CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 81/11
[2012] ZACC 14

In the matter between:

COMPETITION COMMISSION — Applicant

and

YARA SOUTH AFRICA (PTY) LTD — First Respondent

OMNIA FERTILIZER LTD — Second Respondent

SASOL CHEMICAL INDUSTRIES LTD — Third Respondent

Heard on : 24 November 2011

Decided on : 26 June 2012

JUDGMENT

ZONDO AJ (Mogoeng CJ, Jafta J and Nkabinde J concurring):

Introduction

[1] The Competition Commission (Commission), a body established by section 19(1) of the Competition Act[1] (Act), has applied for leave to appeal directly to this Court against the judgment and order[2] of the Competition Appeal Court[3] (CAC), which set aside a decision of the Competition Tribunal[4] (Tribunal) granting the Commission leave to amend its referral of a certain complaint to the Tribunal and another decision of the Tribunal dismissing a counter-application that had been brought by the second respondent. The second respondent's counter-application was aimed at setting aside the referral of the Commission's complaint to the Tribunal. The background to the decision of the CAC and the present application is set out below.

Background

[2] The Chief Executive Officer of the Commission is the Commissioner.[5] The Commissioner is responsible for the general administration of the Commission and for carrying out its functions.[6] The first respondent is Yara South Africa (Pty) Ltd (Yara), previously known as Kynoch Fertilizer (Pty) Ltd. The second respondent is Omnia Fertilizer Ltd (Omnia). The third respondent is SASOL Chemical Industries Ltd

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[1] Act 89 of 1998.

[2] *Yara South Africa (Pty) Ltd v Competition Commission and Others*, *In re Competition Commission v Sasol Chemical Industries Ltd and others*, *In re Omnia Fertiliser Ltd v Competition Commission* [2011] 1 CPLR 78 (CAC).

[3] The Competition Appeal Court is established by section 36(1) of the Act.

[4] The Competition Tribunal is established by section 26(1) of the Act.

[5] The Commissioner is appointed by the Minister of Trade and Industry in terms of section 22 of the Act.

[6] Section 22(3) of the Act.

(SASOL). The Commission seeks no relief against SASOL and joined it in these proceedings only for the interest it might have in the matter. SASOL did not participate in this application. Yara and Omnia opposed the Commission's application.

[3] The functions of the Commission[7] include investigating complaints that it initiates itself and those it receives from members of the public concerning alleged contraventions of the provisions of Parts A and B of Chapter 2 of the Act[8] and, in appropriate cases, referring complaints to the Tribunal for adjudication. These include contraventions of the provisions of sections 4, 8 and 9 of the Act.[9]

[4] In December 2003 the Commission received a complaint from two close corporations, namely, Nutri-Flo CC and Nutri-Fertilizer CC (Nutri-Flo complainants) concerning alleged contraventions of the Act. The Nutri-Flo complainants filled in the relevant form prescribed for lodging a complaint with the Commission and put up an affidavit they had previously used in support of an application for interim relief in the

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[7] The functions of the Commission are set out in section 21 of the Act.

[8] The initiation of a complaint by the Commission and the submission of a complaint to the Commission by any person are provided for in section 49B(1) and (2) of the Act. Section 49B(3) provides for the assignment of an investigation to an inspector by the Commissioner once a complaint has been initiated or received by the Commission. Section 49C provides for interim relief that the Tribunal may grant in respect of a prohibited practice. Section 49D provides for consent orders. Section 50 provides for the Commission to refer a complaint to the Tribunal for adjudication if it determines that a prohibited practice has been established. Section 50 also provides that if the Commission decides not to refer a complaint to the Tribunal, it must issue a notice of non-referral in which case the complainant may in terms of section 51(1) refer the complaint to the Tribunal.

[9] Essentially section 4 deals with restrictive horizontal practices, section 8 deals with the abuse of dominance and section 9 deals with price discrimination.

Tribunal.[10] The Nutri-Flo complainants produce, distribute and supply blended fertilizers out of the raw material either manufactured or imported by Yara, Omnia and SASOL.

[5] In the form prescribed for lodging complaints with the Commission, the Nutri-Flo complainants filled in the words "SASOL Chemical Industries Proprietary" in the box in which they were required to state whom the complaint concerned. This suggested that the complaint concerned SASOL. In the box in which they were required to give a description of the complaint, they wrote:

> "The respondents (SASOL) have imposed price increases in respect of raw materials it supplies to the complainants, to such an extent as to render its continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached hereto."

This statement suggested that the prohibited practices that the Nutri-Flo complainants were complaining about were "amplified in the affidavit" accompanying the complaint form.

[6] In the affidavit that accompanied the complaint form, the following was said:

> "KCL and Urea are imported by a cartel ('the cartel'), of which SASOL is a member and which cartel collusively controls the price at which these products are sold in the local market. The other members of the cartel are the Third Respondent ('KYNOCH') and the Fourth Respondent ('NITROCHEM')."

[10] That is interim relief provided for in section 49C of the Act.

The third and fourth respondents to which reference is made in this quotation were Yara and Omnia respectively.

[7] Pursuant to the complaint, the Commission conducted an investigation. It then referred the complaint to the Tribunal for adjudication in terms of the Act. In that referral Yara, Omnia and SASOL were cited as the respondents. Subsequently, the Commission amended the referral twice. After lengthy negotiations, SASOL and the Commission concluded a settlement agreement in terms of which SASOL admitted having acted in contravention of the provisions of section 4(1)(b) of the Act by agreeing to various pricing formulae for, and discounts to, products manufactured or supplied by itself, Yara and Omnia. SASOL provided the Commission with details of how these agreements were reached and enforced. It also undertook to co-operate with the Commission in "prosecuting" Yara and Omnia. SASOL also agreed to pay an administrative penalty of R250 680 000,00.[11]

[8] Ahead of the hearing of the complaint by the Tribunal the parties exchanged further particulars and witness statements. The Commission made it known that, in order to prove its complaint, it would use information received from SASOL. Yara and Omnia indicated that they considered that information to fall outside the scope of the amended referral of the complaint. As a result of this attitude on the part of Yara and Omnia, the

[11] Section 58(1)(a) of the Act confers upon the Tribunal, among other powers, the power to impose an administrative penalty on a party that is found to have committed certain prohibited practices under the Act.

