IN THE COMPETITION APPEAL COURT

REPUBLIC OF SOUTH AFRICA

CASE NO: 33/CAC/Sep03

DATE: 3-12-2003

In the matter between:

FEDERAL-MOGUL AFTERMARKET SOUTHERN AFRICA (PTY) LTD **Appellant**

and

THE COMPETITION COMMISSION **Respondent**

J U D G M E N T

DAVIS, JP:

This matter concerns an appeal against two decisions of the Competition Tribunal ("the Tribunal") under case number 08/CR/MAR01. In its first decision of 28 January 2003, the Tribunal found appellant had acted in contravention of section 5(2) of the Competition Act 89 of 1998 ("the Act"). In its second decision of 21 August 2003, the Tribunal ordered appellant to pay an administrative penalty of R3 million pursuant to the provisions of section 5(2) of the Act.

As Mr Unterhalter, who appears together with Mr Wilson on behalf of appellant stated in his heads of argument, the appeal turns on three central contentions which were raised in the notice of appeal of 9 September 2003, namely:

1. The Tribunal was mistaken in law and in fact in finding that appellant had contravened section 5(2) of the Act.
2. Section 59 of the Act is unconstitutional to the extent that it permits the Tribunal as an administrative body to impose discretionary pecuniary penalties for contraventions of the Act and accordingly, the Tribunal should not have exercised a power in terms of

section 59 to impose a penalty on appellant.

3. In any event, the penalty of R3 million which was imposed by the Tribunal on appellant was not an appropriate penalty, taking into consideration the factors listed in section 59(3) of the Act.

Prior to dealing with these substantive matters, the question arises as to whether the Minister of Trade & Industry, being the appropriate Minister insofar as the Act is concerned, should have been joined in these proceedings. It appears to be common cause that Mr Marcus, who appears together with Mr Chaskalson, in the capacity of *amicus curiae* at the invitation of this Court, raised this question with appellant's counsel some weeks ago. Notwithstanding the caution by Mr Marcus as to the necessity of joining the Minister, appellant chose to proceed to prosecute the appeal this morning. Accordingly, before deciding as to whether the matter should be heard, argument was heard from all parties regarding the question of joinder.

The contention placed before the Court by Mr Marcus turned on the necessity of joining the relevant Minister in proceedings of this nature. In a number of cases the Constitutional Court has dealt with this question, *inter alia*, in Jooste v Score Supermarket Trading (Pty) Ltd 1999(2) BCLR 139 (CC) at paras 7-9, in which Yacoob, J said:

> "*[7] It is undesirable for a court to make an order of constitutional invalidity in relation to an Act of Parliament or Provincial Act unless the relevant organ of State which is not a party to the proceedings has had an opportunity to intervene in those proceedings. Because Rule 6(2) had not been complied with, the Minister of Labour, who is the relevant organ of State and who had not been given any opportunity to intervene in the case before the High Court, was notified and given the opportunity to intervene in the proceedings before this Court. The Minister chose to intervene, opposed the confirmation of the finding of*

the High Court and presented helpful argument in support of that opposition.

[8] It is, however, necessary to consider the consequences arising from the matter having been determined by the High Court without notice to any organ of State. It was contended on behalf of the applicant that the Minister of Labour had no direct interest in the proceedings and that there was accordingly no need for an opportunity for intervention to have been afforded to that office.

[9] The contention has no substance. The Compensation Act is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The State has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate. Section 35(1) is an element of that legislation and the Minister, as the representative of the State responsible for the administration of this legislation, clearly had a direct, abiding and crucial interest in the outcome of the litigation. This Court may well have declined to confirm an order solely on the ground that notice of the proceedings in the High Court was not given to the Minister. But there is no need to consider this course of action any further because these proceedings can be disposed of on more substantive grounds without any prejudice to the State." (emphasis added)

It appears from this *dictum* in Jooste's case that, where a dispute comes before a court and turns on a question of the constitutional validity of a piece of applicable legislation, the appropriate Minister should be joined.

Mr Unterhalter submitted that a declaration of constitutional invalidity was not, in effect, what the appellant sought in these proceedings. He submitted that the issue for decision by this Court was whether the Tribunal, taking account of the Constitution, should have declined to apply the provisions of section 59 of the Act and, therefore, refused to impose any administrative penalty on the grounds that the empowering section conflicted with the Constitution. In this way Mr Unterhalter sought to negotiate his case past the obstacle of the argument relating to joinder, by contending that, in the final analysis, this Court was not required to invoke powers in terms of section 172 of the Constitution of the Republic of South

Africa, Act 108 of 1996 ("the Constitution"); in order to declare section 54 to be unconstitutional; hence the *dicta* cited from Jooste's case were inapplicable to the proceedings before this Court.

This argument can be rebutted on a number of grounds. Suffice it to say that in Mkangeli & Others v Joubert & Others 2001(2) SA 1191 (CC) at paras 9-10, Chaskalson, P (as he then was) disposed of this argument thus:

> "*In dealing with these issues and whether an order for eviction is appropriate in the circumstances of this case, Flemming, DJP gave detailed consideration to the constitutionality of the Act and concluded that its provisions are inconsistent with the Constitution. In their application for a certificate under Rule 18 of the Rules of the Constitutional Court, the applicants contend that this finding was made despite the fact that the constitutionality of the Act had not been raised as an issue on the papers and that no argument had been addressed to the Court on that issue.*
>
> *In the judgment in which he furnished a negative certificate, Flemming, DJP does not suggest that this averment is incorrect. Having reached the conclusion that the Tenure Act was unconstitutional, Flemming, DJP considered it unnecessary to make a formal declaration of invalidity - this despite the provisions of section 172(1) of the Constitution which requires that a court, when deciding a constitutional matter within its jurisdiction 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its own consistency.' If the constitutionality of the legislation was not relevant to his judgment, the learned Judge ought not to have considered that issue; if it was relevant, he ought to have taken steps to have had the Minister responsible for the administration of the Act joined as a party to the proceedings. He ought then to have heard argument from the parties on that issue and if he found the Act to be inconsistent with the Constitution, he ought to have made a declaration to that effect as required by section 172(1) of the Constitution.*"

Notwithstanding an attempt by Mr Unterhalter to distinguish this case from the present dispute there is, in my view, no valid distinction that can be so drawn.

