

**IN THE COMPETITION APPEAL COURT  
OF SOUTH AFRICA**

**CASE NO: 22/CAC/SEP02**

In the matter between:

**ASSOCIATION OF SHIPPING LINES**

Applicant

and

**THE COMPETITION COMMISSION OF SOUTH AFRICA**

Respondent

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**J U D G M E N T**

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**A. INTRODUCTION**

1. The Applicant is the Association of Shipping Lines (“ASL”), which represents the interests of shipping lines whose vessels use one or more ports on the South African/Mozambique seaboard in the Walvis Bay/Nacala range. The Respondent is the Competition Commission.
  
2. The Applicant seeks a declarator that the Competition Commission (the “Commission”) enjoys jurisdiction in terms of section 10 of the Competition

Act (No. 89 of 1998), hereinafter referred to as “the Act”, to consider applications for exemption from the application of Chapter 2 of the Act for categories of agreements and practices (defined by generic type).

3. The Applicant seeks the further declaration that the Commission enjoys jurisdiction to consider the Applicant’s application for exemption for a category of practices relating to shipping liner conferences and similar practices as is more fully set out in paragraph 1.2 of the Notice of Motion.
4. The Applicant accordingly seeks to establish that the Commission enjoys the jurisdiction in terms of section 10(1)(b) of the Act to consider and grant or refuse applications for category exemptions generally or more frequently referred to as block exemptions.

**B. LEGISLATIVE FRAMEWORK**

5. The gravamen of this application relates to the interpretation that is to be accorded to Section 10(1) of the Act. Section 10 of the Act regulates the granting of exemption from the application of Chapter 2 of the Act. Chapter 2 sets out the practices which are prohibited under the Act, including restrictive horizontal and vertical practice, and abuse of a dominant position.

6. The relevant and material part of section 10 provides as follows:

- “(1) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter –
- a) an *agreement* or practice, if that *agreement* or practice meets the requirements of subsection (3); or
  - (b) or category of *agreements* or practices, if that category of *agreements* or practices meets the requirements of subsection (3).
- (2) Upon receiving an application in terms of subsection (1), the Competition Commission must -
- a) grant a conditional or unconditional exemption for a specified term, if the *agreement* or practice concerned, or category of *agreements* or practices concerned, meets the requirements of subsection (3); or
  - b) refuse to grant an exemption, if –
    - (i) the agreement or practice concerned, or category of *agreements* or practices concerned, does not meet the requirements of subsection (3); or
    - (ii) the *agreement* or practice, or category of agreements or practices does not constitute a *prohibited* practice in terms of this Chapter.
- (3) The Competition Commission may grant an exemption in terms of subsection (2)(a) only if -
- (a) any restriction imposed on the *firms* concerned by the *agreement* or practice concerned, or category of either *agreements* or practices concerned, is required to attain an objective mentioned in paragraph (b); and
  - (b) the *agreement* or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:
    - (i) maintenance or promotion of exports;

- (ii) promotion of the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive;
- (iii) change in productive capacity necessary to stop decline in an industry; or
- (iv) the economic stability of any industry designated by the *Minister*, after consulting the Minister responsible for that industry.

...

- (5) The Competition Commission may revoke an exemption granted in terms of subsection (2)(a) or subsection (4A) if -
  - a) the exemption was granted on the basis of false or incorrect information;
  - b) a condition for the exemption is not fulfilled; or
  - c) the reason for granting the exemption no longer exists.”

### **C. APPLICATION OF THE LAW AND CONCLUSION**

- 7. At the outset and as is evident from the provisions of section 10(5), the granting of exemptions, whether they relate to an individual or a category of agreements or practices, is not cast in stone and the Commission has the jurisdiction to revoke such exemptions either on the basis of false or incorrect information or that a condition for exemption is not fulfilled. The Commission can also revoke an exemption if the reasons for the granting of the exemption no longer exist.
- 8. In terms of section 10(1) a firm may apply to the Commission for the

- exemption either of “an agreement or practice” or a “category of agreements or practices”, if such “agreement or practice” or “category of agreements or practices” as the case may be, meets the requirements of section 10(3).
9. Further and in terms of section 10(2), the Commission is required, upon receiving an application in terms of section 10(1) to grant or refuse an exemption depending on whether the “agreement or practice” or “category of agreements or practices”, as the case may be, does not meet the requirements set out therein.
  10. In terms of section 10(3), the Commission may grant an exemption in terms of section 10(2)(a) only if the “agreement or practice concerned” or “category of either agreements or practices concerned”, as the case may be, is required to attain an objective mentioned in section 10(3)(b).
  11. It is thus clearly apparent from the wording of Section 10 that a distinction is drawn throughout between an agreement or practice and a “category of agreements or practices”.
  12. Accordingly, if reason for the law is the life of a law, then it follows that a particular meaning must be ascribed to the words “category of agreements or practices” which distinguishes it from the words “agreement or practice”. Otherwise there would be no basis for the distinction drawn

between these two concepts in section 10.