Commission applied to the Tribual for a further amendment of the referral which Yara and Omnia opposed on the basis that the proposed amendment fell outside the scope of the Nutri-Flo complaint. The proposed amendment covered alleged collusive behaviour on the part of Yara and Omnia. Omnia brought a counter-application to have the referral of the complaint set aside on the basis that the Nutri-Flo complainants had not submitted any complaint concerning collusive behaviour by itself and Yara.

The Tribunal decision

[9] On 2 December 2009 the Tribunal heard the two applications. On 24 February 2010 the Tribunal granted the Commission's application for leave to amend the referral to include alleged collusive behaviour by Yara and Omnia and dismissed Omnia's counter-application.

The CAC decision

[10] Omnia appealed to the CAC against the decision of the Tribunal. The CAC heard the appeal against the two decisions of the Tribunal and handed down its judgment on 14 March 2011. The CAC upheld Omnia's appeal, set aside the Tribunal's two decisions and replaced them with—

(a) a decision dismissing with costs the Commission's application for leave to amend;

(b) a decision effectively granting Omnia's counter-application; and

(c) a decision setting aside the referral of the complaint against Yara and Omnia.

To decide the appeal, the CAC's approach in its judgment was to determine whether or not the complaint lodged by the Nutri-Flo complainants was also a complaint against Yara and Omnia or whether it was a complaint against SASOL only. The CAC focused on the ambit of the Nutri-Flo complaint. It found that the Nutri-Flo complaint was against SASOL only. To reach this conclusion the CAC relied heavily on its view that the Nutri-Flo complainants had not intended to lodge a complaint against Yara and Omnia. It drew this inference from the fact that Yara and Omnia were not mentioned in the box of the prescribed complaint form where the complainants were required to specify whom the complaint concerned.

[11] The CAC accepted that in the affidavit accompanying the complaint form the deponent implicated Yara and Omnia in conduct prohibited by the Act. However, the CAC took the view that, as long as this information did not relate to a complaint that had been submitted to, or initiated by, the Commission against Yara and Omnia, the referral to the Tribunal could not be amended to include it. The CAC said that the Commission's amendment sought to introduce a different cause of action or complaint into the referral. In other words, the CAC held that an amendment of an existing referral to the Tribunal could not introduce a new complaint (or a new cause of action) that had not previously been submitted to, or initiated by, the Comission, nor could such an amendment introduce

a complaint against a party who had not previously been the subject of such complaint submitted to, or initiated by, the Commission.[12]

Proceedings in this Court

[12] The Commission has now applied for leave to appeal directly to this Court. There is also an application pending before the CAC for leave to appeal against the CAC's decision to the Supreme Court of Appeal. The Commission has indicated in the affidavit of its Commissioner that, if this Court grants the Commission leave to appeal to this Court, it will not pursue its application for leave to appeal to the Supreme Court of Appeal.

Jurisdiction

[13] If the Commission is granted leave to appeal the issues that will arise for determination relate to the extent of the power of the Tribunal, if it has such power, to grant leave for the amendment of a referral of complaints to it. In *Senwes*[13] this Court held that a dispute on whether the Tribunal went beyond its powers raises a constitutional issue.[14] I am of the opinion that an issue concerning the power of the Tribunal to grant or

[12] The CAC held, at para 39:

> "I can only conclude that the Legislature intended that complaints be initiated or submitted as provided for in section 49B(1) and 49B(2)(b) of the Act. Further, the Legislature must have intended that the Commission should only refer to the Tribunal such a complaint as initiated or submitted to it. Consequently only particulars of the complaint as submitted by the Nutri-Flo should have been referred to the Tribunal. The information relating to cartel activity and collusion was not intended by Nutri-Flo to be a complaint."

[13] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6 (*Senwes*).

[14] Id at paras 16-8.

refuse an amendment in regard to complaints referred to it in terms of the Act is a constitutional issue. Accordingly, this Court has jurisdiction.

What the application is about

[14] The Commission seeks leave to appeal against the decision of the CAC to the effect that the referral of a particular complaint to the Tribunal against a respondent cannot be amended to introduce a new complaint against the same respondent or cannot be amended to join a new respondent to the referral unless the new complaint had previously been submitted to, or initiated by, the Commission or the new respondent had been the subject of a complaint submitted to, or initiated by, the Commission.

[15] The Commission submits that the decision of the CAC is not justified by the provisions of the Act. Indeed, the Commission complains that the decision of the CAC undermines the investigative nature of its powers. It contends that the decision is based on a misinterpretation by the CAC in this case and in *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others* [15] (*Loungefoam*) of the judgment of the Supreme Court of Appeal in *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*[16] (*Woodlands*). The *Woodlands* judgment was handed down in September 2010.

[15] [2011] 1 CPLR 19 (CAC).

[16] 2010 (6) SA 108 (SCA).

[16] Although the Commission initially applied to this Court for leave to appeal against the *Woodlands* judgment, it later withdrew its application. Despite this, the Commission says that it never accepted the correctness of *Woodlands*. Indeed, it lays the blame for the position in which it says it finds itself which has prompted it to apply for leave to appeal to this Court in this matter on the *Woodlands* judgment and on how that judgment has been interpreted by the CAC and the Tribunal. It contends that this can be seen in the CAC judgment in this case, the Tribunal's order (without the reasons) in the *South African Breweries Ltd & others v Competition Commission; In re Competition Commission v South African Breweries Ltd and others*[17] (*SAB*) and in the CAC judgment in *Loungefoam*.

