislation; one should look for the customs and practices of countries to determine how laws are applied and how the law enforcing authorities function in practice. There are, thus, limits to comparative law. The differences between the South African Act and the EC Treaty provisions have been referred to. The differences between the approach of United States case law and my interpretation of s 4(1)(b) is clear: there is no basis for importing a "rule of reason' analysis in construing s 4(1)(b). The words of the legislature are clear and unambiguous.

This does not mean the end of joint ventures: they will only be prohibited if the partners are *competitors* "directly or indirectly fixing a purchase or selling price or any other trading condition; … dividing markets by allocating customers, suppliers, territories, or specific types of goods or services". Joint ventures do not necessarily involve any of these practices. Those that do may be exempted under the provisions of s 10 or chapter 3.

E Costs

[32] The appellants appeal against the Tribunal's award of costs on the basis that s 57 requires each party, in the circumstances set out in the rule, to pay its own costs. Section 57(1), however, provides that "[s]ubject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs". The Tribunal's rules make it clear that the costs order in this case is permissible. Rule 58(1) allows the Tribunal to make an order for costs in proceedings under Part 4. The decision of the Tribunal is clearly an order made under Part 4 of the Tribunal's rules.

F Order

[33] The appeal is therefore dismissed with costs including the costs of two counsel.

Malan AJA

Davis JP and Jali JA concurred.