



competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CRP163Oct15/PIL089Apr17

In the exception application:

Siyakhuphuka Investment Holdings (Pty) Ltd

Complainant

And

Transnet SOC Limited

First Respondent

Transnet National Ports Authority

Second Respondent

Panel : A Wessels (Presiding Member)
Medi Mokuena (Tribunal Member)
M Mazwai (Tribunal Member)

Heard on : 6 July 2017

Decided on : 17 October 2017

REASONS

INTRODUCTION

- [1] This is an exception application by the respondents, Transnet SOC Limited ("Transnet") and Transnet National Ports Authority ("TNPA"), in response to a complaint referred to the Competition Tribunal (the Tribunal) against it, by Siyakhuphuka Investment Holdings (Pty) Ltd ("Siyakhuphuka"). The respondents requested that various points of law arising consequent to the complaint referred by Siyakhuphuka in terms of section 51(1) of the Competition Act (the Act) be determined by the Tribunal before the matter proceeds on the merits.
- [2] The respondents were directed to clarify their points of law. In compliance with the direction of the single member sitting the points of law are as follows:
- 2.1 *Whether, when the Second Respondent performs its duties in terms of the National Ports Act of 2015 (Act 12 of 2005) (the Ports Act) it can, as a matter*

expressions are defined in the Act, with either the First Respondent or any of its business units created in terms of Act 9 of 1989.

- 2.2 *Whether the duties imposed upon the Second Respondent in terms of the Ports Act to regulate and administer ports, and in particular to conclude agreements in terms of section 56 thereof or to issue licences in terms of section 57 and 65 thereof, are subject to the jurisdiction of the Competition Act.*
 - 2.3 *Whether the facts alleged by the Complainant in its initial affidavit (assuming such facts to be correct), disclosed an abuse of dominance either by the First or Second Respondent, as defined in section 8 of the Competition Act.*
 - 2.4 *Whether the facts raised by the Complainant in paragraph 4 - 10 of its Supplementary Affidavit (assuming such facts to be correct), disclosed a prohibited practice in terms of sections 4,5 and 8 of the Competition Act.*
 - 2.5 *In as much as the events referred to in paragraphs 4 – 10 of the Complainant's Supplementary Affidavit have not been considered or investigated by the Competition Commission, whether the Tribunal may consider the same.*
 - 2.6 *Whether, even if on all facts by the Complainant should prove to be true, it is entitled to the relief set out in paragraph 35.1 of its Supplementary Affidavit.*
 - 2.7 *Whether, having regard to the provisions of section 56 of the National Ports Act, the Tribunal has jurisdiction to make the order sought in paragraph 35.2 of the Complainant's Supplementary Affidavit.*
- [3] The single Tribunal member sitting at the second pre-hearing on 6 April 2017, directed that the points of law raised by the respondents be determined by the full panel of the Tribunal.
- [4] The respondents abandoned the fourth and fifth questions of law they had raised. The respondents submitted that if they succeed on the questions of law before the Tribunal that would dispose of the complaint. The consequences whereof are that the Tribunal will not have to consider the merits of Siyakhuphuka's complaint.

BACKGROUND

- [5] Siyakhuphuka self-referred its complaint to the Tribunal on 10 October 2015 after the Competition Commission ("the Commission") had issued a notice of non-referral of the

complaint originally lodged with it. It had lodged its complaint with the Commission on 2 April 2014 and the non-referral notice, issued in terms of section 50(2) of the Act, was sent by the Commission on 14 September 2015.

- [6] Siyakhuphuka's complaint stems from the rejection of its unsolicited proposal to the respondents for a concession to operate a container terminal at the Port of Richards Bay. Siyakhuphuka considered its proposal an application for a concession to operate a container terminal at the Ports of Richards Bay. According to Siyakhuphuka the proposition was intended to provide the Zululand region with global container shipping connections. This application was made to TNPA, which is mandated by the Ports Act to assess such applications.
- [7] The Ports Act envisaged the establishment of an authority which is to administer and regulate the ports in South Africa. In terms of the Ports Act, the Minister of Transport and the Minister of Public Enterprises are required to create a new company called the National Ports Authority (Pty) Limited.¹ The Ports Act provides that until this company is formed TNPA must perform all the functions of the Ports Authority, as set out in the Ports Act.² On the date of hearing this application, the National Ports Authority (Pty) Ltd had not been established by the relevant Ministers.
- [8] TNPA, in a letter penned by the Acting Chief Executive Officer of Transnet, Mr Chris Wells, rejected Siyakhuphuka's unsolicited proposal. Three reasons were proffered for turning down Siyakhuphuka's proposal. For purposes of this application, Siyakhuphuka focused on the following reasons: (a) there were insufficient volumes of base cargo moving through the port to justify such a development; and (b) shipping lines were of the view that the Port of Richards Bay is not suitable for a dedicated terminal. The thrust of Siyakhuphuka's complaint centres on the above reasons and comprises two parts.
- [9] The first complaint is that there is no delineation between Transnet and the TNPA. Siyakhuphuka alleges that the TNPA operates as a division of Transnet consequently, it was incapable of impartiality in its execution of its duty under the Ports Act. Siyakhuphuka alleged that the TNPA is obliged to execute Transnet's corporate strategy to protect volumes against new entrants and growing market shares. As a

¹ Section 3(3) and section 4(1) of the National Ports Act.

