IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO.102/CAC/Jun 10

CT CASE No: 103/CR/Sep08
CC CASE NO: 2007/Sep3164

In the matter between

THE COMPETITION COMMMISSION

Applicant

and

LOUNGEFOAM (PTY) LTD

First Respondent

GOMMAGOMMA (PTY) LTD

Second Respondent

STEINHOFF INTERNATIONAL HOLDINGS LTD

Third Respondent

STEINHOFF AFRICA HOLDINGS (PTY) LTD

Fourth Respondent

In re

LOUNGEFOAM (PTY) LTD

First Appellant

GOMMAGOMMA (PTY) LTD

Second Appellant

STEINHOFF INTERNATIONAL HOLDINGS LTD

Third Appellant

STEINHOFF AFRICA HOLDINGS (PTY) LTD

Fourth Appellant

and

THE COMPETITION COMMISSION

First Respondent

VITAFOAM SA (PTY) LTD

Second Respondent

FELTEX HOLDINGS (PTY) LTD

Third Respondent

KAP INTERNATIONAL HOLDINGS LTD

Fourth Respondent

JUDGMENT

WALLIS AJA (DAVIS JP AND NDITA JA concurring)

[1] On 6 May 2011 this court[1] upheld an appeal against certain decisions by the Competition Tribunal (the Tribunal) in proceedings brought by the Competition Commission (the Commission) against *inter alia* the present respondents, relating to alleged contraventions of s 4(1)(b)(i) of the Competition Act (the Act). Our judgment dealt with two different appeals, the one referred to as the Feltex appeal and the other as the Steinhoff appeal. This is an application for leave to appeal to the Supreme Court of Appeal against our judgment in respect of the Steinhoff appeal. The Commission has already sought and been refused leave to appeal that judgment to the Constitutional Court.[2]

[2] The decisions dealt with in the Steinhoff appeal granted the Commission leave to amend the terms of its complaints against the first and second respondents (Loungefoam and Vitafoam) and ordered the joinder of the third and fourth respondents and the addition of certain relief against them. The amendments and joinder both arose from the invocation by Loungefoam and Vitafoam of the provisions of s 4(5)(b) of the Act. This provides that s 4(1) of the Act prohibiting restrictive horizontal practices, does not apply to 'the constituent firms within a single economic entity' similar in structure to that existing between a company and its wholly- owned subsidiary or further wholly-owned subsidiaries. In stating their defence to the Commission's allegations Loungefoam and Vitafoam claimed that they were such a single economic entity and therefore that they could not be guilty of a restrictive horizontal practice. In response to this the Commission first sought to include what was described as the collusion complaint. Second it sought to add a contention that, if Loungefoam and Vitafoam were in truth a single economic entity, then, in relation to the allegations that they had engaged in a restrictive horizontal practice together with Feltex, they had done so in consequence of the direction of the third and fourth respondents, their immediate and ultimate holding companies. Accordingly the Commission wished to contend that any administrative penalty imposed for such behaviour would be payable by the third and fourth respondents.

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That required their joinder in the proceedings. In seeking leave to appeal the Commission developed its argument in regard to the collusion complaint but, beyond saying that it stood by its heads of argument, did not develop an argument in relation to the joinder point.

[3] The argument in regard to the collusion complaint displayed a considerable measure of confusion, both as to the contentions being advanced by the Commission and the basis for our judgment. It is as well therefore to clarify both matters. When the application for amendment to include the collusion complaint was made, the deponent on behalf of the Commission said in relation to the s 4(5)(b) contention by Loungefoam and Vitafoam that:

'… any sole control that Steinhoff might have enjoyed over Loungefoam (which is not conceded) was as a consequence of a wider co-operation or collusion between firms in the Steinhoff group of companies and those controlled by Daun or in which Daun had a significant interest and influence (which for convenience I refer to as the KAP group of companies). Loungefoam and Vitafoam were a manifestation of this wider co-operation or collusion. Whilst in strict formalism, which is also not conceded, it may appear that Steinhoff controlled Loungefoam sufficiently for purposes of section 4(5)(b) – because of this wider co-operation or collusion – any such control was rooted in a stratagem to achieve what section 4(1)(b) prohibits and cannot be permitted to benefit the Steinhoff group of companies and/or the KAP group of companies.'

This prompted the respondents to say that it was unclear what case the Commission was now seeking to advance. Two possibilities were postulated. The first was that this was an entirely separate complaint against the third and fourth respondents and an entity referred to as Kap. The second was a contention that 'the actions of Loungefoam and Vitafoam ought to be construed as the result of co-ordination between Steinhoff and KAP as an alternative to a complaint that Loungefoam and Vitafoam colluded as independent firms.' It was said that both approaches were impermissible.

