IN THE COMPETITITION APPEAL COURT OF SOUTH AFRICA

CASE NUMBER: 87/CAC/FEB/09

DATE: 3 FEBRUARY 2010

In the matter between:

SENWES LIMITED APPLICANT

and

THE COMPETITION COMMISSION OF

SOUTH AFRICA RESPONDENT

JUDGMENT

Application for Leave to Appeal

DAVIS, JP:

This is an application for leave to appeal to the Supreme Court of Appeal against an order of this Court of 13 November 2009, in which the Court upheld a decision of the Tribunal and thus dismissed the appeal, which was prosecuted by the appellant. The appellant has now proceeded to this Court for leave to have the matter heard by the Supreme Court of Appeal.

In essence, the submissions made by Mr Brassey, who appears together with Ms Enqelbrecht on behalf of the appellant as to why leave should be granted, turn on two fundamental issues:

1. That the decision of the Tribunal, and subsequently the Court, disregarded in a fundamental way, the requirements of due process, because appellant was 'condemned' on the basis of a case that was not properly pleaded, and further a case, to the prosecution of which appellant repeatedly raised objection.

2. It was argued that the evidence to support the conclusion that appellant was guilty of a margin squeeze which formed the basis of the decision of both the Tribunal and the Court is so manifestly inadequate that a court, on appeal, would conclude that no case on the facts had been made out against the appellant.

It is trite that the requirements for leave in a case such as the present, must meet the test of special leave. That test has been canvassed on numerous occasions by this Court, most recently in the case of Woodlands Dairy (Pty) Limited, Milkwood Dairy (Pty) Limited v The Competition Commission (unreported decision of the CAC 7 December 2009).

To briefly recapitulate, the requirement of special leave means that, in addition to the ordinary requirement of a reasonable prospect of success, special circumstances must exist before a further appeal can take place before the Supreme Court of Appeal. In particular, and viewed objectively, there exist the requirements of the importance of the matter to the parties and, further, to the public interest. See American Natural Soda Ash Corporation v The Competition Commission 2005(6) SA 158 (SCA) 172-173. It is also important to again reflect upon the reasons for the test of special leave. In the Woodlands case supra, the Court outlined the background to an appeal from this Court to the Supreme Court of Appeal and the reasons therefore; this bears repetition.

The Supreme Court of Appeal itself was aware of its role as an appellate body which must hear appeals from a specialist court such as The Competition Appeal Court. Thus in Numsa v Fry's Metals 2005(5) SA 433

(SCA), admittedly in an appeal from the Labour Appeal Court, but, in my view, equally applicable to this court, the SCA said:

> "It is in the interest of justice required that special leave be imposed, for if appeals were allowed without trammel, the expeditious resolution of disputes would be unconscionably delayed and the justified objects of the statute impeded."

At para 19.

Mr Brassev has raised what I would consider to be a perception that this Court is opposed to granted leave to appeal on "technical issues". Nothing could be further from the truth. This Court has expressed the view, similar to the dictum of the SCA, in Fry's Metals that the purpose of the Competition Act, is to ensure an expeditious resolution of disputes. When it comes to interlocutory matters, the Court has, on occasion, taken the view that interlocutory applications, brought on what in the colloquial term is now called the 'Stalingrad' approach to jurisprudence, subverts this object of the Act and, therefore, these arguments must be scrutinised with extreme care. Nonetheless, all applications for leave to appeal have to be dealt with in terms of the principles of special leave, whether 'technical' or more substantive. In my view, the question of an expeditious resolution of disputes is a matter of public interest, particularly when it comes to competition matters; hence it too is an important factor in the overall assessment. So much for preliminary observations.

Mr Brassev has submitted that this is a case which manifestly falls within the test of special leave, primarily because the requirements of due process were not met. In short, he argued that when the respondent refers a complaint to the Tribunal, it must be framed with sufficient specificity, so that a party as appellant, knows precisely what case it is called upon to answer. In short, when this Court sought to balance the requirements of the inquisitorial powers granted to the Tribunal against the principles of due process, Mr Brassey submitted that the balance had been struck incorrectly and hence subverted a foundational constitutional principle of due process.

There can be no doubt that in principle, a case brought on the grounds of due process, as I have outlined it, should meet this test of special leave. The problem in each case, is whether on the facts of the case viewed holistically, the appeal meets the requirements as I have outlined.

Applied to the facts of this case, the question which arises is whether, on the basis of the complaint and, therefore, the form of pleadings as employed under the Act, appellant's rights to due process were undermined in the manner in which Mr Brassey has submitted. That requires an examination, albeit briefly, of the concept of margin squeeze and its application to facts of the case.

Admittedly the word 'margin squeeze' does not appear in section 8 of the Act nor in any other section thereof. But, as found by this Court, the terms of the Act are widely couched and exclusionary acts are defined in such a manner that it can surely not be contended, on the basis of the reasoning set out in the principle judgment, that a margin squeeze cannot form part of section 8 of the Act.