The section 63(2) point

[17] Before I turn to the Commission's applications for condonation and for leave to appeal, I need to deal with a preliminary point based on section 63(2) of the Act. In its opposition to the Commission's application, Omnia contends that, contrary to the provisions of section 63(2), the Commission failed to apply to the CAC for leave to appeal to this Court. It is necessary to refer to sections 62(4), 63(1) and 63(2). Section 62(4) reads:

> "An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Supreme Court of Appeal or the Constitutional Court, subject to section 63 and their respective rules."

[17] [2011] 2 CPLR 403 (CT).

Section 63(1) reads as follows in the relevant part:

> "(1) The right to appeal in terms of section 62(4)—
> (a) is subject to any law that—
> (i) specifically limits the right of appeal set out in that section; or
> (ii) specifically grants, limits or excludes any right of appeal".

Section 63(2) reads as follows:

> "(2) An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only—
> (a) with leave of the Competition Appeal Court; or
> (b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be."

[18] Section 63(2) must be read in the light of section 167(6) of the Constitution[18] and section 16(1) and (2) of the Constitutional Court Complementary Act[19] (CCC Act). Section 16(1)(a) of the CCC Act gives the Chief Justice the authority to make rules by notice in the Gazette "relating to the manner in which the Court may engage in any matter in respect of which it has jurisdiction". Section 16(2) reads:

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[18] Section 167(6) provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court—
> (a) to bring a matter directly to the Constitutional Court; or
> (b) to appeal directly to the Constitutional Court from any other court".

[19] Act 13 of 1995.

> "The rules shall, when it is in the interests of justice and with leave of the Court, allow a person—
>
> (a) to bring a matter directly to the Court; or
>
> (b) to appeal directly to the Court from any other Court."

[19] The respondents contend that, before the Commission could apply to this Court for leave to appeal, it was obliged to first apply to the CAC for leave to appeal to this Court and to obtain a positive or negative decision of the CAC on that application.

[20] There are two possible approaches to section 63(2). One approach is that non-compliance with section 63(2) constitutes a bar and, until its requirement is complied with, an application to this Court for leave to appeal against a CAC decision cannot be entertained. Another approach is that access to this Court is regulated by section 167(6) of the Constitution and the Rules of this Court which do not lay down any requirement that a litigant who wishes to apply to this Court for leave to appeal against a decision of any court must first apply to that court for leave to appeal to this Court. In terms of this approach section 63(2) must be interpreted not to constitute a bar but the Court must take non-compliance with section 63(2) into account as one of the factors relevant to determining whether or not it is in the interests of justice to grant the litigant leave to appeal to this Court.

[21] I do not think that on the facts of this case it is necessary to decide which one of these approaches to section 63(2) is correct. This is so because, if the correct approach is

that non-compliance with section 63(2) constitutes a bar, this application falls to be dismissed, and, if the correct approach is the second, this application, in my view, still falls to be dismissed. This is because of the conclusion one is bound to arrive at either on the condonation application or on the merits of the application for leave to appeal. I now turn to the Commission's application for condonation.

Condonation

[22] In determining whether to grant condonation, this Court considers whether it would be in the interests of justice to do so. It is common cause that in this matter the Commission failed to comply with the requirement of Rule 19 that an application for leave to appeal to this Court against a decision of any court must be lodged with the Registrar of this Court within 15 court days from the date of the handing down of the judgement sought to be appealed against.[20] Both Yara and Omnia oppose the application for condonation and contend that the Commission has failed to make out a proper case for condonation. In support of their opposition they refer to various factors which they submit militate against granting condonation. The Commission persists in its contention that it has made out a proper case for condonation.

[20] Rule 19(2) states in relevant part:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal".

The extent of the delay

[23] The judgment against which the Commission seeks leave to appeal was handed down on 14 March 2011. In terms of Rule 19 the Commission was obliged, if it wanted to appeal to this Court against that judgment, to lodge its application on or before 6 April 2011. It lodged its application only on 25 August 2011. This means that the Commission took over five months after the CAC judgment had been handed down before it lodged its application. There can be no doubt that a delay of four and a half months,[21] where the Rules prescribe 15 court days, is excessive.

Explanation for the delay

[24] The Commissioner says that initially the Commission intended to follow the usual appeal process by applying for leave to appeal to the Supreme Court of Appeal. Accordingly, the Commission caused counsel to be instructed to prepare an application for leave to appeal to the Supreme Court of Appeal that was to be made to the CAC. That application was lodged on 19 April 2011. In that application the Commission also set out the constitutional issues which it submitted arose out of the matter. This means that as at 19 April 2011 the Commission was aware that the matter raised constitutional issues.

[21] The period from the day of the handing down of the CAC judgment to the date when the Commission lodged its application to this Court was over five months but the period of delay in lodging the application, which must be calculated from the expiry of the period within which the commission was obliged to lodge its application, was four and a half months.

[25] The Commissioner also refers to the handing down of *Loungefoam* and says that it compounded the legal uncertainty concerning the Commission's powers of investigation and referral. He then says that the Tribunal set aside the complaint referral in the *SAB* matter on the basis of the principles set out in *Woodlands* and reinforced by the CAC's decision in the present matter. At that time the Tribunal had not given reasons for its order in the *SAB* matter.

[26] The Commissioner also states that "[s]ince then, the Commission has received a slew of challenges in its current investigations and to its pending referrals." Importantly, after saying this, the Commissioner says: "It accordingly became clear that this matter required urgent attention from a higher court." The impression created by the Commissioner's affidavit is that by 7 April 2011, when the *SAB* order was issued, it had decided that there was a need for it to seek a decision from this Court.

[27] The Commissioner also states that "[o]n being advised that an application for direct access to this Court was possible, the Commission caused these papers to be prepared as expeditiously as possible." The Commissioner does not disclose:

(a) when the Commission received the advice;

(b) from whom the Commission received the advice;

(c) the steps the Commission took to cause the papers to be prepared;

(d) when the Commission took the steps to cause the papers in this matter to be prepared;

(e) who prepared the papers; and

(f) when the preparation of the papers was completed.