² Section 3(1) of the National Ports Act.

result, Siyakhuphuka submits that its application was not properly considered and was actually handled and declined by Transnet.

- [10] Siyakhuphuka submitted that the conduct of the TNPA and Transnet contravened sections 4 and 5 of the Act, in that it has the effect of substantially preventing or lessening competition. It was its further submission that, the TNPA and Transnet acted unlawfully in terms of section 8 of the Act. Their conduct constitutes an abuse of Transnet's dominant position.
- [11] The second complaint is that, after rejecting Siyakhuphuka's proposal, TNPA availed the proposal to Transnet Port Terminals,³ ("TPT") a direct competitor of Siyakhuphuka. TPT subsequently implemented Siyakhuphuka's concept and design despite having expressed the view that the Port of Richards Bay terminal was not suitable for containers. Siyakhuphuka again alleges that this constitutes an abuse of Transnet's dominant position and therefore is unlawful in terms of section 8 of the Act.
- [12] In response to the complaint filed, Transnet and TNPA submitted that the complaint does not constitute a prohibited practice because in terms of section 4, Transnet and TPT are a single juristic entity consequently are not in competition with each other. In addition Transnet and TPT are not in a customer-supplier relationship as a singular juristic entity cannot be in a relationship with itself in terms of section 5. Furthermore, in terms of section 8 the market for the provision of port land and authorisations/licences to operate a container terminal in the Port of Richards Bay does not exist as the development and operation of ports is subject to regulation – authorisation and licencing in terms of the Ports Act. Furthermore, a case of dominance, an abuse thereof, or any exclusionary acts has not been made.
- [13] In its supplementary Founding Affidavit, Siyakhuphuka sought to apprise the Tribunal of recent events which allegedly have a direct bearing on the matter. These events are that, four months following the filing of its answering affidavit, Transnet announced its decision to commence with the development of the base cargo terminal at Richards Bay. TNPA did not issue a proposal offer prior to this announcement. Siyakhuphuka concludes that the reasons given by TNPA for its rejection of Siyakhuphuka's proposal therefore lack foundation.
- [14] Siyakhuphuka, in its supplementary founding affidavit accepted that TPT and TNPA constitute a single firm for competition law purposes, but argues that Transnet is a

³ A business unit formed by Transnet and tasked with the handling of cargos through ports.

vertically integrated firm. TNPA owns and controls all of the land at all South African ports and is exclusively empowered, in terms of the NPA, to grant licenses or authorisations. TNPA is therefore a monopoly provider or supplier of port land and authorisations or licenses to firms in the downstream market for the provision of port facilities or services. TPT and Siyakhuphuka are, therefore, competitors in this downstream market.

[15] The relief sought by Siyakhuphuka in its supplementary founding affidavit are:

- (a) *The refusal by Transnet to accept Siyakhuphuka's proposal as set out in annexure D to the founding affidavit is declared to be a prohibited practice in contravention of section 8(b) and 8(c) of the Competition Act, alternatively it is declared that the agreement between TNPA and TPT in terms of which they agreed to refuse Siyakhuphuka's proposal as set out in annexure D to the founding affidavit is void and constituted a prohibited practice.*
- (b) *The respondent is, in terms of section 58(1)(a)(viii) alternatively section 58(1)(a)(ii) of the Competition Act, ordered to accept Siyakhuphuka's proposal on the terms set out in that proposal.*
- (c) *The respondent is ordered to pay an administrative penalty of an amount to be determined by the Tribunal in due course.*
- (d) *The respondent is ordered to pay the cost of this complaint referral.*

[16] Effectively Siyakhuphuka alleges that TNPA's rejection of its application amounts to a refusal by a dominant firm to give a competitor access to an essential facility and/or refusal to supply a scarce good to a competitor, when it would be economically feasible to do so. The actions of TNPA are therefore alleged to be in violation of section 8(b), 8(c) and 8(d)(i) of the Act.

