IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: CAC64/8/2006

DATE: 11 JUNE 2007

In the matter between:

AMERICAN NATURAL SODA ASH CORPORATION — First Applicant

CHC GLOBAL (PTY) LTD — Second Applicant

And

BOTSWANA ASH (PTY) LTD — First Respondent

CHEMSERVE TECHNICAL PRODUCTS (PTY) LTD — Second Respondent

WEBBER WENTZEL BOWENS — Third Respondent

THE COMPETITION COMMISSION OF SOUTH AFRICA — Fourth Respondent

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J U D G M E N T

(Application for Leave to Appeal)

DAVIS, JP:

[1] This is an application for leave to appeal against the judgment of this Court of 5 January 2007 in which the Court dismissed an appeal against the decision of the Competition Tribunal ('Tribunal'). The Tribunal had refused an application for the disqualification of first

respondent from continuing to participate as an intervenor in complaint proceedings which had been brought by fourth respondent before the Tribunal, together with its legal team, being the third respondent, from continuing to represent first respondent in those proceedings.

[2] Before dealing with the merits of the application for leave to appeal, it is necessary to set out the test which must be applied by this Court before it grants leave to appeal to the Supreme Court of Appeal.

[3] In American Natural Soda Ash Corporation & Another v The Competition Commissioner & Others 2005(6) SA 158 (SCA) at 21-22, the Supreme Court of Appeal set out the test thus:

> "As we observed in Numsa..., the procedures for applying for leave to appeal and the factors relevant to obtaining special leave are well established. The criterion for the grant of special leave to appeal is not merely that there is a reasonable prospect that the decision of the CAC will be reversed, but that the applicants can establish some 'additional factor or criterion'. One

is whether the matter, though depending mainly on factual issues, is also of very great importance to the parties or of great public importance.

In applying this criterion, this Court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal and that the public interest demands that disputes about competition issues be resolved speedily, that the matter is objectively of such importance to the parties or the public, that special leave should be granted.

We emphasise once more that the fact that applicants have already had a full appeal before the CAC will normally weigh heavily against the grant of leave. And the demands for expedition add further weight to that."

In this connection see also the test for special leave as set out by Corbett, JA (as he then was) in Westinghouse Brake & Equipment v Bulger Engineering 1986(2) SA 555 (A) at 564-565.

[4] In summary, it is clear that leave from this Court can only be granted in special circumstances in terms of the test as has been set out. This stringent approach to leave is

clearly congruent with the objects of the Competition Act 84 of 1998 ('the Act'). One of the purposes of the Act is to ensure that, save for constitutional matters, this Court should be the final forum for all litigants. That the drafters appeared to overlook a provision in the Constitution has produced a situation where there is a further possible hearing to the Supreme Court of Appeal ("the SCA"). The SCA has recognised that the constitutional demand that it is the final court for appeal in relation to non-constitutional matters must be weighed with the purposes of this Act so that special leave becomes the appropriate test. See American Natural Soda Ash Corporation, supra.

[5] I make one further comment about special leave. Almost any case that comes before a Court dealing with leave to appeal is of importance to the parties concerned. Litigation, by its very nature, is a process about which the warring parties feel strongly. That is why they have been unable to resolve their disputes and come before a court. If the test for special leave is to be applied, it cannot simply be that leave is granted because the matter is of importance to the parties. The dispute must be of such importance to make it distinct from

considerations which would normally apply in matters of leave to appeal.

[6] Mr Brassey, who appeared together with Mr McNally for the appellants (applicants in this application), sought to persuade this Court that leave should be granted essentially on two bases namely, that this Court had erred in its rejection of the so-called "side-switching argument" and secondly, that there was clear evidence of a breach of confidence sufficient to justify the relief which applicants sought initially from the Tribunal and then from this Court.