[28] All of this is important information that would have helped us in assessing the diligence with which the Commission dealt with the matter.

[29] The Commissioner elected not to take this Court into his confidence and provide it with all relevant facts. A litigant who approaches a court for an indulgence and fails in this serious way to take the Court into its confidence does not deserve the indulgence of the Court. It is difficult to see how it can ever be in the interests of justice for the Court to come to the assistance of a litigant who withholds so much relevant information from it which it needs to decide whether or not to come to his assistance after failing to comply with its Rules.

[30] The Commissioner does not say when the CAC handed down its judgment in *Loungefoam*. One has been able to establish this from the judgment itself. The judgment was handed down on 6 May 2011. However, the Commissioner ought to have informed this Court of the date and also ought to have told this Court when the Commission became aware of *Loungefoam*. In failing to inform this Court the Commissioner has failed to take the Court into his confidence and apprise it of all relevant facts. He ought to have taken this Court into is confidence even if that may have shown the Commission in a negative light in regard to its delay in lodging the application. When *Loungefoam* was

handed down and when the Commission became aware of it are highly relevant factors to the question whether the Commission acted diligently in lodging the application when it did. This is so because the Commissioner relies on the handing down of the CAC judgment in *Loungefoam* as one of the factors that convinced the Commission that it should lodge an application for leave to appeal to this Court. I think it is fair to expect that the Commission must have become aware of *Loungefoam* soon after it had been handed down on 6 May 2011.

[31] The Commissioner states that the Tribunal also set aside the complaint referral in the *SAB* matter on the basis of the principles set out in *Woodlands* and reinforced in the present case. He says that at the time of the preparation of his affidavit the Tribunal had not yet given its reasons for its decision in the *SAB* matter. Just as he failed to do in regard to his reliance on the handing down of *Loungefoam*, the Commissioner also failed, in relation to his reliance upon the issuing by the Tribunal of its order in the *SAB* matter, to inform the Court of the date when that order of the Tribunal was issued and when it was that the Commission became aware of the order. Once again, in failing to do this, the Commissioner has failed to take this Court into his confidence and place before it all relevant facts which the Court should have in considering how to exercise its discretion.

[32] It appears from the judgment of the Tribunal in *SAB* that the Tribunal issued its order on 7 April 2011 and gave its reasons on 16 September 2011. So, actually, contrary to the impression that one gets from the sequence of events as set out in the

Commissioner's affidavit, the Tribunal's decision in *SAB* was issued before the judgment of the CAC in *Loungefoam*.

[33] Furthermore, the Commission's application for leave to appeal to the Supreme Court of Appeal raised constitutional issues. This was about mid-April 2011. It is difficult not to ask the question: Since the Commission had decided that it was appealing against the decision of the CAC in this matter and knew even the constitutional issues that it wanted to pursue in support of its appeal, why then did it not lodge the present application at the same time? There is no answer to this question in the Commissioner's affidavit.

[34] No matter how one looks at the Commission's explanation, there is, at least, a period of over three months for which no explanation whatsoever is provided.[22] That is the period from 7 May to about 24 August 2011. In my view the explanation that the Commission attempts to advance is so manifestly unsatisfactory that it can almost be rejected as no explanation at all.

Prospects of success

[35] Since the appeal in this matter may still be heard by another court, and the CAC is yet to decide the Commission's application for leave to appeal to the Supreme Court of

[22] A similar period of unexplained delay was sufficient cause for this Court to refuse condonation in *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* [2009] ZACC 12; 2009 (10) BCLR 1040 (CC).

Appeal, it would be undesirable for this Court to express a view on the Commission's prospects of success. Therefore, for the purposes of condonation and the application for leave to appeal, I shall assume in favour of the Commission that it has reasonable prospects of success if leave to appeal is granted. However, the assumption that the Commission may have reasonable prospects of success does not necessarily mean that the Commission would be entitled to condonation or that it should be granted leave to appeal to this Court at this stage. All the factors must be taken into account to arrive at the decision whether or not it is in the interests of justice to entertain this matter at this stage or to grant the Commission condonation.

The importance of the constitutional issues raised in the matter

[36] If leave to appeal were granted, the constitutional issues would relate to the scope of the power of the Tribunal to grant leave for the amendment of a complaint referred to it in terms of the Act. Although this is an important constitutional issue, its importance must be weighed against other factors which are also important. If this Court does not entertain the Commission's appeal at this stage, all it will mean is that this is not the right time for it. Not only are there prospects that the constitutional issue may, in due course, receive the attention of the Supreme Court of Appeal, if leave to appeal is granted, but also that the constitutional issue may receive the attention of this Court in due course.

The application for leave to appeal

[37] I have already pointed out that whether this Court grants or refuses the Commission leave to appeal depends on the view it takes as to what the interests of justice dictate. There are two important aspects to the question whether or not this Court should grant the Commission leave to appeal. The one relates to the merits of the appeal if leave is granted. The other is whether, assuming that there are prospects of success, this Court should grant leave at this stage without allowing the matter to first go to the Supreme Court of Appeal if the necessary leave were to be granted. I shall address both aspects of the matter.

[38] As far as the merits of the appeal are concerned, we have to deal with the application for leave to appeal on the assumption that the Commission has reasonable prospects of success. However, the reasonableness of the prospects of success is not decisive of the question whether or not it is in the interests of justice that this Court grants the Commission leave to appeal at this stage. All relevant factors must be taken into account.

