



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO037Aug10/VAR240Feb16

In the matter between:

Foskor (Pty) Ltd

Applicant

and

The Competition Commission

First Respondent

Omnia Group (Pty) Ltd

Second Respondent

The Complainants in case no: 2007Dec3382

Third to Sixth Respondents

Panel	: Yasmin Carrim (Presiding Member)
	: Andreas Wessels (Tribunal Member)
	: Anton Roskam (Tribunal Member)
Heard on	: 10 May 2019
Last Submission Received	: 27 May 2019
Reasons Issued on	: 18 December 2019

Reasons for Decision

Introduction

- [1] This matter concerns an application by Foskor (Pty) Ltd ("Foskor") to vary the Competition Tribunal ("Tribunal") Consent Order handed down on 28 February 2011. It comes with a convoluted history which warrants some discussion in detail.
- [2] Foskor is a producer of rock phosphates and phosphoric acid, primarily for the international (i.e. export) market. Foskor is involved at both the upstream and

downstream levels in the supply of phosphate-based fertilizers and is the only vertically integrated phosphate supplier in South Africa.

- [3] Foskor mines phosphate rock from its open-cast mine in Phalaborwa, the only viable source of the rock in South Africa. The phosphate rock is then crushed, milled, concentrated and dried, and turned into phosphate rock concentrate. Foskor is the only local miner of phosphate rock in South Africa and the only producer of the phosphate rock concentrate.
- [4] Approximately 85% of the phosphate rock mined by Foskor is railed to Foskor's manufacturing plant at Richards Bay, while the rest is sold locally and internationally.
- [5] Foskor's facility at Richards Bay consists of granulation, phosphoric acid and sulphuric acid plants, supported by various storage facilities. At this facility, Foskor produces, amongst others, two-phosphate based granular fertilizers, mono-ammonium phosphate ("MAP") and diammonium phosphate ("DAP").
- [6] Phosphoric acid, on the other hand, is produced by reacting sulphuric acid with phosphoric rock and recycled phosphoric acid. Foskor further uses phosphoric acid to produce MAP and DAP, which is also sold as an input to nitrogen, phosphate and potassium ("NPK") fertilizer blends. Foskor is currently the only supplier of phosphoric acid in South Africa.
- [7] Omnia Group (Pty) Ltd ("Omnia"), is a manufacturer and retailer of fertilizers. Omnia is largely active in the downstream fertilizer market.
- [8] Omnia is the largest South African purchaser of Foskor's phosphoric acid, purchasing approximately 50% of the phosphoric acid of Foskor's domestic sales. Phosphoric acid is an input in Omnia's NPK fertilizers. Omnia produces NPK fertilizers in granular and liquid form and on-sells MAP, DAP and other blends of fertilizers. Its MAP and DAP fertilizers are bought from Foskor and compete with similar products manufactured by Sasol and Foskor, as well as with imported MAP and DAP products.

Consent Order Proceedings

- [9] During 2007 the Competition Commission ("Commission") received various complaints from animal feed producers against Foskor.¹ The Commission investigated the complaints and found, *inter alia*, that Foskor was charging local (domestic) customers a Free- on- Board Richards Bay price ("the FOB price") plus a 75% notional (not actual) freight cost of shipping the product to India. The Commission was of the view that this amounted to an excessive price in contravention of section 8(a) of the Competition Act, 89 of 1998 ("the Act").
- [10] Following the Commission's investigation, Foskor and the Commission concluded a consent agreement in July 2010. A hearing for confirmation of the consent agreement was held on 26 January 2011.
- [11] At that hearing the Tribunal was concerned about the wording of clause 5.4 of the agreement, which, as originally formulated, stated that Foskor would not "*revert to its past pricing policy*". It was not clear to the panel how Foskor would henceforth price its phosphoric acid in the domestic market in order to ensure that it did not contravene section 8(a) of the Act. The Tribunal accordingly asked that clause 5.4 of the consent agreement be amended to indicate the pricing methodology which Foskor would use to determine the price charged to domestic customers for phosphoric acid.
- [12] An addendum containing a new clause 5.4, was signed by Foskor and the Commission on that day (26 January 2011) (the "first addendum") which read as follows:

"The Competition Commission and Foskor hereby agree to the following amendment: -

The substitution of clause 5.4 of the Consent Agreement with the following: -

¹ The Third to Sixth Respondents are the complainants in the complaint filed with the Commission under case number 2007Dec3382.

