23/96

REPORTABLE

Case No 242/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

RICHARDS BAY BULK STORAGE (PTY) LTD Appellant

v

THE MINISTER FOR PUBLIC ENTERPRISES Respondent

CORAM : E M GROSSKOPF, F H GROSSKOPF, NIENABER, MARAIS and SCOTT JJA

HEARD : 23 FEBRUARY 1996

DELIVERED : 26 MARCH 1996

JUDGMENT

E M GROSSKOPF J A:

E.M. GROSSKOPF JA :

In 1982 the South African Transport Services, the predecessor of Transnet Ltd ("Transnet"), which was the second respondent in the court **a quo**, let a site in the Richards Bay harbour area to the appellant for the reception, storage, handling and distribution in bulk of liquid and liquefied products. At all material times this lease remained operative and the appellant continued to make use of the bulk liquid storage facilities erected on the leased property.

Virtually from the inception of the lease Island View Storage (Pty) Limited ("IVS"), the third respondent in the court **a quo**, made various attempts to persuade Transnet's predecessor, and later Transnet itself, to grant a similar lease to IVS in respect of vacant land in the Richards Bay Harbour area. The land was the property of Transnet's predecessor and from 1990 it belonged to Transnet by virtue of the provisions of the

Legal Succession to the South African Transport Services Act 9 of 1989. However, all IVS's endeavours proved to be fruitless.

On 15 November 1991 the Competition Board ("the Board") caused Government Notice 1101 to be published in Government Gazette 13620 of that date. In terms of the notice it was made known that the Board was undertaking an investigation in terms of s 10 (1) (a) of the Maintenance and Promotion of Competition Act 96 of 1979 ("the Act") "in order to establish whether a refusal by Transnet Ltd, or a division of that company, to lease land in the Richards Bay harbour area to Island View Storage (Pty) Ltd for the purpose of erecting a bulk liquid storage facility on such a site constitutes a 'restrictive practice' as defined in section 1 of the Act."

In terms of the said s 10 (1) (a) the Board, established under s 3 of the Act, may make such investigation as it may consider necessary

into any restrictive practice which it has reason to believe exists. If after such an investigation the board is of the opinion that such a practice exists, it shall under s 12 (2) recommend to the Minister for Administration and Economic Co-ordination (later known as the Minister of Public Enterprises who is the respondent in this appeal and to whom reference will sometimes be made as "the Minister") that such action be taken under section 14(1) as he may consider necessary. That subsection provides :

> "Whenever after consideration of a report by the board in terms of section 12 (1) as to the result of any investigation made by it in terms of section 10 (1) (a), (b) or (d), the Minister is of opinion that a restrictive practice exists or may come into existence ... and is not satisfied that such restrictive practice ... is justified in the public interest, ... -
>
> (a) the Minister of Finance may, at the request of the Minister, in terms of the Customs and Excise Act, 1964 (Act No. 91 of 1964), by notice in the *Gazette* suspend, as from the date of the publication of such notice, any duty to be paid upon imported goods of like nature to any goods affected by the operation of that restrictive practice ... to the extent and for

such period as he may deem fit;

(b) the Price Controller may at the request of the Minister fix, under the Price Control Act, 1964 (Act No. 25 of 1964), the maximum price at which any commodity, other than any insurance or banking service, affected by the operation of the said restrictive practice ... may be sold by any person to any other person or at which any person may purchase such commodity from any other person;

(c) the Minister may by notice in the *Gazette*-

(i) declare the said restrictive practice ... to be unlawful, and require any person who in the opinion of the Minister is concerned in the said restrictive practice ... to take such action, including steps for the dissolution of any body corporate or unincorporated, the severance of any connection or of any form of association between two or more persons, including any such bodies, the termination of the membership of a member of any body corporate or the application of any prohibition by the Minister on the exercise of any right to vote attached to the holding of any share in any such body, as the Minister may consider necessary to ensure the discontinuance or prevention of that restrictive practice ... or to eliminate any undesirable features thereof;

(ii) require any person who is or was a party to any agreement, arrangement, understanding or omission or applies or has applied any business practice or method of trading or commits or has committed any

act or brings or has brought about any situation which may be specified in the notice, to terminate or to cease to be a party to such agreement, arrangement, understanding or omission or to refrain from applying such business practice or method of trading or to cease to commit that act or to bring about that situation or to refrain from at any time becoming a party to any agreement, arrangement, understanding or omission or applying any business practice or method of trading or committing any act or bringing about any situation of a nature specified in the notice which in the opinion of the Minister is likely to have the same effect."