[39] As to whether or not this Court should entertain this matter at this stage, the Commission has said that a problem has arisen as to the correct interpretation of *Woodlands*. In the light of this, it seems to me that the preferable approach is for the Supreme Court of Appeal to be first afforded an opportunity to hear and pronounce on the merits of the Commission's complaints with regard to *Woodlands*. The

pronouncement of the Supreme Court of Appeal in this regard may well make it unnecessary for the Commission to approach this Court. The pronouncement may be in the Commission's favour, or, even if it is against it, the Supreme Court of Appeal may explain the situation in its judgment in such a way that the Commission decides not to take the matter any further.

[40] The Commission has sought to make the case that, if this matter has to first go to the Supreme Court of Appeal, that it will cause undue delay and during that period the legal uncertainty about the extent of its investigative powers will continue and that would be unacceptable. Part of the difficulty with the Commission's argument is that, while it is the entity that should primarily be adversely affected by an undue delay in the resolution of its perceived difficulties in this regard, it itself has not acted with the urgency with which it now would like this Court to act. After the CAC had handed down its judgment in the present matter, the Commission failed to lodge timeously its application with the CAC for leave to appeal to the Supreme Court of Appeal. The Commission also failed to lodge its application to this Court within the prescribed period of 15 court days but took over five months to do so. The Commission failed to make an application to the CAC in accordance with section 63(2) of the Act for leave to appeal to this Court.

[41] In making the point in the last sentence of the preceding paragraph I am not, for purposes of this judgment, suggesting that the Commission was obliged to comply with section 63(2) of the Act because, as I said earlier, it is not necessary to make a decision

on the section 63(2) point. The only point I am making is that, if the Commission regarded the matter of obtaining a decision of this Court on the issue as urgent, one would have expected that, out of caution, it would have simply made the application contemplated in section 63(2) so as to ensure that there would be as few hurdles to this Court entertaining its application as possible. The Commission did not do so. Finally, when the Registrar of the CAC offered the parties early dates for the hearing by the CAC of the Commission's application for leave to appeal to the Supreme Court of Appeal, it was the Commission that failed to make itself available for that matter to be heard earlier rather than later.

[42] No case is made by the Commission that bringing the matter to this Court as opposed to taking it to the Supreme Court of Appeal will result in the matter being heard sooner.

Conclusion

[43] In the light of all the above it seems to me that, if one were not to refuse the Commission's application for condonation and consider whether it is in the interests of justice to grant leave to appeal, one would conclude that it is not in the interests of justice to grant the Commission leave to appeal directly to this Court. Accordingly, whether it is because it is not in the interests of justice to grant the Commission condonation or because it is not in the interests of justice to grant the Commission leave to appeal, the

fact of the matter is that the interests of justice do not favour this Court entertaining this matter at this stage.

[44] It seems to me that the Commission's application falls to be dismissed. With regard to costs, I am of the opinion that the Commission should pay Yara's and Omnia's costs. I also think that those costs should include the costs consequent upon the employment of two counsel where two counsel were employed.

Order

[45] In the result I make the following order:

> The application for leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel where two counsel were employed.

CAMERON and YACOOB JJ (Moseneke DCJ concurring):

[46] This is an application by the Competition Commission for leave to appeal against a decision of the Competition Appeal Court, which overturned an order of the Competition Tribunal (Tribunal). Both the Competition Appeal Court and the Tribunal had to consider whether the Tribunal had the power to grant an amendment to a complaint

referral to include two entities that were not identified as respondents in the initiating complaint, even though the affidavit which formed part of the initiating complaint expressly mentioned them both.[1] The Tribunal held that it did have that power while the Competition Appeal Court held that it did not.

[47] We have had the benefit of reading the judgments prepared by Zondo AJ (the main judgment) and by Froneman J. We agree that this Court has jurisdiction to entertain the appeal, since the scope and exercise of the Commission's powers of investigation and referral of complaints of anti-competitive conduct under the Competition Act[2] (Act) plainly raise constitutional issues. But we differ from the main judgment in that we conclude that leave to appeal should be granted.

[48] The main judgment places significant emphasis on the Commission's four-and-a-half-month delay in coming to this Court, its failure to provide a satisfactory reason for this, and the absence of an account of precisely what happened. It concludes that the Commission's conduct is so wanting that condonation should be refused. This, even if there are prospects of success and despite the considerable importance of the issue.

[49] We do not agree. The Commission performs an important public function: one essential to the success of our democracy and to creating a competitive commercial

[1] See the main judgment at [4]-[6] and [10]-[11] above.

[2] Act 89 of 1998.

sector. The Act deliberately sets out both equity and efficiency-based goals. This shows that competition law and the competitive market it seeks to attain is not for the benefit of businesses alone but also for consumers,[3] workers,[4] and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[5] It exists for the benefit of all South Africans.[6] The Commission is the primary vehicle through which much of this is to be achieved.[7] It is the lifeblood of the Act. We consider that the Commission has sufficiently explained the delay in bringing its application to this Court. We further consider that there is no absolute statutory bar to its appealing directly here. We hold that it should be granted leave to appeal against the decision of the Competition Appeal Court. But since the majority concludes that leave should be refused, it would not be appropriate to set out our views on the merits of the Commission's case. This is because the merits may come before the Supreme Court of Appeal and, in due time, before this Court too.

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[3] Preamble and section 2(b).

[4] The Preamble provides:

> "The people of South Africa recognise:
>
> > . . .
> >
> > That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans."

[5] Section 2(f).

[6] See the Preamble of the Act which states that the statute is enacted in order to—

> "provide all South Africans equal opportunity to participate fairly in the national economy".

[7] Section 21.

Condonation

[50] The Commission seeks condonation for the late filing of its application for leave to appeal. The judgment of the Competition Appeal Court it seeks to challenge was delivered on 14 March 2011. The Rules of this Court[8] gave the Commission 15 days from then to lodge its application – that is, on or before 5 April 2011. Instead, it lodged its application only on 25 August 2011. That is a delay of over four months.