5.4 Foskor undertakes not to revert to its past pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India. Henceforth, Foskor will charge a price based on the FOB Richards Bay Port in respect of phosphoric acid."

- [13] The Tribunal was also of the view that there should be an express admission by Foskor that its conduct contravened section 8(a) of the Act, as well as an administrative penalty to punish Foskor for its contravention. A further addendum incorporating those two aspects was consequently signed by the parties on 23 February 2011 (the "second addendum").
- [14] Another hearing was then held on 28 February 2011. In that hearing Foskor and the Commission advised the Tribunal of the existence of a third addendum which contained monitoring provisions for a duration of 3 years. However, the third addendum was not signed by the Commissioner by the time of the hearing.
- [15] The Tribunal handed down the Consent Order as requested at the hearing but only in relation to addenda one and two. The third addendum was not confirmed in that order of 28 February 2011 ("the 2011 Consent Order").
- [16] Foskor thereafter charged domestic customers, such as Omnia, an FOB Richards Bay-based price for its phosphoric acid until about mid-2014. However, from around September 2014, Foskor priced its phosphoric acid in the local market above the FOB Richards Bay price.
- [17] Omnia then approached the Commission seeking clarity on the interpretation of Foskor's pricing obligation in the 2011 Consent Order arguing that Foskor's new pricing policy was in breach of Foskor's pricing obligations.

High Court Proceedings

- [18] Whilst the Commission was engaging Omnia with regards to its concerns, Omnia applied to the High Court for an order declaring that Foskor was required, under the 2011 Consent Order, to sell its phosphoric acid to domestic customers at a price which was based on FOB Richards Bay.
- [19] It appears that Foskor, in that court, argued that there was ambiguity in clause 5.4 and sought a variation of the consent order on the basis that the third addendum had been excluded by serious omission or error. Hence, it was obliged to charge the FOB Richards Bay price for a period of only 3 years which the third addendum provided for.
- [20] In relation to the meaning of clause 5.4 the High Court found that the remedy for the excessive pricing was indeed the FOB Richards Bay price as benchmark excluding any additional charges:

“The excessive price was remedied by the removal of the 75% CFR India freight charge. It is exactly what the Competition Commission and Foskor wished to achieve. It requires Foskor to desist from charging any additional charges to the FOB price.”²

- [21] In relation to the third addendum High Court found:

“[21] I interpose to mention, in conclusion, that a further addendum [third unsigned addendum] was considered by the Competition Commission and which Foskor maintain is part of the [Tribunal Consent] order. The document is not signed, but it is annexed to the papers ... The document does not form part of the order... If there is an obvious error or omission in the [Tribunal Consent] order the parties affected should address that issue to the Competition Tribunal for rectification (our emphasis) ...

² *Omnia v Foskor and Others* Case number: 14554/2015 (delivered on 16 October 2015) at paragraph [18].

[19] Foskor it seems has placed itself in a straitjacket, as it were, in the domestic market as to how the price of phosphoric acid is to be determined. Clause 5.4 places an obligation upon Foskor and requires obedience. The allegations in the papers that Foskor charged the FOB price for three years subsequent to the order are not seriously disputed. It is certainly compelling evidence of the understanding of the consent order by Foskor and its obligations.”³

[22] Foskor subsequently appealed to the Full Bench of the High Court but was unsuccessful. The Full Bench confirmed the High Court’s interpretation and found that the FOB Richards Bay Port price is the published export price minus the CFR costs. In its own assessment of the interpretation of clause 5.4, the Full Bench found that there was no ambiguity and that Foskor was attempting to set aside the consent order on the basis of mistake, which it couldn’t do.