[7] Mr Brassey now refined his argument about side-switching. He contended that in the present case there had clearly been a switch by Mr Dingley from the fourth respondent to third respondent. On the basis of that switch, fourth respondent had a justifiable cause for complaint. Even if fourth respondent refused to so proceed, the applicants would have *locus standi* to 'slipstream' fourth respondent and bring a case on the basis of side-switching. In other words, once a side-switch had been established, a third party in the position

of applicant could also bring such an application. Mr Brassey conceded, as he had to, that none of the authorities presented to this Court, fell within this factual matrix. In all of the cases that had been presented to this Court, the side-switching involved a movement from one party to an adversarial party.

[8] In the present case, Mr Dingley had been employed by fourth respondent which, as Mr Gotz, who appeared on behalf of the first respondent noted correctly, had a duty to prosecute a complaint which had been brought by first respondent, both in the interests of the public and in the interests of first respondent ('the complainant'). The side-switching *jurisprudence* did not extend to the case of a person moving from one party to another who was also in an adversarial position to the applicant.

[9] Viewed accordingly, it is difficult to see what possible merit there could be in this nuanced approach adopted by Mr Brassey to the issue of side-switching. Mr Trengove, who appeared on behalf of third respondent classified it as a new argument. It is not necessary for this Court to determine whether it was a new approach or merely a

subtle shift of an argument which had previously been presented to this Court.

[10] That leads to the issue of the breach of confidence. Mr Brassey's central point, which he made most forcibly in his reply, can be summarised thus: Applicants had entered into confidential discussions to settle a dispute with fourth respondent. Pursuant to that initiative, they sought an undertaking of confidentiality. Accordingly, it could not be contended that the test in a matter such as the present dispute should result in the position that, once the discussions had been sought to be undertaken in a confidential manner, applicant would have to show precisely what was confidential in order to obtain relief.

[11] Expressed differently, the discussion took place pursuant to a confidential undertaking. A person who was present at those confidential discussions owed a duty to the parties to those discussions to uphold the undertaking of confidentiality. Once Mr Dingley had moved from fourth respondent to the third respondent, he had no right to breach that undertaking, nor did the applicants have to do more than show that a person present at these confidential discussions had moved to an adversarial

party in order to obtain the relief sought in this case.

[12] In amplification of this argument, Mr Brassey submitted that the proper test to be applied was the following: could there be an exploitation of the information given to Dingley which could lead to a position which could be detrimental or disadvantageous to applicants?

[13] Mr Trengove correctly pointed out that the potential exploitation of information given to Dingley could only justify the relief sought by applicants if that information had been confidential, was still confidential and remained relevant to the dispute in point. On the facts, as this Court has already found, Dingley denied the set of allegations raised by applicants. If the two affidavits to which Mr Dingley deposed in this case, are examined, these documents reveal that he was at great pains to deny that any information of which he was possessed was of a confidential nature.

[14] Mr Brassey made much of the fact that there was a shift in the approach given by Mr Dingley in the two affidavits to which he deposed, namely, that in the first affidavit he had no recollection of the discussions, while in the

second affidavit he “suddenly” began to recollect details thereof.

A more careful reading of the second affidavit supports a different set of conclusions. In the second affidavit Mr Dingley discusses the fact that in October 2005 he entered the employ of third respondent and that he had no involvement in the present saga of litigation until late April 2006, approximately four years after his last involvement with the case. He then describes how he spoke with members of third respondent regarding what had occurred while he was in the employ of fourth respondent. The narrative continues at paragraph 36 of this affidavit:

> ”It was concluded that there was nothing barring me from involvement in the matter and it was understood that I remained subject to the confidentiality provisions of the Act. This conclusion was reached after taking into account the following:
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> 36.1. First, the settlement agreement had been discovered and made available to third respondent (its contents were thus known) and had been placed before this Tribunal for formalisation as an order...