[51] We accept that four and a half months would ordinarily be excessively long. But this was not deliberate, wanton delay. Nor was it the product of inattention or idleness. The Commission decided at first not to apply to this Court, but to seek leave from the Competition Appeal Court to appeal to the Supreme Court of Appeal. This application was lodged in the Competition Appeal Court on 19 April 2011 and was later set down for hearing on 5 December 2011.

[52] Meanwhile, the Tribunal on 7 April 2011 handed down its decision in *SAB*,[9] in which, applying various decisions of the Competition Appeal Court, it dismissed a complaint referral by the Commission because of lack of congruence with the initiating

[8] Constitutional Court Rule 19(2) provides:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

complaint.[10] The Competition Appeal Court handed down judgment in *Loungefoam*[11] on 6 May 2011, in which it also strictly enforced a requirement that the complaint referral must match the complaint initiation.

[53] The main judgment correctly notes that the order in *SAB* was issued before the decision in *Loungefoam*.[12] The statement accompanying the order was enough to cause significant concern in relation to the efficacy of the Commission's procedures.[13] The Tribunal itself says that the outcome was "regrettable" and its statement foreshadowed

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[9] *South African Breweries Ltd and others v Competition Commission; In re Competition Commission v South African Breweries Ltd and others* [2011] 2 CPLR 403 (CT) (*SAB*). This order was issued with an accompanying statement, quoted below n 13.

[10] In later reasons, handed down on 16 September 2011, the Tribunal decried at length what it described as the Competition Appeal Court's unwitting undermining of its and the Commission's powers ("We believe that entirely unwittingly, decisions that impact on the legal requirements for a valid referral based on the prior complaint, have threatened to undermine the rights of complainants and the public as represented by the Commission to get access to justice.") (Id at para 98).

[11] *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications* [2011] 1 CPLR 19 (CAC) (*Loungefoam*).

[12] Main judgment at [32] above.

[13] The statement accompanying the Tribunal's order reads:

> "**Statement on dismissal of complaint referral against SAB and the appointed distributors, 7 April 2011**
>
> *We have found that we do not have jurisdiction to hear this referral. This is a regrettable outcome but we are bound by recent decisions of the superior courts to come to this conclusion. Recent case law requires that a complaint lodged by a complainant to the Commission should be the same as that referred to us unless it meets certain formalities that have to be complied with, prior to the referral.*
>
> *When we give reasons for our decision we will explain why the case law, which is binding upon us, has led us to this conclusion. We will also indicate why this case law may need re-consideration by superior courts in the future so that a complainant's rights of access to justice and the Commission's investigative powers are not unduly compromised.*
>
> *We regret that this case has not been brought to finality so it could be decided on the evidence and not a point of jurisdiction. The complainant will not know whether its complaint was well founded and the respondents will not have an opportunity to clear their names from accusations of anticompetitive conduct.*"

See the Tribunal's website, http://www.comptrib.co.za/publications/press-releases/the-competition-commission-and-sab-07-april-2011/, accessed on 31 May 2012.

that it would, in its reasons, take the extraordinary step of—

> "*explain[ing] why the case law, which is binding upon us, has led us to this conclusion. We will also indicate why this case law may need re-consideration by superior courts in the future so that a complainant's rights of access to justice and the Commission's investigative powers are not unduly compromised.*"[14] (Emphasis added.)

The statement, rather than necessarily encouraging the Commission to appeal directly to this Court immediately, might have increased the Commission's confusion and encouraged it to wait for the reasons promised by the Tribunal which would "indicate why [the] case law may need re-consideration by superior courts", including this Court. The assertion that the Commission's delay is "manifestly unsatisfactory" must therefore be qualified.

[54] The Commission complains that the decisions in issue unduly constrict its power to amend complaint referrals. It explains that they provoked a multiplicity of challenges to the procedures it uses in the performance of this public function. It says – and the respondents have not been able to controvert this – that the decisions have thrown all its current investigations and referrals into disarray. Currently, it says, it is facing procedural challenges in 12 of its 34 pending referrals. Hence, it decided in August 2011 to appeal to this Court directly to seek expeditious determination of the issues.

[14] Id.

[55] We accept, and there is no reason to doubt this, that it was the Commission's desire to perform its important public functions properly that led to its seeking further legal advice. And that was in relation to whether the Commission could appeal directly without first asking the Competition Appeal Court for leave to appeal to this Court. This is the first time an issue of this kind has had to be considered. As we will show, it is a difficult question that would have given competent legal advisors pause, and on which the main judgment expresses no final view. This, in our view, extenuates the delay.

[56] We agree that it would have been better if the Commission had made its decision more smartly. We agree that its explanation of the 20-week delay is patchy. A detailed timeline would have been informative and helpful. Despite this, the position of the Commission is to a degree understandable.

[57] It should be noted that the respondents were not unduly prejudiced by the delay. They knew from the outset that the Commission intended to challenge the Competition Appeal Court's decision. The only question was in what forum.

[58] What is more, the delay must be seen against the background of the complexity of the entire litigation process in this case. The proceedings started in October 2003. The respondents, which are accused of anti-competitive conduct, have exercised all the legal options available to them. That is their right. And they are entitled to complain, as they

do, because the Commission has delayed the process by further months. But they cannot expect to be heard to complain too loudly.

[59] Most important to the condonation assessment is the fact that the Commission was trying in good faith to discharge its important public functions. It floundered around, but not inordinately. It wasted valuable time, but it explains its prevarication. We think its explanation is sufficient.

Leave to appeal

[60] In addition to raising a constitutional issue, the Commission must satisfy us that the interests of justice favour granting it leave. Here, we point out that delay and a satisfactory explanation for it feature more intensely in the assessment of condonation for lateness. These aspects, though they must be given due weight, are not crucial in evaluating whether the interests of justice favour granting leave to appeal.

[61] Two other aspects are more important here. The first is whether the Commission should be permitted to come directly to this Court, instead of first approaching the Supreme Court of Appeal. We think it should. We appreciate that the opinion of the Supreme Court of Appeal would be of some value in determining the difficult question of what congruence is required between complaint initiation and complaint referral. But we do not think the value of that Court's views should preclude the Commission's appeal.