Variation Application

[23] Foskor then turned its focus to the variation application at the Tribunal. In the variation application before us Foskor asks the Tribunal for an order:

23.1. Amending clause 5.4 of the first addendum to the 2011 Consent Order (which, as mentioned, was included in the Tribunal Order); and

23.2. Declaring that the proposed unsigned third addendum is part of the 2011 Consent Order.

[24] The relief was sought on two principal grounds. First, the agreement was made an order of the Tribunal by a mistake common to the parties. Hence, in terms of section 66(c) the Tribunal was empowered to vary it. Second, in the event that it was found that the third unsigned addendum is not part of the 2011 Consent Order, then this was as a result of an obvious error or omission and should be rectified by the Tribunal in terms of section 66(b).

[25] However, in its replying affidavit Foskor, who had previously relied on mistake and error/omission as grounds for variation under sections 66(b) and (c), now pleaded changed circumstances/hardship.

³ *Omnia v Foskor and Others* Case number: 14554/2015 (delivered on 16 October 2015) at paragraph [19].

- [26] Omnia took exception to Foskor's changed case and new evidence in reply and accordingly filed a notice of application to strike out various portions of Foskor's replying affidavit.
- [27] Foskor opposed the strike out application and sought leave to file a supplementary affidavit containing evidence of changed circumstances or hardship and which also included the confirmatory affidavit of Mervin Dorosamy ("Dorosamy"), a former employee of the Commission, regarding the Commission's alleged intended duration of the pricing condition ("supplementary application").
- [28] The Commission did not oppose Foskor's supplementary application in so far as it related to changed economic and market circumstances. The Commission however opposed Foskor's supplementary application to the extent that Foskor seeks to introduce and rely on the averments of Dorosamy.
- [29] Omnia submitted that the new relief sought by Foskor in the alternative (namely, a variation of the Tribunal Order on the basis of supposedly changed circumstances) was incompetent as a matter of law, and that the new evidence which Foskor sought to adduce about the Commission's views or intentions in the settlement negotiations in January 2011 was inadmissible.
- [30] However, in the course of this the Commission proceeded to investigate Foskor's pricing and Omnia's concerns. The Commission and Foskor subsequently concluded a consent agreement to amend and/or vary the terms of clause 5.4, which was jointly filed by the parties on 25 April 2017. Thus, the Commission and Foskor effectively sought an amendment to their previous agreement through the mechanism of a new consent agreement as agreed to by both parties.

The New Consent Agreement

- [31] The Commission's decision to conclude the amendment agreement with Foskor ("new consent agreement") was primarily informed by the Commission's findings in its investigation into Foskor's pricing for phosphoric acid.
- [32] The Commission conducted two reviews prior to concluding the new consent agreement and found that Foskor's pricing for phosphoric acid during the investigated periods was below cost, indicating that the excessive pricing concern had fallen away.

- [33] The purpose of the new consent agreement is to remove the third obligation in clause 5.4 of the 2011 Consent Order, which requires Foskor to charge a price based on the FOB Richards Bay Port in respect of phosphoric acid. The Commission and Foskor agreed that the amended pricing condition should read as follows:

“5.4 Foskor undertakes not to revert to its pricing policy for the sale of phosphoric acid, phosphate rock, MAP and DAP. This policy comprised of an import parity benchmark for phosphoric acid which included notional freight charges to India.”

- [34] In terms of the amended pricing condition, Foskor will henceforth be allowed to charge to its domestic customers a price that is reasonably related to the economic value of its goods as long as such pricing is in accordance with the provisions of the Act.
- [35] The Commission requests that we confirm the agreement as a consent order in terms of section 49D. Omnia opposes this application on the basis that the Tribunal cannot amend or vary its own order on any other grounds other than those provided in section 66(b).

Tribunal Direction

- [36] Against this background the Tribunal issued a direction,⁴ with the agreement of the parties, that the following points should be first be argued and determined:

“1. Whether, on the grounds advanced by Foskor, the Competition Tribunal has the power in terms of the Competition Act or in law, to vary or amend the terms of the Tribunal order granted by consent on 28th February 2011.

2. Whether any of the variation grounds advanced by Foskor are precluded by the order of the full bench of the High Court on 06 November 2017.

3. Whether the Tribunal can vary or amend the consent order granted on 28 February 2011 on the basis of agreed terms between the Commission and the Applicant (Foskor).

⁴ On 11 February 2019.

4. Whether the Tribunal is permitted to vary an order in situations arising in hardship, emanating from a consent order issued by the Competition Tribunal; and if so

a. whether in the circumstances, Foskor should be permitted to file its supplementary founding affidavit.”