[4] The Commission expressly disavowed the first of these and adopted the second. That emerges from the heads of argument it placed before the Tribunal, a copy of the

relevant portion of which was attached to the application for leave to appeal. It said therefore that it was not concerned with a new complaint of collusion. The problem was that in its amendment it expressly alleged that, if Loungefoam and Vitafoam were in fact a single economic entity, that was because of a

'wider co-operation or collusion between firms in the Steinhoff group of companies and … the KAP group of companies… Loungefoam and Vitafoam were a manifestation of this wider co-operation or collusion.'

Not surprisingly therefore the Tribunal understood that what was being alleged was 'in the alternative a charge of a broader or wider collusion between the Steinhoff group of companies ("Steinhoff") and the Kap group of companies ("Kap")'.[3] It said that the Commission's proposed allegations 'extended the complaint of collusion to Steinhoff International and Kap International'[4] and held that 'the complaint of collusion between Steinhoff and Kap [was] initiated by the Commission'.[5] In other words the Tribunal understood, notwithstanding the Commission's contentions that it was not seeking to refer a new complaint of collusion, that it was in fact doing so by extending the existing complaint from Loungefoam and Vitafoam to the parent companies. It held that it was permissible to do so on the basis that a statement in the original initiation statement that:

'The relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of …',

sufficed to provide a rational link between the original complaint and the amendment.

[5] In arguing the appeal counsel initially sought to support this reasoning. However, he was faced with the difficulty that the statement relied on by the Tribunal in granting the amendment was particularly inscrutable. It said that the relationship between Steinhoff, Loungefoam and Vitafoam 'orchestrated the collusive conduct', when this was precisely what would be expected if Steinhoff controlled both Loungefoam and Vitafoam as a single economic entity. Also it made no mention of Kap. In addition the Tribunal had held that it was at the least an extended complaint

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of collusion and its reasoning was incompatible with the decision by the Supreme Court of Appeal in *Woodlands Dairy,*[6] which had not been decided when the Tribunal gave its decision, but which held that its approach to the adequacy of a referral was incorrect. Faced with these and other difficulties, counsel shifted his ground and sought to defend the amendment on the footing that it raised nothing more than factual allegations to support a contention by the Commission that, even if the outward appearance indicated that Loungefoam and Vitafoam were a single economic entity under the control of Steinhoff, that outward appearance was a façade or sham, created by Steinhoff and Kap, and in truth they were separate entities.

[6] As noted in para 62 of our judgment there could be no objection to such a factual contention and counsel for the Steinhoff appellants accepted this. What was not accepted was that the proposed amendments could or should be construed in this way. We held that they could not be so construed. We did so on the basis that they were not so expressed in the affidavit in support of the application for amendment, nor was that how they were put in argument before the Tribunal, nor initially in argument before us. It was not how the Tribunal understood the amendment nor was it how the Steinhoff respondents had understood it. They had specifically said that it meant something else and the Commission accepted their formulation in their heads of argument before the Tribunal. It was for that reason alone that the appeal succeeded.

[7] That did not in any way prevent the Commission from advancing before the Tribunal the argument as finally formulated by its counsel in arguing the appeal. All that it required was for the Commission to formulate its amendment in terms that reflected this argument. I said that specifically in para 63 of the judgment. That should not have been difficult and it is a mystery why the Commission did not do so and proceed with the matter. Instead a further 18 months have passed in fruitless attempts to appeal against our judgment. The mystery deepened when we were assured in the course of argument in this application that the Commission is not seeking to depart from the approach of counsel when he argued the appeal. In other

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words it wishes to do no more than advance factual allegations to support a contention by the Commission that, even if the outward appearance indicated that Loungefoam and Vitafoam were a single economic entity under the control of Steinhoff, that outward appearance was a façade or sham, created by Steinhoff and Kap, and in truth they were separate entities.

[8] It was submitted that we had erred in our interpretation of the collusion amendment. Even assuming this to be so it would not justify the grant of special leave to appeal to the Supreme Court of Appeal. No final issue has been disposed of by setting aside the Tribunal's decision to grant the amendment. As we made plain in our judgment all that is required if the Commission wishes to pursue these arguments is for it to formulate its proposed amendment so as to reflect them. It may be doubted in those circumstances whether our decision is a final judgment and susceptible to an appeal at all, but what is clear is that an appeal on such a point involves no issue of law or any point of public importance. Indeed that is clear from the heads of argument delivered by the Commission in support of this application. All that was said on this point was that 'there can be no basis for the Steinhoff respondents to complain that they did not know the basis for the amendment' and that this court erred 'in finding that it was impermissible for the Commission to advance the narrow construction of the collusion amendment'. Not a word was said to suggest that this raised an issue of any substance or importance, much less one that would justify the grant of special leave to appeal.