[17] In its supplementary replying affidavit, Transnet and TNPA raised, *inter alia*, two points *in limine* firstly being that the case brought by Siyakhuphuka is that it seeks to rely on 'recent events' after the filing of the answering affidavit is the same case it had brought before the High Court, Kwa-Zulu Natal Local Division, Durban.⁴ The cause of action does not amount to a prohibited practice but rather an alleged breach by the TNPA of its obligations in terms of the Ports Act which the complainant has a remedy in terms

⁴ Please see paragraph 6 page 577 and paragraph 8 page 578 of the Reply to Supplementary Founding Affidavit.

of section 47 of the said Ports Act at its disposal. Therefore it would be improper for the Tribunal to adjudicate this complaint having regard that the matter has been referred to the High Court.⁵ As such, the Tribunal ought to dismiss the complaint.

[18] The second point in limine, being that the claim regarding the announcement of the development and operation of a container terminal at the Port of Richards Bay does not constitute part of the original complaint submitted to the Commission and that the Tribunal would not have the jurisdiction to consider a complaint until a notice of referral was filed. Since such was not done, the Tribunal does not have jurisdiction.⁶

[19] Furthermore, Transnet denies vertical integration of Transnet and TPT. It also denies that TNPA and TPT are to be viewed, for the purposes of competition law as singular juristic entities, commercial feasibility study or cost analysis conducted by Siyakhuphuka in relation to the alleged section 8(b) contravention. Transnet adds that there is no need for the explanation of economic feasibility for TNPA to grant the complainant authorisations or licences. The respondents also deny that TNPA's actions amounted to a denial of access to essential facilities in terms of section 8(b) and exclusionary conduct in terms of section 8(c).

[20] In compliance with the Ports Act Siyakhuphuka laid a complaint with the Ports Authority Regulator ("Ports Regulator"), in terms of section 47(2) and Directive 2(1) of the Directives promulgated under the Ports Act. The complaint was heard and a written decision issued on 15 July 2015. The complaint was dismissed without a cost order.⁷

[21] Subsequently, in June 2016, Siyakhuphuka brought a review application against the Ports Regulator of South Africa, Transnet SOC Limited, the Minister of Public Enterprises and the Minister of Transport. This application is still pending before the High Court of KwaZulu-Natal Local Division.⁸

POINTS IN LIMINE

[22] The respondents submit that a person may only operate a port facility or terminal or provide port services once an agreement is concluded with TNPA in terms of section 56 of the Ports Act or once a license has been granted in terms of section 57 of the Ports Act. The powers of TNPA to conclude agreements and grant licenses are

⁵ Please see Notice of Motion marked as annexure PDB3 page 594.

⁶ Please see paragraph 13 and 14 of the Reply to Supplementary Founding Affidavit. My understanding is that there is a Notice of Non-Referral in the files, please see volume 1.

⁷ See page 213 to 225 of the record.

⁸ See page 594 to 599 of the record. The application is dated 9 June 2016.

specifically regulated by the Ports Act.⁹ Therefore, when TNPA exercises these powers it is ultimately exercising a public law function. The respondent's contend that the exercise of these powers cannot be considered to constitute "economic activity" as envisaged by section 3 of the Competition Act, which excludes activities not conducted along commercial and competitive lines.

- [23] The respondents argued that the matter is fundamentally one of public law over which the Competition Tribunal does not have jurisdiction.¹⁰ In fact and in law the respondent's contention is that this is a matter for the High Court to determine in review proceedings.
- [24] The complainant has, however, alleged that the activities and functions of TNPA, as contemplated in the Ports Act, extend beyond mere regulatory activity for the following reasons.¹¹ Firstly the agreements in section 56 of the Ports Act are commercial agreements and therefore, the conclusion and implementation of these agreements constitute economic activity. Secondly, the Ports Act also envisages that TNPA performs a landlord function in terms of its ownership of and ability to lease land. Leasing land, the complainant submits, is an economic activity. Thirdly, given that the Ports Act contemplates the formation of a public company as the authority, it cannot be said that the functions of the authority are purely regulatory.
- [25] Therefore, the complainant alleges, that in concluding agreements to authorise the design and construction of a port the TNPA carries out economic activity and, as a result is subject to the provisions of the Competition Act when making these decisions,¹²
- [26] The Ports Act empowers TNPA to authorise the design, construction, rehabilitation, development, financing, maintaining and operation of port terminals and port facilities or the provision of services relating thereto;¹³ and to grant licences to operate a port service or a port facility¹⁴ in South Africa.
- [27] We are of the view that when TNPA considers granting concessions to operate port terminals it is exercising a function in terms of a statute. Therefore, when TNPA makes a decision whether or not to grant concessions it is exercising public power over which

⁹ Paragraph 35 of the Respondent's Heads of Argument.

¹⁰ Transcript 06 July 2017 page 5.

¹¹ Complainant's Heads of Argument pages 13 – 14.

¹² Transcript 06 July 2017 page 34.

¹³ Section 56 of the National Ports Act.