[37] The Tribunal’s direction effectively separated the jurisdictional issues from the merits of the amendment itself.

Issues overtaken by events

[38] Up until the conclusion of the new consent agreement, Foskor’s variation application was not supported by the Commission on the grounds of mistake, error or omission. This created a difficulty for Foskor as highlighted by the High Court because the premise of the order was the 2011 agreement between the Commission and Foskor.

[39] The High Court remarked that the nature or form of the Tribunal order sought to be varied by Foskor had a contractual nature when it explained why Foskor could not rely on unilateral mistake -

[10] The question thus in fact raised is whether any of these grounds set out in para 9 above, allows for the settlement agreement and the order of court to be set aside. This was however not the issue before the court a quo and the agreement of compromise creates new rights and obligations as a substantive contract that exists independently from the original cause.

[11] Foskor could only raise these submissions if the consent agreement was obtained by means of fraud or Justus provided the mistake vitiated true consent and did not merely relate to motive or to the merits of the dispute or mistake common to the parties. None of these grounds exist. A unilateral mistake on the part of one party, that does not flow from a misrepresentation by the other does not allow the former party to resile from a settlement agreement.(our emphasis) It seems that Foskor consented to this clause and now regret the results, this however is not a ground to set aside the settlement and the court order.”⁵

[40] Hence Foskor could not rely on a variation of the consent order under section 66(b) unless this was supported by the Commission.

[41] The Commission has persisted with its opposition to a variation of the consent order under section 66(b) as sought by Foskor but has instead concluded a new consent agreement which seeks to amend/vary the 2011 Consent Order based on changed circumstances.

[42] As a result, the legal enquiry has now crystallised into one essential enquiry namely, whether as a matter of law the Tribunal can vary or amend the 2011 Consent Order based on changed circumstances/hardship and on terms agreed between the Commission and Foskor.

[43] There is therefore no need for us to consider Foskor's application in terms of section 66(b). Section 66(b) however remains relevant insofar as Omnia persists with its opposition to the new consent agreement on the basis that a consent order can only be amended on grounds listed in section 66(b).

⁵ *Foskor (Pty) Ltd v Omnia Group (Pty) Ltd* Case number: A203/2016 (delivered on 06 November 2017) at paragraphs [10] and [11].

Our Analysis

Section 49D and the nature of consent agreements

[44] Section 49D of the Act provides as follows:

“49D. Consent Orders

(1) If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b);

(2) After hearing a motion for a consent order, the Competition Tribunal must-
(a) make the order as agreed to and proposed by the Competition Commission and the respondent;
(b) indicate any changes that must be made in the draft order before it will make the order; or
(c) refuse to make the order.”

[45] The nature of consent orders has previously been considered by the Competition Appeal Court.

[46] In *Glaxo SmithKline*⁶ the Competition Appeal Court (“the CAC”) said:

“The terms of section 49D(1) in relation to the scope of the powers of the Commission is clear. The language is clear, and effect can be given to the ordinary meaning of the words. Section 49D empowers the Commission to agree the terms of an “appropriate order” with a respondent against whom a complaint has been laid and in respect of whose practices an investigation has been instituted. The content of the agreement which the Commission is empowered to enter into is limited to “the terms of an appropriate order”. Clearly such order could be drafted in terms which incorporate an annexed detailed agreement. An example of such an agreement is the December 2003 settlement agreement at issue here.

⁶ *GlaxoSmithKline South Africa (Pty) Ltd and Another v David Lewis N.O. and Others* Case number: 62/CAC/Apr06.

The nature of the agreement which the Commission can conclude is limited to an agreement on the terms of an appropriate order. That agreement is not to be confused with a settlement agreement which may itself be incorporated in the proposed order. The actual terms of the proposed order are not enforceable nor, indeed, is any settlement agreement which is referred to or incorporated in the proposed order legally enforceable until it is dealt with and confirmed by the Tribunal in terms of section 49D. The binding effect of the agreed order will be limited to requiring the parties to proceed with an application to the Tribunal for confirmation of the agreed order in terms of section 49D of the Act."