[62] The Act envisages appeals directly from the Competition Appeal Court to this Court.[15] In matters involving the constitutionality of the Commission's interpretation and exercise of its statutory powers, this Court is necessarily the final Court. The questions at issue here are so important that it is nearly inevitable that, whoever succeeds in the Supreme Court of Appeal, this Court will be asked to have the last word. The issues do not involve matters of common law, on which this Court particularly values the views and experience of the Supreme Court of Appeal.[16] It is true that even where common law matters are not at issue, this Court values the views of the Supreme Court of Appeal. Nevertheless, the largely statutory and constitutional nature of the questions at issue counts against requiring an appeal to the Supreme Court of Appeal first.

[63] So does the delay those proceedings will entail – a delay the Commission says it cannot afford, because the rulings it seeks to challenge have plunged its investigations into disarray.[17] We think its assertion must be given not only credence, but also substantial weight, in affording it a direct appeal. Given the importance of the issues, the need for their speedy resolution, and the Commission's plight until that happens, the weight of our system's multiplicity of appeals should not be made to fall too heavily on it.

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[15] Sections 62(4) and 63(2).

[16] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 50-60.

[17] The judgment in *South African Breweries Ltd and others v Competition Commission; In re Competition Commission v South African Breweries Ltd and others* [2011] 2 CPLR 403 (CT) at Part B para 97, the order of which is referred to in [52]-[53] above, is pertinent here, as the Tribunal squarely raises its "concerns about the

[64] The second issue is this. Can the Commission apply to this Court for leave to appeal without first seeking leave to do so from the Competition Appeal Court? We think it can. Section 62(4) of the Act empowers an appeal from a decision of the Competition Appeal Court on, amongst others, constitutional matters to this Court, "subject to section 63 and [this Court's] rules."[18] Section 63(1)(a)(ii) provides that this right of appeal is subject to any law that "specifically grants, limits or excludes any right of appeal". Section 63(2) provides that an appeal in terms of section 62(4)—

> "may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court, only—
>
> (a) with leave of the Competition Appeal Court; or
>
> (b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be."

[65] The second respondent, Omnia, contended that this provision means that a litigant seeking to appeal to this Court against a decision of the Competition Appeal Court may not approach this Court until it has sought and obtained, or been denied, the leave of that Court. This is not correct. First, the right of appeal is expressly subject to "any law" that "specifically grants" a right of appeal.[19] Plainly, section 167(6) of the Constitution is a law of this kind. It provides that national legislation or the rules of this Court "must

effectiveness of the workings of [the complaint and referral procedure] system" and the need for guidance from the higher courts.

[18] The relevant statutory provisions are set out in the main judgment at [17] above.

[19] Section 63(1)(a)(ii).

allow" a litigant, "when it is in the interests of justice and with leave of the Constitutional Court", to bring an appeal directly to this Court.[20] This Court has explained that—

> "[t]he Constitution enables this Court to exercise control over the cases it will entertain and by doing so, to be the supreme guardian of the Constitution. It does this by enabling this Court to decide whether it will hear an appeal on a particular constitutional matter regardless of whether or not there is a right of appeal to any other Court."[21]

[66] The provisions of section 63 must be interpreted to accord with this constitutional scheme. And that is not difficult, since the section, by providing that the right of appeal is subject to any law that specifically grants a right of appeal, subordinates its requirements to the express constitutional right of direct access to this Court in section 167(6) of the Constitution.

[67] What then to make of "only" in section 63(2)? The second respondent argued that this imposes an absolute bar on an unfettered approach to this Court. But that is to overrate its importance in a more complex statutory and constitutional scheme.[22] Although the constitutionality of the provision was not directly challenged, the

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[20] Section 167(6) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

Section 16(2)(b) of the Constitutional Court Complementary Act 13 of 1995 is in parallel terms.

[21] *Director of Public Prosecutions, Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC) at para 25.

interpretation contended for, on the face of it, may necessitate the conclusion that the provision is in conflict with section 167(6). That should be avoided if reasonably possible. The provision should, if reasonably capable of a constitutionally compliant interpretation, be given it.

[68] Reading section 63(2) together with section 63(1)(a)(ii), and in the light of the Constitution's imperative injunction that direct access must be capable of being afforded to this Court, it is clear that the bar cannot be absolute. The bar operates only when the interests of justice, as envisaged in the Constitution, do not require that leave to appeal directly be granted to this Court. In those cases, the Competition Appeal Court must first be approached. But in cases where the interests of justice require that this Court grant direct access, the bar is not absolute.

[69] The express provisions of the Constitution and the provisions of the Act can thus be reconciled. The two appellate structures – one mandated by the Constitution; the other embodied in the statute – recognise the primacy of the Constitution,[23] with the result that the specialist institutions in the competition field are subordinate to the appeal provisions in the Constitution.

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[22] *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (6) SA 158 (SCA) at paras 8-15.

[23] Section 1(2)(a) of the Act itself provides that it must be interpreted "in a manner that is consistent with the Constitution".

[70] This does not mean that the word "only" has no significance, but merely that it must be read as subordinate to the constitutional imperative of direct access to this Court. Practically speaking, the legislation envisages that litigants will in the usual course seek the leave of the Competition Appeal Court before approaching this Court. This is because the views of that Court, as a specialist forum, will be helpful or in some cases even necessary for this Court to assess the constitutional strength of the challenge to the decision in issue. But the interests of justice may require that a litigant be afforded direct access to this Court. Here, the fact that a litigant has not sought the leave of the Competition Appeal Court would be pertinent to its application to this Court, but will not disable it. This Court is at liberty to grant direct access, as the Constitution requires, and nothing in the legislation need be read to detract from its power.