The question is, whether on the basis of the complaint and these pleadings viewed as a whole, appellant's rights to due process were undermined, because it was not appraised properly of the case which was brought against it.

Margin squeeze is defined by Richard Whish, Competition Law (6th Edition) at 744 as follows:

> "A vertical margin squeeze can occur where a firm is dominant in an upstream market and supplies a key input to undertakings that compete with it in a downstream market. In such a situation, the dominant firm has a discretion as to the price it charges for the input, and this could have an effect on the ability of firms to compete with it in the downstream market."

Compare this definition to what was placed before the appellant by respondent when it generated the complaint. In particular, I refer to the referral affidavit reproduced at paragraph 16 of the principal judgment, and the further affidavit deposed to by Mr Maphumulo. In the referral affidavit

the following is stated:

> "Senwes abuses its dominance in the handling and storage of grain market by charging in effect lower storage fee to a producer, who agrees to sell the grain stored in Senwes' silos to Senwes. Producers who sell their products to third parties that compete with Senwes downstream, pay a higher fee for the storage of grain. CTH alleges that this practice has made it virtually impossible for it to compete with Senwes in a trading market within the relevant geographical area."

Mr Maphumulo's affidavit includes the following averment:

> "Senwes' pricing policy for grain storage is such that it favours or facilitates a situation whereby it would not be financially feasible for a farmer to sell his or her grain to a competitor of Senwes. This practice gives Senwes an unfair advantage over its competitors in the grain trading market. This conduct constitutes an inducement to suppliers and customers not to deal with Senwes' competition. The effect is to impede new firms from entering into the grain trading market or to impede existing firms from expanding within that market."

Furthermore, the following appears in the complaint:

> "Senwes' practice of charging differential tariff fees for storage is exclusionary. It has an anticompetitive effect as it impedes or prevents CTH and other grain traders, who would compete with Senwes, from expanding within the downstream market for grain trading and thus is in contravention of section 8(c) of the act."

I return thus to Professor Whish's definition. In the present case, it was found that appellant was dominant in the upstream market. It supplied storage, a key input in the downstream market. The fact that it charged differential prices, which had an effect on the ability of firms to compete with it in a downstream market, is what Professor Whish refers to as a margin squeeze. There is no magic in this term. It is clear, and well known in competition jurisprudence. It may not have appeared in the Act, but that does not mean that it is not part of the Act. A careful reading of the particular pleadings would have alerted any qualified person in competition law to the fact that, in broad terms, the complaint referred to a margin squeeze.

Mr Brassey submits that it is unfair to introduce the notion of expertise into the reasonable reader of the pleadings. But in this particular case, the appellant was advised by very experienced and extremely knowledgeable counsel as to the case against it. If appellant was uncertain about it, then shortly thereafter when counsel read the witness statement of Dr Theron, which was produced before the hearing, they could have had no difficulty or illusion that a margin squeeze was contained within the framework of the complaint.

In short, this is a case where, on a reasonable reading of the complaint and the documentation pursuant thereto, the facts, as alleged, fell squarely within the clear and simple definition of margin squeeze as I have cited it from the leading work of Professor Whish. Were this not to have been the case, were none of these averments to have been contained within the complaint or witness statements, were appellant not to have been advised by such skilled counsel, it may have been an entirely different case and then constitutional arguments may have had application. But they do not have application in this case, because the case must be judged purely and exclusively on the facts of the present dispute as they emerged before this Court.

Further, this is a case where appellant chose to conduct its defence in the manner it did. It now comes before

the Court to say, notwithstanding that this is a reasonable reading of the complaint and witness statements viewed within an established jurisprudence of margin squeeze, its rights of due process have been compromised. Were this particular line of argument to be allowed, it would play havoc with the outcome of any case which comes before the Tribunal, because the argument could be that ignorance of the law, or alternatively a risky litigation choice that is, not to have taken a particular cause of action, has now resulted in a conclusion which undermines due process. That can surely not be the conclusion which is justified in terms of the facts.

Once this particular conclusion is reached, the fact that appellant raises a whole range of evidential issues as to what evidence it might have been able to bring in order to show that a margin squeeze did not exist, is irrelevant. There was more than sufficient evidence which was adduced by the respondent as set out in the principal judgment, to justify the conclusion that a margin squeeze existed in this case.

Mr Bhana, who appeared together with Mr Dalrymple on behalf of the respondent is correct. Appellant chose a particular cause of action, (not to object formally to the case of a margin squeeze) that course of action has now resulted in an adverse judgment. It is not for this Court to give appellant a second opportunity to reargue an entire case, on the basis that it chose the wrong approach at the time.

On these reasons, therefore, the test for special leave cannot be met on these facts, no matter how imaginative Mr Brassey sought to elevate the case to that of constitutional principle. It is the facts of this case which ultimately are decisive of the decision of this Court. Accordingly the application for leave to the Supreme Court of Appeal is DISMISSED, together with costs, including costs of two counsel.

DAVIS, JP

MAILULA & MALAN JJA agreed