- [47] In *Netcare Hospital Group*⁷ the CAC set out the test for confirmation of consent agreement agreements as follows:

*"In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement. An agreement which imposes an inordinately low penalty for a serious contravention will obviously bring the objects of the Competition Act into disrepute and will be against public policy. It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the competition authorities into disrepute. As indicated the Tribunal cannot hear any evidence but it can surely make such inquiries at the hearing as it deems fit in order to satisfy itself that the abovementioned objectives are properly met."*⁸

- [48] Section 49D thus contains a unique framework which enables the Commission to regulate the conduct of firms expeditiously but with transparency and accountability. While the jurisdictional requirement for consent orders is an agreement between the Commission and a respondent, the agreement is not enforceable unless it is confirmed by the Tribunal. The Tribunal on the other hand may confirm the agreement as an order but only if it promotes the objectives of the Act, is in the public interest, rational and is not shockingly inappropriate.

⁷ *Netcare Hospital Group (Pty) Ltd & Another v Norman Manoim N.O & Others* Case Number: 75/CAC/Apr08.

⁸ *Netcare Hospital Group (Pty) Ltd & Another v Norman Manoim N.O & Others* Case Number: 75/CAC/Apr08 at paragraph [29].

- [49] While consent agreements under section 49D are agreements between the Commission and respondents with the purpose of settling a dispute, they differ from settlement agreements in private disputes because they relate to matters of public not private interests. The Commission represents a public interest namely the promotion of competition and the prevention of abusive conduct by dominant firms in markets. At the same time, they differ from plea bargain arrangements because they are administrative and not criminal in nature.
- [50] Ordinarily, in civil proceedings settlement agreements concluded and incorporated in a court order bring finality to the *lis* between the parties, and the *lis* becomes *res judicata*. This is not necessarily the case in consent agreements which may provide for behavioural remedies. Behavioural remedies in consent agreements often require the respondents to show ongoing compliance with the agreed behavioural remedy, including reporting obligations and the Commission customarily continues to exercise its monitoring function as a regulator with general oversight functions over a particular market.
- [51] Omnia insists that notwithstanding the special nature of consent orders and the unique expedited mechanism of settlement agreements under section 49D, the Tribunal should treat all orders alike, and that a variation of the 2011 consent order can only be done on the grounds contained in section 66(b).⁹ Hence, in Omnia's view even if a respondent faced hardship or changed circumstances, this Tribunal is precluded from granting a variation of the consent order in perpetuity unless the variation was sought on the limited grounds contemplated in section 66(b).
- [52] But Omnia's stance requires us to approach the matter without regard to the other provisions of the Act itself and our mandate and functions provided for therein.

⁹ Section 66(b) provides:

"66(b). Variation of order —The Competition Tribunal, or the Competition Appeal Court, acting of its own accord or on application of a person affected by a decision or order, may vary or rescind its decision or order—....in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission"

- [53] The Act has established the Commission, the Tribunal and the Competition Appeal Court in order to promote the objectives stated in the Preamble of the Act and the Purpose of the Act. The three agencies constitute the regulatory framework for competition matters throughout the Republic.
- [54] The Commission and Tribunal's mandates include the promotion of competition and economic growth. The Commission is mandated *inter alia* to investigate, refer and monitor the conduct of dominant firms. The Commission performs its overall enforcement function through the powers granted to it under section 49 and the referral process provided under sections 49B and 50.
- [55] Apart from its general functions, the Commission also exercises monitoring and compliance functions over remedies imposed by the Tribunal on respondents in abuse of dominance cases, including remedies contained in consent agreements. The monitoring function differs in accordance with the nature of the remedy imposed. For example, in the case of administrative penalties or divestitures the Commission may monitor a once off compliance with the terms of the remedy. In the case of behavioural remedies such as pricing and supply remedies there is usually ongoing monitoring by the Commission for a specified period
- [56] In this case the behavioural remedy agreed to by the Commission and Foskor has the aim of addressing a previous pricing abuse, i.e. excessive pricing. The pricing of a firm is however a dynamic process because *inter alia* the costs of the firm to produce or sell the specific product or service may change over time. It is impossible at the time of imposing a pricing remedy to foresee all future changes in a market, which could lead to detrimental consequences to the firm.
- [57] We emphasize that this matter must be looked at in the context of excessive pricing by a dominant firm, Foskor, that entered into a consent agreement with the Commission in relation to that conduct. In this context we are not dealing with the conduct between private parties or acts of common law criminality but with ongoing dynamic processes, i.e. the prices charged as well as the costs of a specific firm, Foskor, that can change over time in accordance with market dynamics. Changing circumstances over time therefore is a distinct possibility in this context.

