

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case Number: 16/IR/DEC99

In the matter between

**South African Raisins (Pty) Ltd
Johannes Petrus Slabber**

**First Claimant
Second Claimant**

and

**SAD Holdings Ltd
SAD Vine Fruit (Pty) Ltd**

**First Respondent
Second Respondent**

Reasons for order

1. Introduction

Aggrieved parties in competition litigation generally claim that they are incurring considerable economic harm in consequence of the alleged transgression of competition law. This harm, it is alleged, continues unabated during the invariably lengthy investigations that are necessary in order to bring competition matters to full trial, thus frequently killing the patient before the cure can be administered. For this reason, the right to appear before the competition authorities and petition for an interim order that, if successful, temporarily interdicts the perpetrator from continuing the allegedly transgressive behaviour is generally accepted as an important remedy under competition law. This remedy has not been available under previous competition regimes in South Africa. Accordingly, the decision of the legislature to provide for interim relief in terms of Section 59 of the Competition Act (89 of 1998) is a major departure from previous practice in this country.

The matter now placed before the Tribunal goes to the heart of the provision of interim relief. It asks whether interim orders made in terms of Section 59 are subject to appeal. The underlying significance of this question is that by declaring interim orders appealable the further prospect of staying execution of the order pending the appeal looms large.

The time frame implied by allowing this, in turn calls into question the effectiveness of the interim relief remedy.

2. Background

On 24 November 1999, the Competition Tribunal granted an order (Case no. 04/IR/Oct99) designed to secure for the claimants, South African Raisins (Pty) Ltd (SAR) and Mr JP Slabber, interim relief from restrictive practices allegedly perpetrated by the respondents, SAD Ltd and SAD Vine Products (Pty) Limited. The order provided that the first respondent suspend the application of certain provisions of its articles of association. The offending provisions prescribed that producers of raisins, who were also shareholders of the first respondent, are obliged to sell their entire raisin crop to the second respondent. Through these provisions, the market for the processing and packaging of raisins was foreclosed with potential competitors unable to access raisins for further processing. The Tribunal further decided that the interim order would not be effective without allowing the claimants access to certain parts of the distribution infrastructure, namely customized wooden crates, owned by the respondents and utilized by the farmers for transporting their produce to the processing and packaging plants. The order also provided that the respondents inform their suppliers – the farmers who, if they wish to sell output to SAD, are also compelled to hold shares in the first respondent – of the order made against them. The order provided that the communication to the farmers take place by no later than the 6th of December 1999.

On the 6th of December the respondents filed an appeal against the order. Under covering letter dated the 3rd of December – although apparently only dispatched on the 5th of December – SAD Ltd circulated copies of the order to its shareholders who constitute the overwhelming majority of producers of grapes-for-raisins. However, in the covering letter SAD Ltd asserts – in bold type – that the appeal lodged has suspended the order, effectively calling on their members to ignore the order.

On the 8th of December, SAR and Mr. Slabber again approached the Tribunal. On this occasion, the claimants ask that the Tribunal declare that

- the notice of appeal is invalid and of no force and effect;
- the respondents are in contempt of the previous order of the Tribunal;
- future appeals, in particular of the previous order, if any, deriving from these proceedings, will not suspend the operation of the order;
- the respondents are liable for the costs of this application.

The Tribunal heard this application on the 22nd of December 1999 and on the 24th of December handed down an order substantially in favour of the applicant. The order is repeated at the end of this decision. The reasons for the order now follow.

3. Reasoning

3.1 Is the notice of appeal valid?

The claimants argued that the respondents' notice of appeal was invalid and accordingly of no force and effect – in particular, they argued that an invalid notice, because it is no notice at all, cannot have the effect of suspending the operation of the order. They based their claim that the notice of appeal was invalid on the assertion that the Competition Act, 89 of 1998 itself does not provide for an appeal against an interim relief order in terms of Section 59 and that this interpretation of the Act is supported by the common law and High Court practice relating to interim interdicts.