[71] In considering whether it is in the interests of justice to allow an appeal directly to this Court, the nature of the matter is relevant. In the same way as the views of the Supreme Court of Appeal are particularly pertinent in common law matters, so are the views of the Competition Appeal Court, as a specialist body, important in competition matters that lie at the complex intersection of law and economics.

[72] That is not the position here. The matter concerns the public power of the Commission and the Tribunal, and not the substance of their expert decisions in promoting competition. The Commission has moreover explained why it did not approach the Competition Appeal Court first. It was advised that it was entitled to come

directly to this Court. Given the nature of the issues, that advice was correct. The considerations the Commission has advanced militate strongly in favour of granting it leave to appeal directly, even though it has not obtained the views of the Competition Appeal Court on the strength of its constitutional challenge. Other matters are being held up while this appellate process proceeds. The need for finality is plain.

[73] In our view, leave to appeal should be granted. We say nothing about the strength of the prospects of success, though that there are indeed prospects is an indispensable part of our decision.

FRONEMAN J (Skweyiya J and van der Westhuizen J concurring):

[74] I have had the benefit of reading both the judgment prepared by Zondo AJ (main judgment) and the judgment of Cameron and Yacoob JJ (dissenting judgment). I agree with the main judgment that leave to appeal should not be granted, not on the basis that condonation should be refused, but because it is not in the interests of justice for leave to be granted. My reasons for this proceed from a somewhat different perspective from that of the main judgment.

[75] The Competition Commission (Commission) performs an important public function. I would be hesitant to refuse leave on condonation grounds where there are reasonable prospects of success on appeal, as I believe there are in this case. For the reasons set out in paragraphs 50 to 59 of the dissenting judgment, I thus agree that condonation should be granted.

[76] Where I differ from the dissenting judgment is whether the interests of justice require this Court to hear the matter, before the Competition Appeal Court (CAC) decides the application for leave to appeal still pending before it. I do not think that the interests of justice are best served by allowing that to happen.

[77] For the purposes of this judgment I proceed on the assumption that the dissenting judgment's interpretation of sections 62 and 63 of the Competition Act[1] (Act) is correct.[2] But even that finding does not imply that the pending application for leave before the CAC is impermissible. Indeed the dissenting judgment recognises that procedure to be the usual course to follow and that the views of the CAC, "as a specialist forum, will be helpful or in some cases even necessary to this Court in assessing the constitutional strength of the challenge to the decision in issue".[3] In my view this is one of those cases. There are two reasons for following the usual course.

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[1] 89 of 1998.

[2] Although that interpretation is appealing, I do not consider it necessary to decide the issue in this case.

[3] At [70] of the dissenting judgment.

[78] The first is a general one. Simultaneous applications for leave to appeal to this Court and the Supreme Court of Appeal are allowed by this Court's rules, but with specific requirements of disclosure of when and where other leave has been sought, and whether conditionally or not.[4] In my view the obvious purpose of these provisions is to enable this Court to assess whether it is in the interests of justice to grant leave where leave is also being sought to another court. In order properly to make that assessment it is necessary to know what the status of a competing application for leave to appeal before another court is. The Commission's application to this Court was brought after the application to the CAC for leave to appeal to the Supreme Court of Appeal was already set down for hearing. That kind of ambivalence does not serve the interests of justice

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[4] Rule 19(3) states:

> "An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—
>
> (a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;
>
> (b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;
>
> (c) such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and
>
> (d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—
>
> (i) which court;
>
> (ii) whether such application is conditional upon the application to the Court being refused; and
>
> (iii) the outcome of such application, if known at the time of the application to the Court."

well. In general it is better to await another court's views if there are hierarchical provisions involved.[5]

[79] The dissenting judgment finds overriding justification for jumping this hurdle on the basis that the issue at stake concerns the public powers of the Commission and not its expert function of promoting competition.[6] It is true that the constitutional issue at stake is the public powers of the Commission, but I disagree that this issue does not also "lie at the complex intersection of law and economics",[7] where the views of the CAC are admittedly important.

[80] The constitutional issue relating to the public power of the Commission is, in my respectful view, inextricably bound to, and perhaps even finally determined by, a court's view on the extent to which there should be deference to the determination of economic issues by the Competition Tribunal (Tribunal).[8] As I understand its essence, that is exactly what the Commission's complaint against the recent judgments of the CAC and Supreme Court of Appeal amounts to, namely that the economic expertise of the Commission and the Tribunal is being undermined by what is regarded as an overly formalistic interpretation of their powers and functions under the Act.

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[5] Compare *Municipality of Plettenberg Bay v Van Dyk & Co Inc* [2003] ZACC 23; 2004 (2) BCLR 113 (CC) at paras 8-9.

[6] At [72] of the dissenting judgment.

[7] At [71] of the dissenting judgment.

[8] Section 28(2) of the Competition Act states, in relevant part:

[81] I doubt that this argument can be squarely and substantively met by asserting that legality (the powers of the Commission) is a purely "legal" question. Underlying any legal determination of the powers of the Commission and the Tribunal is some understanding of what role economics, and what kind of economics, should play in the process. For my part, I would value as much articulation and debate of these often unarticulated premises by all concerned, before making a final determination on the issue. It is a matter of regret that this means more time has to be taken before the issue can finally be determined, but much is at stake and I fear that precipitate granting of direct appeal to this Court will not, in the longer run, serve the interests of justice.

[82] It is for these reasons that I would not grant leave to appeal at this stage of the process.

"Each member of the Competition Tribunal must have suitable qualifications and experience in economics, law, commerce, industry or public affairs".

For the Applicants:	Advocate W Trengove SC, Advocate G Marcus SC, Advocate MJ Engelbrecht and Advocate I Goodman instructed by Cheadle Thompson & Haysom Inc.
For the First Respondent:	Advocate J Pretorius instructed by Gerrit Coetzee Inc.
For the Second Respondent:	Advocate D Unterhalter SC and Advocate P Farlam instructed by Norton Rose South Africa.