- [58] At the level of principle, we would agree with both the Commission and Foskor that respondents cannot be denied relief from the Tribunal in changed circumstances or hardship because to do so would not be accordance with the mandate and functions of the Tribunal.
- [59] The question however is whether the Act itself empowers the Tribunal to vary its orders on this basis.
- [60] Both the Commission and Foskor argue that section 27(1)(d), empowers the Tribunal to amend its orders on the basis of changed circumstances/hardship. Omnia argues that we are precluded from exercising our powers under section 27(1)(d) by *Mike's Chicken & Two Others and Astral Foods Limited & The Competition Commission*¹⁰ and that we do not enjoy any inherent jurisdiction as high courts do.
- [61] Section 27(1)(d) provides that the Tribunal may make “*any ruling or order necessary or incidental to the performance of its functions in terms of this Act.*”
- [62] Section 27(1)(d) was recently considered by the Constitutional Court in *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another*¹¹ where the Constitutional Court endorsed the CAC's views that the Tribunal's discretionary powers under section 27(1)(d) were wide and urged it to exercise these in order to give relief to parties in the interests of justice –

“Section 27(1)(d) of the Act provides that the Tribunal may make any ruling or order that is necessary or incidental to the performance of its functions in terms of the Act. Section 58 of the Act further grants the Tribunal the power to make an appropriate order in relation to a prohibited practice including an order interdicting any such practice. Both of these sections are formulated widely enough to include the power to grant declaratory relief in respect of issues in dispute referred to it.

¹⁰ 32/CAC/Sept/03

¹¹ *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* (CCT296/17) [2019] ZACC 2; 2019 (4) BCLR 470 (CC); 2019 (3) SA 1 (CC).

In addition to the wide powers conferred upon the Tribunal, there are persuasive policy considerations to conclude that the Tribunal has the power to grant declaratory orders”¹²

- [63] The CAC in *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v CC*¹³ expressed the view that an unsatisfactory interpretation of the powers of the Tribunal and could result in a barrier to justice.¹⁴
- [64] In that case both the Constitutional Court and the CAC were of the view that the Tribunal should not adopt an over-technical approach to parties seeking relief when the subject matter of the dispute falls within the mandate of the Tribunal. Both courts found that the Tribunal was empowered to grant declaratory relief and ought to have done so to avoid unnecessary and protracted proceedings.
- [65] The Tribunal may be a creature of statute but as pointed out by the Constitutional Court and the CAC, unlike other statutory bodies it enjoys a great degree of discretion in the conduct of its proceedings, enjoys inquisitorial powers and can have regard to hearsay evidence.¹⁵
- [66] In *Mikes Chicken* the CAC stated that “section 27(1)(d) was obviously not intended to provide for an eventuality covered specifically by section 66(b)”.¹⁶ However, the CAC did *not* say, as Omnia suggests, that the Tribunal was precluded from varying its orders on grounds other than those listed in section 66(b).

¹² See *Competition Commission of South Africa v Hosken Consolidated Investments Limited and Another* (CCT296/17) [2019] ZACC 2 at paragraphs [76] and [77].”

¹³ In *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v CC* Case Number: 154/CAC/Sep17.

¹⁴ In *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v CC* Case Number: 154/CAC/Sep17 at paragraph [26].

¹⁵ See *Competition Commission and South Africa Airways (Pty) Ltd* 18/CR/Mar01 at page 5: “Section 55(1) of the Competition Act gives the Tribunal member presiding a wide discretion to determine procedural issues.” See also *Industrial Development Corporation of South Africa Ltd and Anglo-American Holdings Ltd* 45/LM/Jun02 and 46/LM/Jun02 where it was stated in paragraph [61]: “In our law the exercise of the inquisitorial power has been widely construed as a survey of certain decisions shows. This is because an inquisitorial tribunal’s purpose is to seek the ‘complete truth’ as opposed to the adversarial tribunal’s seeking of ‘procedural truth’ between the versions of two or more contending parties.”