The claimants interpret the Act as providing an appeal against only two types of Competition Tribunal decisions. The first type of decision, which is appealable in terms of Section 17, relates to a decision of the Tribunal to either approve or prohibit a merger in terms of Section 15(2). The second type of decision is appealable in terms of Section 58 and relates only to matters which have either been referred to the Tribunal by the Commission in terms of Section 50(a), or have been referred to the Tribunal in terms of Section 51(1) after the Commission has issued a notice of non-referral in terms of Section 50(b). This interpretation of Section 58 derives from a chain of references to other provisions of the Act ending with Section 50: Section 58 provides for appeals “by a participant in a hearing referred to in section 53”, which in turn is a person “who may participate in a hearing contemplated in section 52”, and a hearing contemplated in terms of Section 52 is a hearing relating to matters dealt with by the Commission in terms of the aforementioned Section 50. Thus, Section 58 does not provide for an appeal against an interim relief order in terms of Section 59.

On this reasoning, the claimants essentially argued that because the Act makes no explicit provision for an appeal against an interim relief order, such an order is not appealable.

In addition, the claimants contended that their interpretation of the Act was supported by the common law treatment of interlocutory orders, which has recently been confirmed by the then Appellate Division in *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A), namely that an order granting an interim interdict is not appealable.

The Competition Commission, appearing *amicus curiae* at the request of the Tribunal, supported the view that the notice of appeal was invalid and, accordingly, of no force and effect.

The Commission relied on the *Cronshaw* case, among others, as authority for its view that only a final “judgment or order” of the High Court is appealable and accordingly that the granting of an interim interdict that does not have final effect is not appealable. This position follows from the interpretation that the courts have given to the words “judgment or order” in Section 20(1) of the Supreme Court Act, which provides for appeals against decisions of the High Court, namely that they mean a decision that is final and definitive. In addition, the Commission cited the principle laid down in *Pretoria Garrison Institutes*

v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) in terms of which an order is considered to be a simple interlocutory order, and therefore not appealable, if it does not “dispose of any issue or any portion of the issue in the main action or suit”, or “irreparably anticipates or precludes some of the relief which would or might be given at the hearing”. Only interlocutory orders that have a final and definitive effect on the main action are appealable (*South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T)).

The Commission submitted that the words “any decision” as used in Section 58 of the Competition Act must, in light of the authorities cited, be interpreted as any “final decision” of the Tribunal.

Following the approach of the court in *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A), at p. 47, that an interdict *pendente lite* (interdict pending litigation) does not constitute a final and definitive order because the issues addressed by the order would be finally resolved in the main action, the Commission argued that an interim relief order in terms of Section 59 is similarly not a final and definitive order because it is equivalent to an interdict *pendente lite*; it is a temporary measure pending a comprehensive investigation by the Commission.

The respondents opposed this aspect of the application on two grounds. Firstly, they relied on the Constitution as authority for the appealability of interim relief orders in terms of Section 59, and secondly, they argued that the order of the Tribunal, though interlocutory in appearance, was final in effect. We must, nevertheless, point out that it is not entirely clear whether the respondents intended these arguments to be considered in the alternative, or whether they intended them to be sequential. In any event, our decision does not depend on this distinction.

On the first ground, they argued that the Competition Act must be interpreted so as to be compatible with the principles laid down in the Constitution. They contended that the interpretation advocated by the claimants and the Commission discriminated against respondents in applications brought in terms of Section 59, and thus breached Section 9 of the Constitution, which provides that everyone is equal before the law. By denying respondents in interim relief applications the right to appeal against an adverse order by the Tribunal, respondents in these applications would be treated differently to parties against whom orders are made under any other provision of the Act since such orders are appealable. Furthermore, they argued that the right to appeal against an interim relief order could not be limited in terms of Section 36 (the limitation clause) of the Constitution. The respondents also relied on Section 33 of the Constitution to support their contention concerning the appealability of interim relief orders. In this regard they maintained that, being an administrative organ, the Tribunal was bound by Section 33 to dispense “administrative action which is justifiable in relation to the reasons given for it” and that this meant that all orders of the Tribunal, including orders in terms of Section 59, were appealable.