36.2. Second, having carefully studied the pleadings filed of record, I determined that my recollection of the meetings and the discussions to which I have been made party, had been pleaded and were contained in the written arguments before the Appeal Court. In particular, the record reflects that the First Applicant had pleaded and argued that it should be properly construed as a pro competitive legitimate joint venture.

36.3. Third, I believed (and still do) that at the relevant time, I had no knowledge of any confidential information of the applicants at all, let alone any such information which is germane to the first respondent's interests in the Ansac matter...

36.4. Fourth, a significant period of almost four years has elapsed since my previous limited involvement and the case appeared to have developed considerably based on my analysis of the pleadings and recollection of events".

These passages clearly show that, if the two affidavits differed, it was due to additional information to which

Dingley had had recourse, prior to the second affidavit.

[15] On these facts, which call to be examined in terms of the approach adopted in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A), the question arises as to how another Court could come to a conclusion different to this Court. In other words, is there any information which another Court could glean from the affidavits presented by applicants and the detailed denial by respondents which would justify it to conclude that the radical relief sought in this case can be granted on a broad and relatively bald assertion of confidentiality? I think not.

[16] There is no argument which has been presented to this Court which suggests that the Plascon-Evans rule should not apply in this case. Accordingly, on its application, it appears that there can be no reasonable prospect of success to the extent that this consideration remains part of the test which must be taken into account in considering special leave. As Mr Trengove further asked rhetorically, if the necessary information is not placed before the Court, where lies the cause of action to sustain the drastic form of relief sought by applicants?

[17] There is a further consideration which justifies the approach of this Court. In determining whether applicants meet the test of special leave, as I have already noted the matter must be of very great importance to the parties or of great public importance. What that means is that this dispute must clearly be of such import as to be critical to the ultimate case, being the complaint brought by first respondent to fourth respondent.

[18] Mr Gotz referred us to a decision of the Second Circuit of the United States Court of Appeals in Armstrong v McAlpin 625F.2d433, a case which has been confirmed by the US Supreme Court in Firestone Tyre & Another v Risjord 449 US 368 (1981). In Armstrong, the issue before the Court, *inter alia*, was that of a so-called 'midstream' appeal similar to that confronting this Court, namely the question of a disqualification of a firm representing a party in a dispute. The Second Circuit said the following:

> "In recent opinions many members of this court have noted that the availability of an immediate

> appeal seemingly contributed to the proliferation of disqualification motions and the use of such motions for purely tactical reasons, such as delaying a trial".

The judgment then goes on:

> "[W]e do not think the harm caused by the erroneous denial of disqualification motion differs in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work product objection or orders denying motions for recusal of the trial judge.
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> In those situations we have held that no immediate appeal is available as a matter of right...Moreover, the harm caused by an erroneous denial of a disqualification motion is usually not irreparable since this court retains its traditional power to grant a new trial if the district court's ruling ultimately turns out to be incorrect".

[19] These *dicta* do not justify a denial of an appeal *per se*, but rather support the conclusion that this particular appeal is not of such "very great importance to the

parties" to justify special leave. In other words, in this matter, applicants had an opportunity to put their case before the Tribunal and, furthermore, appealed to this Court. On the reasoning adopted in McAlpin's case, it would appear that it can never be said that this dispute, at this stage of the overall proceedings is of such great importance as to justify special leave.

[20] In my view, to adopt a contrary position, would be to so weaken the notion of special leave as to hollow it of content so that almost all cases prosecuted in the Tribunal, appealed to this Court will be heard in the Supreme Court of Appeal and possibly, with some imagination from one or other counsel, in the Constitutional Court. That can never be in the interests of competition *jurisprudence* in this country or the economy which is dependent on speedy and expeditious resolution.

[21] In my view, this case raises no profound new question of law because the case is resolved on the facts. It is not of such great importance to the parties for the reasons I have outlined. For these reasons the application for

leave to appeal is dismissed, with costs, including costs of two counsel.

DAVIS, JP

MAILULA, AJA and PATEL, AJA: Concurred.