¹⁴ Section 57 of the National Ports Act.

the Tribunal has no jurisdiction. This accords with the approach adopted in *AEC Electronics (Pty) Ltd and The Department of Minerals and Energy*¹⁵ where the Tribunal held as follows:

*"We neither have the competence to instruct a state functionary exercising a public power to act in a particular manner or to desist from acting in a particular manner. As such they are not susceptible to our jurisdiction and the proper course would have been to proceed with an administrative law case to the High Court to review... The complaints...relate to the manner in which it has exercised its discretion as a regulator - bias, arbitrariness etc., all of which are typically the matters considered in High Court administrative reviews. The business of the Competition Act is the wrongful exercise of market power a matter over which the Tribunal has jurisdiction. The business of administrative law is the wrongful exercise of public power a matter over which the Tribunal has no jurisdiction"*¹⁶

[28] The Competition Appeal Court ("CAC") agrees with the Tribunal to stay out of disputes that fall squarely within the sphere of administrative law. CAC in *Ian Walter Buchanan and The Health Professions Council of South Africa and Other*¹⁷ held that:

*"Buchanan cannot get what he wants through the Competition Act, because the restrictions of which he complains are contained in a statute... If Buchanan has a remedy, it would have to be by way of a constitutional challenge to the relevant provisions of the HP Act or by way of a review of the Ministers failure to promulgate a wider exemption in respect of corporate practices. In either case the relevant challenge would have to be instituted in the High Court."*¹⁸

[29] Further in *Dumpit Waste Removal (Pty) Ltd and The City of Johannesburg and Pikitup Johannesburg (Pty) Ltd*¹⁹ the Tribunal held:

"The applicants may well be justified in holding that the respondents have flouted the basic requirements of fairness provided for in the Constitution and administrative law. However, these claims must be adjudicated in another

¹⁵ CRP014Jun09.

¹⁶ *Ibid* at para 21.

¹⁷ 134/CAC/Jan2015.

¹⁸ *Ibid* at para 34.

¹⁹ IR007Apr03.

forum. The provision of the Constitution and the Systems Act clearly place these questions outside the ambit of the Competition Act.”²⁰

- [30] It is clear from the above cases that the CAC and the Tribunal rightly adopted the approach that the Competition Act is of no application in administrative law disputes. Therefore, the appropriate forum for the complainant to approach is the High Court in order to review the decision of TNPA. This the complainant has correctly done and the matter is currently pending in the KwaZulu-Natal High Court Local Division, Durban. The complainant, therefore, erred in approaching the Tribunal for relief as the Tribunal in fact and in law it does not have jurisdiction to hear this matter.
- [31] Although the inaction by the Minister of Transport and the Minister of Public Enterprises, contrary to sections 4(1) and 4(2) of the Ports Act, and its failure to establish National Ports Authority (Pty) Ltd is undesirable, this is a matter for Parliament to determine and not the Competition Tribunal.
- [32] Therefore, on the facts before us we conclude that the conduct of the first and second respondents do not fall within the jurisdiction of the Act. Consequently the Tribunal does not have jurisdiction to consider the complaint brought by Siyakhuphuka.
- [33] The Tribunal is a creature of statute and can only act within its powers. Issues relating to the granting of concession as complained by Siyakhuphuka falls outside the ambit of the Act.
- [34] The Tribunal cannot direct the TNPA to grant a concession to construct, develop or operate a terminal at a port or to whom such a concession should be granted.
- [35] However, this does not mean that in an instance where competition issues and / or questions arise from the application of the Ports Act, which do not fall squarely within the regulatory functions (and do not touch on administrative law), the Tribunal will shy away from its duties under the Act.
- [36] It is for these reasons above that we find in favour of the respondents and dismiss Siyakhuphuka’s complaint in its totality.

²⁰ *Ibid* at para 31.

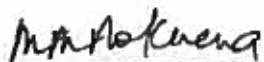
COSTS

[37] Both parties in this application requested the Tribunal for costs orders. The Tribunal is disinclined to grant either of them costs.

ORDER

We make the following order:

- 1) The exception application brought by Siyakhuphuka Investments (Pty) Limited under case number:CRP163Oct15/PIL089Apr17 relating to case number CRP163Oct15 is dismissed;
- 2) The complaint referral brought by Siyakhuphuka Investments (Pty) Limited under case number CRP163 Oct15 is dismissed; and
- 3) Each party to pay its costs.



Mrs Medi Mokuena

Ms Mondo Mazwai and Mr Andreas Wessels concurring

17 OCTOBER 2017

DATE

Tribunal Researchers:

Busisiwe Masina and Hayley Lyle

For the complainant:

Adv. Gavin Marriott, instructed by Cox Yeats

For the respondents:

Adv. J. Pammenter SC, and Adv. C. Sibiya,
instructed by Mkhabela Huntley