On the second ground, the respondents contended that the Tribunal's order has final effect because the share of the present season's crop that, as a result of the order, would be purchased by SAR, would be irretrievably lost to the respondents.

The Tribunal finds in favour of the claimants. The statute clearly does not accord a right of appeal to the Competition Appeal Court in respect of Section 59 hearings. The claimants are correct in submitting that neither Section 17 nor Section 58 – or, for that matter, any other provision in the Act – provides for an appeal against an order of the Tribunal for interim relief.

Moreover, the claimants' contention that the common law and High Court treatment of interim relief supports their interpretation of the Act is well founded. In fact, it would appear that the legislature intended Section 59 to provide a remedy similar to a simple interlocutory interdict, which at common law is not appealable, as opposed to an order that finally and definitively disposes of the matter. This is reflected in the provisions of Subsections 59(2) and (3), which explicitly limit the duration of an interim relief order.

The High Court authorities cited by the respondents and the Commission in support of their view on the appealability of interlocutory orders remain good law. The approach that has crystallized from these authorities has recently again been endorsed by the Supreme Court of Appeal in *Guardian National Insurance Co. Ltd v Searle* NO 1999 (3) SA 296 (SCA).

Our view that Section 58 only accords a right of appeal against a final decision of the Tribunal and not against the granting of an interim relief order in terms of Section 59, is further supported by the interpretation that was given to section 76(1) of the Patents Act 57 of 1978 in *Pfizer Inc v South African Druggists Ltd* 1987 (1) SA 259 (T). In that case, the court interpreted Section 76(1) of the Patent Act, which provides for an appeal against an "order or decision" of the Commissioner of Patents, to apply to final decisions of the Commissioner only.

In our view, the respondents contentions based on a Constitutional right of appeal against interim relief orders are without merit. The approach that they advocate would render any form of interim relief worthless. Under this approach, all that need be done to avoid execution of the order would be to note an appeal against it, as this would stay execution pending the appeal being heard. This would be untenable – interlocutory interdicts are a justifiable, and indeed an essential, remedy in any legal system.

The Tribunal also does not share the respondents' view that the order in fact has final effect. The order merely requires of the respondents that they temporarily suspend the operation of certain of their articles of association. It requires that, in the interim, they will not take action against farmers who deliver their product to the processing plant of their choice and who do so using the respondents' crates. None of these remedies is irreversible.

It is irrelevant that the interim order might be prejudicial to the respondents in the interim in that they might lose part of the current season's crop to SAR. It has become trite law that the prospect of loss and inconvenience arising from an interim interdict, whether irreparable or not, is not determinative of the status of the order as being final and definitive (*Pretoria Garison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A); *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A); *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A)). The test is "whether the order bears directly upon and in that way affects the decision in the main suit" (*African Wanderers Football Club* case, supra at p. 870). As pointed out above, the Tribunal's interim order of the 24th of November 1999 in no way restricts the scope of the final decision that will be taken in respect of the claimants' complaint currently under investigation by the Commission.

Our conclusion that an interim relief order in terms of Section 59 is not appealable serves to avoid an outcome that would frustrate the whole purpose of providing an interim relief remedy in competition matters. If the granting of an interim order in terms of Section 59 were appealable and the interim order stayed, as is argued by the respondents, this would destroy the main object of Section 59 – to provide interim relief pending final determination of the complaint following a full investigation by the Commission.

Accordingly, the Tribunal finds that the notice of appeal is invalid and, hence, of no force and effect. Furthermore, because the appeal is invalid, it cannot suspend the operation of the Tribunal's previous ruling.

3.2 Are the respondents in contempt of the Tribunal's order?

The applicants sought an order declaring the respondents in contempt of the Tribunal's order of 24 November 1999 based on the fact that the first respondent had not properly notified its shareholders of the Tribunal's interim order, as had been ordered by the Tribunal. They argued that the first respondent's communication to its shareholders did not comply with the Tribunal's order because in the first respondent's covering letter, which had accompanied a copy of the Tribunal's order, it had advised its shareholders that the respondents had noted an appeal against the order and that as a consequence the order was suspended. Thus, by advising its shareholders that the order was not effective, the first respondent had not properly communicated the Tribunal's order and as a result was in contempt of the order.