13. The language used by the Legislature in section 10(1)(b) is pellucid in its statement. The ordinary grammatical meaning of the word “category” is defined in the New Shorter Oxford English Dictionary as:

“A class, - division ... an entity consisting of a class of abstract objects sharing the particular property together with a class of mappings which preserve that property”.

Similarly, in Webster’s Third New International Dictionary (1993) category is defined as:

“Any major fundamental conception or general class of concepts ...  
Any class, group or classification of any kind”

14. Accepting that language cannot be mathematically precise and applying the ordinary literal meanings to the words “category of agreements or practices” it must be accepted as submitted by Mr. Wallis, who appeared with Mr. Wilson for the Applicant, that these words can mean nothing other than a “category” determined by generic type.
15. I might in passing mention, as was further submitted by Mr. Wallis, that the literal meaning of the words is consistent with the specific meaning attributed to the phrase “category” in other Competition Legislation

- internationally.
16. At the hearing of the matter, Mr. Maleka who appeared with Mr. Ngutshane for the Respondent, was constrained to agree with Mr. Wallis' interpretation of section 10(1)(b) and therefore it would be jejune to consider the purposive interpretation of the words "category of agreements or practices" and the use of block exemptions internationally in order to harmonise the literal interpretation which the Court accords to the provisions of section 10(1)(b). I might, however, mention that block exemption regulations in Europe were introduced with the principle aim of increasing legal certainty and reducing the Commission's workload. Similar considerations must have enjoined the Legislature when it drafted the provisions of section 10 of the Act. It is accordingly unnecessary to consider the jurisprudence evolved in Europe and the USA to consider the meaning to be accorded to the provisions of section 10(1)(b) since, the literal interpretation can lead to no other conclusion than the one constrained for by the Applicant.
  17. In the opposing affidavits, the Respondent contended that to allow such an exemption to the Applicant would accord to the maritime industry a special status, which status is not provided for by the Act. The Act is, however, a broad one, designed to cater to the needs of all sectors of commerce, and not industry specific. It is a springboard that could possibly give rise to future, more industry specific legislation. Also, the Act

is relatively new, as it only commenced on 30<sup>th</sup> November 1998. Therefore various issues will arise, which the court will have to interpret and decide.

**D. COSTS**

18. Mr. Maleka attempted to argue that it was never the Commission's intention to indicate that it did not enjoy jurisdiction to consider block exemptions but rather that the questions of the *locus standi* of the Applicant did not appear to be clear. The Commission also required further information before it could take a decision on the block exemptions envisaged by Paragraph 1.2 of the Notice of Motion. If that was indeed the position of the Respondent, then it should have clearly consented to its jurisdiction to consider block exemptions. This is further not borne out by the Respondent's attitude in opposing this application and by Annexure I.6 which appears at page 160 of the papers wherein the Commission pinned its colours to the mast by stating categorically that so-called block exemptions cannot be considered by it. Accordingly, the Commission can-not resist an order for costs in this matter.

**E. ORDER**

19. I accordingly make the following order :



19.1 It is declared that it is within the jurisdiction of the Competition Commission in terms of section 10 of the Competition Act (No. 89 of 1998);

19.1.1 to exempt from the application of Chapter 2 of the Act a category of practices (existing and/or future) defined in terms of a generic type, if such category meets the requirements of section 10(3) of the Act;

19.1.2 to exempt from the application of Chapter 2 of the Act the following category of practices, if such category meets the requirements of section 10(3) of the Act:

“The gathering of members of the applicant, their subsidiary and associated companies, and other parties in a number of different groupings so as to agree:

- (a) common freight rates and common terms and conditions;
- (b) frequency and allocation of sailings and capacity management;
- (c) common approach to membership of such associations;
- (d) arrangements regarding different sections of the trade;
- (e) tying or loyalty arrangements with customers;
- (f) a common approach to surcharges implemented for

unforeseen circumstances;

- (g) pooling of cargo;
- (h) pooling of revenue;
- (i) pooling of resources.”

19.2 The Respondent is directed to consider the Applicant’s application for exemption of the aforesaid category of practices from the application of Chapter 2 of the Act, and to grant a conditional or unconditional exemption, or refuse to grant an exemption, in respect of such category in terms of section 10(2) of the Act.

19.3 The Respondent is ordered to pay the costs of this application, such costs to include those consequent upon the employment of two counsel.

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PATEL, AJA

HUSSAIN, J. and MAILULA AJA concurred.