The implication of this *dictum* is plain. If this Court decides that section 59 of the Act is unconstitutional for one of a range of reasons which have been advanced by appellant in its very learned heads, the Court, on the strength of the Mkangeli case, would be obliged to consider, in terms of its powers of section 172, whether the Act was unconstitutional and, if so, declare it to so be. This case cannot be reduced to a *quasi*-constitutional dispute, namely that the Court would decide that the section was unconstitutional and simply leave the relevant section hanging in the jurisprudential air. The consequences for competition law in general and the system of administrative penalties as provided for in the Act would be serious in that the law would be left in uncertainty.

As Mr Kennedy, who appeared together with Ms Kathree and Mr Maenetje on behalf of the respondents, correctly noted, the Minister would have two very significant interests in dealing with such a constitutional attack, namely, in defending the constitutional validity of legislation which is his responsibility, and defending the very enforcement mechanism which is contained within the Act. This would be a direct consequence of the declaration this Court would be required to make were appellant to succeed, namely a declaration that section 59 of the Act was constitutionally invalid.

Mr Unterhalter contended further that this matter of joinder had never been raised before the Tribunal either by the respondents or the *amicus* and, accordingly, there was no reason why it should have been raised in the proceedings before this Court. Again this argument can be disposed of on a number of bases. Suffice it to say that, where a third party, as in this case (being the Minister) has a direct and substantial interest in any order the Court might make in proceedings, or if the order cannot be sustained or carried into effect without prejudice in that party, he or she is a necessary party and should be joined in the proceedings

unless the Court is satisfied that he or she has waived his right to be so joined (Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637 (A).)

Joinder is not simply a question of a provision of a set of court rules. It is part of our common law and Mr Marcus was correct to contend that, even if the parties had not raised the question of joinder, this Court would have been so required to do as is evident from the Constitutional Court's jurisprudence, to which I have already made reference. It is not a sustainable argument to say that the matter was not dealt with in the Tribunal and accordingly all the parties, including the Minister, are deemed to have waived their rights, nor is it correct to suggest that some correspondence which might have been generated between appellant's attorney and an individual in the Department of Trade and Industry is sufficient to meet the requirement of joinder.

In short, the Minister ought and should have been joined in these proceedings and the relevant constitutional question cannot be considered without that step having been taken.

The further question then arises as to whether, as Mr Unterhalter has urged upon the Court, the substantive questions relating to section 5(2) of the Act, namely whether the appellant engaged in retail price maintenance can be considered separately from the constitutional questions to which I have already made reference. In general the approach taken by appellate courts is not to hear an appeal in a piecemeal manner (See Hassim v Commissioner of South African Revenue Services 2003(2) SA 246 (SCA) at para 11 and other cases cited in this passage).

The question arises as to whether this approach should be adopted in the present dispute. Mr Unterhalter correctly contended that the request to dispose of an appeal in a piecemeal fashion is not a rule which must be

applied without any consideration of the particular dispute. Are there then some exceptional circumstances which would justify hearing this matter on a piecemeal basis? In my view, there are not. The matter is not pressingly urgent. The complainant is already out of business. Appellant appeals against an order to make payment of a fine. It is not alleging that its own business is now under threat. The further question arises as to how the matter would be decided if the section 5(2) question was heard separately. For example, what would occur insofar as the issues pertaining to the penalty are concerned, absent the constitutional questions inherent therein? Must the Court divide the matter between the price maintenance question and the dispute relating to penalties? If so, issues which are of a factual nature would then have to be recanvassed when the Court dealt with the question of the penalty. That is an inconvenient course of action.

There does not seem to be any reason why this case should not be heard in its totality at one sitting. For this reason, it is not appropriate to hear this matter in various parts. Appellate Courts should not have to engage in litigation in the form of a chain novel. In this case no pressing argument has been put up as to why that approach should be altered.

The final question, therefore, turns on the issue of costs. Mr Kennedy, somewhat optimistically, asked for costs of three counsel. There does not appear to me to be any reason why the appellant should be mulcted in so lavish a manner in which the respondents have sought to arm themselves. The more difficult question relates to whether in fact costs should be awarded on a punitive scale, that is on an attorney and client scale, given, as Mr Kennedy has submitted, that the respondent has been brought to court in circumstances where this matter could not have been heard today given that the Minister was not joined: Had appellant acted at the stage of Mr Marcus' warning and joined the Minister, he may have decided to allow proceedings to continue without any objection; or,

alternatively, asked for a postponement to be suitably prepared to make a contribution to the debate.

It appears from the record that the only party who did raise the issue of joinder was the *amicus*. There does not appear to be any indication that the respondents adopted the approach that the matter should not be heard today, nor is there any evidence that they approached appellant on this basis. Therefore, there does not appear to me to be any basis by which a punitive order of costs in their favour would be justified.

For these reasons, the matter is postponed to a date to be arranged between the parties and the Registrar. The costs of today's proceedings insofar as those costs which have been incurred by respondent are concerned are to be paid by appellant, such costs to include those of two counsel.

This Court wishes to thank Mr Marcus and Mr Chaskalson for their invaluable contribution.

DAVIS, JP:

HUSSAIN, JA & PATEL, AJA: Concurred.