[9] It was submitted on behalf of the Commission that leave to appeal should be granted because, so it was submitted, we had erroneously interpreted the Act as requiring that a referral to the Tribunal may not be wider than the initiating complaint on which it is based and in saying that in terms of s 50(2) of the Act the Commission may not refer a complaint to the Tribunal more than a year after it initiated the complaint. In argument in relation to the first of these points it was said that our decision in this case was inconsistent with the decision of the Supreme Court of

Appeal in *Woodlands Dairy* and with the jurisprudence of this court in cases such as *Glaxo Wellcome*,[7] *Netstar*[8]and, most recently, *South African Breweries*.[9] Some reference was also made to the Constitutional Court's decision in *Senwes*.[10]

[10] The argument is misconceived for two reasons. First there is no difference of approach in these cases. The proper starting point is the decision of this court in *Sappi*.[11] There it was held that the Tribunal has no general power to investigate anti-competitive conduct, but is confined to determining complaints of anti-competitive conduct that have been referred to it by the Tribunal or a complainant. Whilst it is vested with inquisitorial powers it exercises those in the context of a particular complaint that has been referred to it. *Glaxo Wellcome* dealt with the initiation of a complaint and said that 'there must be a rational and recognisable link between the conduct referred to in the complaint and the prohibitions in the Act'. Without that link the Commission would be exercising its powers in relation to matters not comprehended by the Act. In *Netstar* the point was made that the Tribunal exercises the jurisdiction it possesses by virtue of s 27(1) of the Act in relation to a specific referral. As the Constitutional Court expressed it in *Senwes*,[12] it is the referral that triggers the exercise of the tribunal's adjudicative powers, the object of which is to determine whether the alleged prohibited practice has occurred. The appeal succeeded because this court held that the evidence did not justify the Tribunal's factual findings, and that the complaint advanced by the Commission was not established on the facts. In *Senwes* the appeal to the Constitutional Court succeeded because it was held that on a proper construction of the referral the case advanced by the Commission before the Tribunal was covered by the terms of the reference.[13] Similarly in *South African Breweries* the appeal succeeded on the basis that the case the Commission wished to advance before the Tribunal was covered by the terms of the referral.

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[11] Nothing in our judgment in the present case justifies the suggestion that we laid down a rule that there must be 'symmetry between the initiating document and the referral'. (I quote from the Commission's heads of argument.) Instead we applied the law as it has been laid down in the cases I have mentioned. There is therefore no novel point of law of substantial importance requiring the attention of the Supreme Court of Appeal.

[12] The second misconception flows from the fact that these arguments relate to matters that are irrelevant in the light of the Commission's explanation of the case it wishes to advance. That, as pointed out in para 8, is an issue of the construction of its proposed amendment and whether it bears the meaning for which the Commission contends. The legal contentions now advanced simply do not arise in relation to that issue. The same is true for the point in regard to s 50(2) of the Act. All that the judgment said in regard to these two matters was that they 'no doubt' were the reason for the Commission seeking to argue its case on the narrow basis outlined above. That does not amount to a decision on these points and whether it was right or wrong is of no moment as the Commission expressly limits its case in this manner. We are being asked to grant leave to appeal on two legal points that, on the Commission's case, do not arise for consideration or determination. An appeal would therefore take place in a factual vacuum. That is very different from those cases where the Supreme Court of Appeal determines an appeal notwithstanding the fact that as a result of a change in circumstances it cannot give an order having a practical effect. Here the Commission is seeking leave to appeal in relation to issues that on its case do not, and never did, arise for decision.

[13] Although no oral argument was addressed to us in regard to the s 4(5)(b) issue I shall deal with it briefly. The Commission wishes to allege that if Loungefoam and Vitafoam are in truth a single economic entity then the third and fourth respondents may be ordered to pay any administrative penalty imposed as a result of their

participation in the chemical cartel in contravention of s 4(1)(b) of the Act. It founds its case on the provisions of s 4(5)(b). However, if Loungefoam and Vitafoam have participated with Feltex in the chemical cartel, s 4(5)(b) has no relevance. That section only applies to exempt the firms forming a single economic entity from liability under s 4(1) for conduct as between themselves. Once the conduct involves third parties the section becomes irrelevant and all the participant firms are liable to be held to have contravened s 4(1) and be liable for the penalties that such conduct attracts. The section does not provide any basis for making a holding company liable for administrative penalties imposed on its subsidiaries. That does not mean that a holding company may not in certain circumstances be held liable for prohibited anti-competitive conduct by its subsidiary – a matter on which I prefer not to express any view – only that it cannot be held liable under s 4(5)(b). An appeal on this point has no reasonable prospects of success.

[14] In the result the application for leave to appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
ACTING JUDGE OF APPEAL

DAVIS JP and NDITA AJA concurred

Appearances:

Appellant: Mr N H Maentje SC (with him Ms I Goodman)
Instructed by:
Cheadle Thompson & Haysom Inc.

Respondents: Mr D N Unterhalter SC (with him Mr M Wesley)
Instructed by:
Norton Rose South Africa.