According to the jurisprudence in the High Court and in other courts of similar status, such as the Labour Court, an applicant must prove wilfulness and *mala fides* on the part of the respondent in order to succeed with an application for contempt of court (*Consolidated Fish Distributors (Pty) Ltd v Zive & Others* 1968 (2) SA 517 (C) read with *Uncedo Taxi Association v Maninjwa and Others* 1998 (6) BCLR 683(E); *Tshumi & Six Others v Queensborough Plastics & Another* (Unreported decision of the Labour Court, Case No. D455/97); *National Union of Mineworkers v BKH Mining Services t/a Dancarl Diamond Mine & Others* (Unreported decision of the Labour Court, Case No. J1118/97)).

In this regard, the claimants conceded that the first respondent had probably acted on legal advice in communicating the Tribunal's order to its shareholders in the manner described above, and accordingly did not attempt to prove that the first respondent's alleged non-compliance with the order was wilful or *mala fides*. The applicants nevertheless asked the Tribunal to declare that the respondents were in contempt of the order and to order them to properly comply with it. They emphasized that they were not asking the Tribunal to impose a penal sanction, but were merely asking for a declaration of contempt, implying that it was therefore not necessary to prove that the non-compliance had been wilful or *mala fides* – i.e. that only if a penal sanction were requested would such proof be necessary.

In light of the fact that we have found that the respondents' notice of appeal is invalid, and that the Tribunal's order of the 24th of November 1999 therefore remains operative, we agree that the first respondent's communication of the order to its shareholders did not constitute proper compliance with the order. This is merely a factual matter. Since the Tribunal's order was never suspended, the first respondents' notice to its shareholders that it had been suspended, albeit on legal advice, was factually incorrect and therefore did not comply with the order to notify.

However, we do not share the claimants' opinion that we are able to declare the respondents to be in contempt of this tribunal. The term 'contempt' when used in this sense has the technical legal meaning of disobedience to a court or judicial body, which amounts to a criminal offence provided all the elements of the crime have been proved, two of which are wilfulness and *mala fides*. If these elements have not been proved the respondent/accused can strictly speaking not be declared to be in contempt. In fact, counsel for the applicants admitted as much at the hearing by stating that he was "using the word contempt a little bit loosely" and that the first respondent's conduct "technically ... might not be a contempt" (p.7 of the transcript of the hearing).

Although this might merely be a matter of terminology, we have preferred not to make a declaration in the terms sought by the applicants. Rather, to avoid any ambiguity, we have ordered that the first respondent has failed to comply strictly with the Tribunal's order and have made additional orders that we believe ameliorate the effects of this failure.

As we have not declared the respondents to be in contempt, we need not concern ourselves with the question as to whether the Competition Tribunal has jurisdiction to rule on an application for contempt of an order of the Tribunal in terms of Section 73 of the Act or impose a penalty for contempt in terms of Section 74 of the Act. We are satisfied that the order that we have made clearly is an appropriate order as envisaged by Section 60(1)(a) and therefore falls within our jurisdiction.

3.3 Further Appeals

The claimants asked for an order declaring that the Tribunal's interim relief order of 24 November 1999 remain in operation notwithstanding any further appeal that the respondents might note against that order or against the order made in the present application. They contended that such an order was necessary to prevent the respondents from further frustrating the implementation of the interim order. As authority for this motion, they cited the judgment in *South African Druggists Ltd v Beecham Group plc* (1987 (4) SA 876(T)). In simplified terms, that case entailed an application by Beecham to set aside South African Druggists' notice of appeal against an order to put into operation a prior High Court judgment against South African Druggists, pending an appeal against that judgment. The Court held that there was reason to believe that South African Druggists might very well try to further frustrate execution of the said judgment by noting further appeals, and therefore granted the motion sought for the reasons previously given by the Court that ordered the prior judgment to be put into operation; these were that the balance of hardship and convenience were fairly equal and that South African Druggists' prospects of success in appealing against the prior judgment were slight.