Pursuant to the publication of GN 1101 the board concluded an investigation and submitted a report which was published in Government Gazette 14343 of 23 October 1993. Purporting to act in terms of s 14 (1) (c) of the Act the respondent then published notice 1101 of 1992 in the Government Gazette of 6 November 1992. It contained the following declaration and direction :

"I therefore declare unlawful -

Any determination in any agreement, arrangement or

understanding between Transnet Limited and Richards Bay Bulk Storage (Pty) Ltd, and any act or omission by Transnet Limited, which has the object or effect of preventing the allocation by Transnet Limited of suitable land to third parties for the erection of a bulk liquid storage facility in the Richards Bay harbour area.

I further direct Transnet Limited -

(1) to make a suitable site available in the Richards Bay harbour area to persons who are willing and able to erect and to operate a bulk liquid storage facility, and

(2) to ensure -

(a) that competitive parity between undertakings is not unduly distorted by virtue only of the demarcation and allocation of such a site, and

(b) that the extent of the land leased to Richards Bay Bulk Storage (Pty) Ltd at present is not excessive for the purposes of its immediate and foreseeable needs."

S 15 (1) of the Act provides for a right of appeal by any person affected by a notice under s 14 (1) (c) to a special court constituted in terms of s 15 (2) and (3). The appellant duly noted an appeal to the special court against the above declaration and direction but subsequently

also initiated review proceedings in the Durban and Coast Local Division against **inter alios** the respondent. It sought an order setting aside that declaration and direction and called upon the respondent to comply with the provisions of Rule 53 (1) (b) of the Uniform Rules of Court. (The second and third respondents in the court **a quo** mentioned above were cited because of their interest in the relief sought but did not oppose the application and hence are not parties to this appeal.)

The grounds of review on which the appellant sought to rely at the hearing of the application were summarized in its heads of argument as follows:

> "1 The Minister acted *ultra vires* because he did not comply with the procedural or jurisdictional requirements laid down by the Act in that
>
> 1.1 the declaration and direction deal with a restrictive practice which was not investigated by the board and at which the Minister could not validly direct steps in terms of section 14 (1) of the Act;

1.2 the Minister did not carry out the procedure prescribed by the provisions of section 13 of the Act which, on a proper interpretation, is peremptory;

1.3 the Minister, in issuing paragraphs 2 (a) and (b), went beyond the recommendations of the board.

2. If it be held that the Minister's discretion to take steps in terms of section 14 (1) is not limited to the steps which the board recommends, the Minister acted ultra vires in issuing paragraphs 2 (a) and (b), because in terms of these subparagraphs he directs Transnet to exercise a discretion which only the Minister can exercise.

3. Alternatively, paragraphs 2 (a) and (b) are void for vagueness."

The application was opposed by the respondent and at the hearing thereof his counsel contended **in limine** that the court **a quo** had no jurisdiction to hear the matter. The submission was that only the special court could review a decision taken by the respondent under s 14 (1) (c) of the Act. That submission was upheld by Broome DJP who in

consequence dismissed the application with costs. Subsequently he granted the appellant leave to appeal to this court. (The judgment of Broome DJP has been reported : 1994 (4) SA 365 (D).)

It is at this stage convenient to set out the other salient provisions of s 15 of the Act. Under s 15 (2) a special court may be constituted by proclamation in the Government Gazette, with jurisdiction throughout the Republic or in one or more specified areas, for the hearing of all or any one or more appeals lodged in terms of subsection (5). Section 12 (3) provides that any such court shall consist of a judge of the supreme court, who shall be the president, and two assessors with prescribed specialist qualifications. In terms of subsection (5) an appeal to the special court shall be lodged with the respondent within six weeks after the date of publication of the relevant notice and under subsection (6) the power to fix the date, time and place for the hearing of the appeal vests

in the president of the special court.