¹⁶ *Mike’s Chicken & Two Others and Astral Foods Limited & The Competition Commission* 32/CAC/Sept/03 at paragraph [14].

- [67] In any event the facts in *Mikes Chicken* differ from this case. In that case the CAC was essentially concerned with whether an order handed down by the Tribunal intended to void certain supply agreements. The Tribunal had found it had not intended for such an outcome. The CAC differed and found that the order was not ambiguous. The enquiry in *Mikes Chicken* did not concern the question whether a respondent firm could, in the context of excessive pricing and a pricing remedy to address that seek recourse from the Tribunal based on hardship or changed circumstances.
- [68] Omnia's argument also elides the issue of inherent jurisdiction and our powers under section 27(1)(d). The subject matter of the new consent agreement concerns Foskor's contravention of excessive pricing which is within the jurisdiction of the Tribunal. Our powers under section 27(1)(d) are those that are necessary or incidental to our functions. A critical function for which the Tribunal has been established is to regulate the conduct of dominant firms such as Foskor. We are not being asked to exercise jurisdiction over matters not allocated to us under the Act.
- [69] Furthermore, our functions under the Act must also be exercised in accordance with the Constitution.¹⁷ A respondent firm who is suffering hardship due to changed circumstances cannot be denied access to courts, and justice, through an acontextual interpretation of our legislation.
- [70] Therefore, when read in context of the Act, and the Constitution, the Tribunal's powers under section 27(1)(d), must *necessarily* include the power to vary for changed circumstances or hardship.
- [71] It may be that the above interpretation of our powers under section 27(1)(d) may have the effect of "extending" the grounds listed in section 66(b). But such an extension must be viewed as necessary to the exercise of our functions in accordance with Constitutional precepts. A respondent firm cannot be denied access to courts, and justice, through an acontextual and unconstitutional interpretation of our legislation.

[1] ¹⁷ Section 1(2) provides:
"This Act must be interpreted –

- (a) *In a manner that is consistent with the Constitution and gives effect to the purposes set out in section 2; and*
- (b) *in compliance with the international law obligations of the Republic."*

- [72] Indeed, the Constitutional Court in *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others*¹⁸ had occasion to remark that the exceptions under Uniform Rule 42(1), upon which section 66 is modelled, would necessarily need to be extended to address the modern Constitutional context:

“Under common law the general rule is that a judge has no authority to amend his or her own final order. The rationale for this principle is two-fold. In the first place a judge who has given a final order is functus officio. Once a judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.

However, our pre-constitutional case law recognised certain exceptions to this general rule. These exceptions are referred to in the Firestone case. These are supplementing accessory or consequential matters such as costs orders or interest on judgment debts; clarification of a judgment or order so as to give effect to the court’s true intention; correcting clerical, arithmetical or other errors in its judgment or order; and altering an order for costs where it was made without hearing the parties. This list of exceptions was not considered exhaustive. It may be extended to meet the exigencies of modern times (our emphasis).”¹⁹

- [73] This does not mean that every case that is brought to the Tribunal on the grounds of changed circumstances or hardship should be granted. Our discretion under section 27(1)(d) should only be exercised when warranted and in cases where we do intervene such intervention must be in accordance with the principle of legality, transparency and fairness as required by the Act.
- [74] This particular case is concerned with a consent order that was granted under section 49D. The jurisdictional threshold for an amendment would therefore require investigation by and agreement from the Commission. The principles of transparency and fairness would be met by conducting the hearing of the merits of the amendment in public and granting interested parties an opportunity to make submissions.

¹⁸ *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* (CCT73/03) [2005] ZACC 18.

¹⁹ *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* (CCT73/03) [2005] ZACC 18 at paragraphs [27] and [28].

[75] The Commission has referred us to foreign and international law which it urges us to have regard to when interpreting the Act as we are enjoined to in s1(3) of the Act.²⁰ Section 1(3) provides that any person interpreting or applying this Act may consider appropriate foreign and international law.