Since the present application is not an application to put into operation the Tribunal's interim order of 24 November 1999, but rather for a ruling on the validity of the appeal noted against that order, we need not again consider the balance of hardship and convenience which the Tribunal took into account in making the interim order; nor do we need to consider the prospects of success in an appeal – we have found that no appeal exists against that order. In the present case there is no indication that the respondents will in fact take further steps to prevent implementation of the interim relief order. Nevertheless, to remove any doubt concerning the status of the interim relief order and to ensure that the order is not further frustrated, we have ordered that it and this order remain in operation notwithstanding any further appeal that the respondents might note against either that order or this order.

3.4 Costs

On the issue of costs, the claimants, in their founding affidavit, asked for an order directing the respondents to pay the costs of the application, including the costs of two counsel. However, in their replying affidavit they submitted that, in the light of the importance of this matter and the approach adopted by the respondents, the Tribunal should award costs on a punitive scale.

Having made a finding in this application in favour of the applicants, we are entitled to award them their costs. In fact, we are inclined in this matter to award costs on a punitive scale as requested by the applicants, not because we are convinced that it is clear that the

respondents intended to be vexatious in noting the appeal or in opposing this application, but because we consider their actions to have been vexatious in that they “ ... put the other side to unnecessary trouble and expense which [they] ought not to bear” (*In re Alluvial Creek Ltd* 1929 CPD 532 at p. 535). The fact that the first respondent went out of its way to inform its shareholders of the appeal and its opinion, couched as fact, on the effect that the notice of appeal had on the implementation of the order, suggests that the respondents’ notice of appeal might very well have been intended to stultify the interim order. The inference may fairly be drawn that the respondents wanted to apply the common law rule that the noting of an appeal suspends the order to avoid executing the order. The claimants have now had to incur additional costs to ensure execution of the order. We would therefore be justified in making an order for costs against the respondents on a punitive scale.

However, Rule 58 of the Competition Tribunal Rules only provides for an order of costs on a scale as between party and party, and therefore appears to preclude us from making an order on the punitive scale as between attorney and client. Therefore, in lieu of an award on the scale as between attorney and client, we have made a comprehensive costs order on the party and party scale by allowing the costs of all three representatives of the claimants.

4. Order

The Competition Tribunal orders that –

1. the notice of appeal dated 30 November 1999 lodged by the respondents is invalid and of no effect, and accordingly that the Competition Tribunal’s order of 24 November 1999 in the application for interim relief brought by South African Raisins (Pty) Ltd and Johannes Petrus Slabber against SAD Holdings Ltd and SAD Vine Fruits (Pty) Ltd (Case no: 04/IR/Oct99) remains operative;
2. the first respondent has failed to comply strictly with the Competition Tribunal’s order for interim relief (Case no: 04/IR/Oct99) issued on 24 November 1999;
3. the first respondent forward copies of this order and the order for interim relief (Case no: 04/IR/Oct99) issued on 24 November 1999, as well as the attached Afrikaans translations of these orders, to their shareholders by no later than 31 December 1999 under cover of a letter from first respondent stating, without further qualification or comment, that the enclosed orders are distributed by order of the Competition Tribunal;
4. the first respondent publish the attached Afrikaans translations of this order and the order for interim relief (Case no: 04/IR/Oct99) issued on 24 November 1999 in *Die Gembok* newspaper by 31 December 1999 or, if the next issue of that newspaper is to be published after 31 December 1999, in the first issue published thereafter;

5. the Competition Tribunal's interim relief order (Case no: 04/IR/Oct99) issued on 24 November 1999 and this order remain in operation notwithstanding any further notice of appeal against the Competition Tribunal's said interim relief order or any notice of appeal against this order;
6. the respondents, jointly and severally, pay the costs of this application on the scale applicable as between party and party, including the full party and party costs of all three representatives.

D.H. Lewis
Presiding Member

Date

Concurring: C. Qunta and P.E. Maponya