Of special importance are the provisions of s 15 (10), (11) and (13) which read as follows :

> "(10) A special court may after consideration of any appeal, confirm or set aside the notice to which the appeal relates or amend it in such manner as it may deem equitable, and may make such orders as to costs as it may consider just.
>
> (11) The decision of a majority of the members of a special court shall be the decision of the court : Provided that any matter of law arising for decision by that court and any question as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the president of the court and that no other member shall have any voice in the decision.
>
> (13) The decision of a special court shall not be subject to appeal to or review by any court of law."

The question at issue is therefore whether the court a quo had jusrisdiction to hear the review application. This in turn depends on whether the Act excluded such jurisdiction. The Act does not do so in express terms, and the question then is whether it contains an implication

to that effect. The parties were **ad idem** that there is a strong presumption against such an implication -

> "... the Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication ..."

(Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) at 502 G-H. See also Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (A) at 593B-C and Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others 1993 (4) SA 621 (A) at 635 A-B.

In argument before us the respondent's counsel contended that an intention to exclude the supreme court's review jurisdiction should be inferred from the nature and amplitude of the powers granted to the special court created by sec 15 of the Act. Now, of course, it would not be enough for the respondent to show that the special court enjoys

powers of review similar to those exercised by the supreme court under its inherent jurisdiction. In the present context the respondent would have to go further and show that the legislature intended such powers to be exclusive. It is quite conceivable that review powers concurrent with those exercised by the supreme court could be bestowed, as was found to have happened in Pienaar's case (**supra**). In such a case the grant of review powers to the tribunal in question would not mean that the supreme court has been deprived of its common law jurisdiction. However, before any suggestion of concurrent jurisdiction can arise one must examine whether the special court was clothed with any review jurisdiction at all, and I now turn to that question.

It was common cause between the parties that, while the legislature may enact that a tribunal other than the supreme court should have powers of review of this kind, its intention to do so will not be

inferred in the absence of a specific provision or clear indications to that effect. See National Union of Textile Workers v Textile Workers Industrial Union (SA) and Others 1988 (1) SA 925 (A) at 939C.

At the outset it is important to note that the Act contains several provisions relating to appeal and review. Sec 15 (1) grants "a right of appeal" in respect of notices under section 14(1)(c). The special court has held, correctly in my view, that this is an appeal in the wide sense, that is, a complete rehearing of, and fresh determination on the merits of, the matter with or without additional evidence or information. See Smithkline Beecham Pharmaceuticals (Pty) Ltd and Others v Minister of Public Enterprises 1994 (4) SA 382 at 383C, 387F-G. It is to be noted that the Act is silent as to powers of review in relation to the special court. This is in sharp contrast with other provisions of the Act. Thus sec 15(13), which is quoted above, expressly states that the decision of

a special court shall not be subject to "appeal to or review by" any court of law. Sec 10(5) of the Act bestows on the Minister powers of granting, by notice, what may be described as interim relief pending an investigation by the board. Sub-sec (6) then provides that such a notice "shall not be subject to review by or appeal to any court of law". In my view these provisions are very significant. They show firstly that the legislature was alert to the distinction between appeal and review. More importantly, the legislature expressly excluded appeal and review as far as the interim orders were concerned. Concerning the more definitive orders contemplated by sec 14 (1) (c), however, it granted a special right of appeal and remained silent as to review. The clear inference is that the ordinary rights of review remain unimpaired.