[76] We are indebted to the Commission for its efforts in traversing the relevant legislation and case law of many jurisdictions.²¹ Of significance, for example, has been the development in the US cases which resonates with the remarks of the Constitutional Court in *Zondi* but in the context of consent orders.

[77] In *United States v Swift Co.*²² the Supreme Court said:

*"We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. The power is conceded by the Government and is challenged by the interveners only. We do not go into the question whether the intervention was so limited in scope and purpose as to withdraw this ground of challenge, if otherwise available. Standing to make the objection may be assumed, and the result will not be changed. Power to modify the decree was reserved by its very terms and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need."*²³

[78] In addition, the Supreme Court explained:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never Static, and the passing of a decade has brought changes to the grocery business as it has to every other."

²⁰ Section 1(3) provides that any person interpreting or applying this Act may consider appropriate foreign and international law.

²¹ Commission's Heads of Argument

²² *United States v Swift Co.* 286 U.S. 106 (1932).

²³ *United States v Swift Co.* 286 U.S. 106 (1932) at paragraph [114].

The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression."

[79] In *Rufo v Inmates of Suffolk County Jail*²⁴, the Supreme Court confirmed that modification of a consent decree may be warranted under certain appropriate circumstances including *"when the enforcement of the decree without modification will be detrimental to the public interest."*²⁵

[80] In *Lorraine NAACP v Lorain Bd. Of Educ*²⁶, the Court of Appeals, Sixth Circuit, clarified that in *Rufo*, the Supreme Court had relaxed the *Swift* standard for the modification of consent decrees requiring a clear showing of grievous wrong and said:

*"In Swift, the Supreme Court stated that "nothing less than a clear showing of grievous wrong" would support the modification of a consent decree. The Court, however recently abandoned the rigid Swift standard and declared a lesser showing sufficient for modification of consent decrees entered in settlement of so-called "institutional reform" litigation involving and affecting the operation of governmental institutions or organizations."*²⁷

[81] It is clear from the above decisions of the US Courts, that the modification of a consent decree is permitted under certain appropriate circumstances including when the enforcement of the decree without modification will be detrimental to the public interest.

²⁴ *Rufo v Inmates of Suffolk County Jail* 502 U.S. 367 (1992).

²⁵ *Rufo v Inmates of Suffolk County Jail* 502 U.S. 367 (1992) at page 384.

²⁶ *Lorraine NAACP v Lorain Bd. Of Educ.* 979 F.2d 1141, 1148 (6th Cir. 1992).

²⁷ *Lorraine NAACP v Lorain Bd. Of Educ.* 979 F.2d 1141, 1148 (6th Cir. 1992) at paragraph [28].

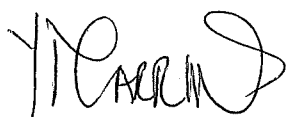
Conclusion

- [82] The Tribunal should exercise its powers in order to give relief to parties that are subject to its jurisdiction and not interpret them to serve as a barrier to justice.
- [83] As a matter of law, section 27(1)(d) interpreted in accordance with the Constitution and having regard to foreign law must include the Tribunal's power to amend/vary a consent order on the grounds of changed circumstances or hardship. Our discretion under section 27(1)(d) would be exercised here as a necessary function of our regulatory mandate under the Act, which is to regulate the conduct of firms in markets.
- [84] Any other interpretation would undermine the functions of the Commission and Tribunal in exercising their mandate under the Act.

ORDER

Accordingly, the following order is hereby granted:

1. The Commission's application for confirmation of the new consent agreement which seeks to vary the 2011 consent order can be considered by the Tribunal in terms of section 27(1)(d) read with section 1(2) and 1(3).
2. The Commission may proceed to set its application down for a hearing on the merits by arrangement with the Registrar
3. There is no order as to costs.



Ms Yasmin Carrim

18 December 2019
DATE

Mr Andreas Wessels and Mr Anton Roskam concurring

Case Manager	: Kameel Pancham and Helena Graham
For the Applicant	: Adv. N Cassim SC, Adv. Y Alli instructed by Shaheem Samsodien Attorneys
For the Commission	: Bukhosibakhe Majenge, Maya Swart, and Nokuphiwa Kunene
For Second Respondent	: Adv. P Farlam SC instructed by Falcon and Hume Inc.