A further important pointer to the nature of the special court's powers is that its appeal powers are limited to ministerial orders in terms

of sec 14(1)(c). The sub-section does not apply to the exercise of other powers under the Act. In so far as s 14 (1) applies to a practice which may be a restrictive one, the Minister may, after consideration of a report made by the board in terms of s 12 (1), and if he is of opinion that a restrictive practice exists, publish a ministerial notice **inter alia** declaring the practice to be unlawful. At his request the Minister of Finance and the Price Controller may then in terms of s 14 (5) (a) and (b) take further action having far reaching consequences for the person considered to be guilty of the restrictive practice. Now, let us assume that the board failed to publish the notice prescribed by s 10 (4), i.e. a notice **inter alia** inviting written representations. In the postulated case the action taken in terms of s 14 (1) (a) and (b), in respect of which no appeal lies to the special court, could undoubtedly be assailed on review on the ground of the irregularity in the proceedings of the board. This

was conceded by the respondent's counsel. (See S v Hotel and Liquor Traders' Association of the Transvaal and Others 1978 (1) SA 1006 (W) at 1014 A-D which deals with somewhat similar provisions in a predecessor to the Act.) It would be highly anomalous if a notice under sec 14(1)(c) which is permeated by the identical irregularity could not be attacked on review. And a further anomaly would be that the review proceedings relating to sec 14(1) (a) and (b) would be the subject of appeal, if necessary right up to the appellate division, whereas in respect of sec 14(1)(c) the matter would end before the special court. This could hardly have been the intention of the legislature.

Before us it was argued that the same anomaly would exist if the special court had no review jurisdiction, because, even under its appeal jurisdiction, it could be called upon to decide matters which may be the subject of review. The differences between review and the type of

appeal granted in the present case may be summed up as follows. Such an appeal involves a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information. By contrast a review is in general directed at a consideration of the legality or regularity of the decision in question: Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) 13 F-G and Baxter, Administrative Law at p 256. On the difference between the two processes, see also Hager and Others v Windhoek Municipal Council 1961 (3) SA 806 (A) at 814 A-F. The nature of a review is not changed merely because in exceptional cases the court of review may also have to consider "the merits", e.g. to establish whether the decision maker took irrelevant matter into consideration.

I shall assume, in favour of the respondent, that because the

special court is not confined to confirming or amending a notice under s 14 (1) (c), but may also set it aside, that court is empowered to strike down such a notice because of some illegality or irregularity pertaining to it. If it should do so, however, it seems to me that it would be exercising its appellate jurisdiction. The situation would then be analogous to that in which an ordinary court allows an appeal because of an irregularity appearing from the record before it. There would then be a certain amount of overlapping between the powers of appeal of the special court and the supreme court's review jurisdiction. The extent of overlapping would, however, be limited, and an aggrieved person would have the choice whether to proceed by way of appeal to the special court or review to the supreme court. I see no real anomaly in this: at any rate, no anomaly as serious as that which would arise if the supreme court had powers of review in respect of all decisions under the Act

except those in terms of sec 14 (1)(c).

Of course, it may be said that the legislature did differentiate between decisions under sec 14(1)(c) and those under all other sections of the Act in that only the former were made subject to appeal. It must be appreciated however that the right of appeal is a special privilege which would not have existed but for the provisions of the Act. There are presumably good reasons of policy for limiting it to decisions under section 14(1)(c). The mere fact that a special privilege is granted does not however lead to the conclusion that ordinary common law rights whose exercise is not inconsistent with the privilege are thereby abrogated.

The respondent's counsel placed great stress on the technical nature of the subject matter with which the Act is concerned. The adjudication of such matters, he contended, was entrusted to the special

court, whose composition was designed to deal with them. I do not agree with this submission. The exercise of review powers, which relate in the main to procedural matters, does not usually entail reference to the technical merits of a decision. Moreover, the technical nature of these matters admittedly did not deter the legislature from leaving the supreme court's powers of review unaffected in respect of all decisions other than those under section 14(1)(c). Why would a review of a decision under sec 14(1)(c) be any different?

For the above-mentioned reasons I consider that the special court was not granted review jurisdiction. It follows that no reason exists for inferring that the supreme court's powers of review were impliedly excluded.

I turn now to the judgment of the court a quo. The gist of the reasoning of Broome DJP may be thus summarised :

(a) The Act does not expressly exclude the review jurisdiction of the supreme court in respect of a notice published under s 14 (1) (c) of the Act. The enquiry must therefore be whether that jurisdiction was ousted by necessary implication (at 366 I - J).

(b) The functions and composition of the special court leave no doubt but that it is a specialised court (at 369 I). The following **dictum** of Botha J A in Pienaar's case (**supra**) at 637C is therefore apposite:

> "The structure of the Court is certainly closely akin to that of the known specialist Courts. Consequently there is, in my view, substantially less reason in the present case ... for closely scrutinising the provisions in question or for jealously guarding against interference with the jurisdiction of the ordinary Courts."

(c) Since the president of the special court must be a judge who alone decides matters of law it is a court which ranks equal in status with the supreme court (at 369 D with reference to Pienaar's case, supra, at 640 E).

(d) The proceedings of the special court, although described as an appeal, amount to a complete rehearing (at 369 D - E).

(e) The special court may confirm, set aside or amend the notice in question. Hence an aggrieved party may seek any relief in the special court which he might otherwise hope to obtain by way of review in the supreme court (at 369 E - F).

(f) In consequence the powers of the special court on appeal to it are greater and not less than those of the supreme court on review, and it would be anomalous to have a situation where an aggrieved party could pursue a "review" remedy in either of two courts of equal status (at 369 I with reference to Pienaar at 640 C-E).

(g) There is also the consideration that the legislature has precluded any appeal from, or review of, a decision of the special court (at 369 I-J).

(h) It is true that the review proceedings by the supreme court under the common law pave the way for a possible appeal to the appellate division, which means that the highest court has the last word. However, it would be curious if the legislature expressly ousted that division's jurisdiction to adjudicate on the merits of a notice, but implicitly preserved that jurisdiction in respect of procedural irregularities which were capable of being corrected by the special court, the very court that is given the last word on the merits (at 370 B and F).

(i) Having regard to all these factors the legislature has manifested a clear intention to oust the supreme court's jurisdiction of common law review in respect of a notice published under s 14 (1) (c) of the Act.

Much of this reasoning is of course unassailable and in conformity with what I have said above. Counsel for the appellant did submit,

however, that the dictum in Pienaar's case quoted in (b) above finds no application in casu unless it appears that the legislature bestowed powers of review upon the special court. This submission is well-founded. In Pienaar's case this court had to deal with the situation in which s 17 B (2) (a) of the Labour Relations Act 28 of 1956 had expressly conferred appellate and review jurisdiction upon the Labour Appeal Court in regard to proceedings of the industrial court, and the question was whether the review jurisdiction of the ordinary courts had been implicitly excluded. By contrast the legislature has not, of course, expressly conferred review jurisdiction upon the special court.

What is, however, of greater importance is that the learned judge a quo seems to have left out of account the substantial differences between appeals and reviews, and that, judging from the wording of the Act as discussed above, the legislature deliberately refrained from

bestowing powers of review on the special court. The Act therefore provides no warrant for the finding that the powers of the special court are equal to or greater than those of the supreme court on review (see paragraphs (e), (f) and (h) **supra**). The two sets of powers are essentially different, although, as I have said, there may be a certain area of overlapping.

Moreover the court **a quo** did not advert to the unlikelihood that the right of review should be excluded only in respect of notices under sec 14(1)(c).

If the court **a quo** had had regard to these features, it would, I consider, not have held that the supreme court's powers of review were ousted by the Act.

In the result the appeal should in my view succeed. The following order is made:

1. The appeal is allowed with costs, including the costs of the application for leave to appeal. The costs of two counsel are to be allowed.

2. The order of the court **a quo** is altered to:

   The preliminary objection by the first respondent to the Court's jurisdiction is dismissed. The applicant is entitled to such costs (including the costs of two counsel) as have been occasioned by the hearing of the objection.

3. The respondent is to be afforded an opportunity to file an additional affidavit dealing with the additional grounds for review as they were formulated in the heads of argument.

E M GROSSKOPF

JUDGE OF APPEAL

F H GROSSKOPF JA] CONCUR

NIENABER JA]

MARAIS JA]

SCOTT JA]

EMG/al