REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.
(4)

……19 July 2022…… ……

DATE SIGNATURE

CAC CASE NO: 198/CAC/Jan22

CT CASE NO: CR053Aug10

In the matter between:

GOODYEAR SOUTH AFRICA (PTY) LTD **Appellant**

and

COMPETITION COMMISSION **1st Respondent**

APOLLO TYRES SOUTH AFRICA (PTY) LTD **2nd Respondent**

CONTINENTAL TYRES (PTY) LTD **3rd Respondent**

BRIDGESTONE SOUTH AFRICA (PTY) LTD **4th Respondent**

SOUTH AFRICAN TYRE MANUFACTURERS CONFERENCE (PTY) LTD **5th Respondent**

JUDGMENT

MANOIM JA (Potterill AJA and Kubushi AJA concurring)

Introduction

[1] This is an appeal against a directive given by the presiding member at a pre-hearing conference of the Competition Tribunal (Tribunal) relating to the admission of an expert witness statement.[1]

[2] The appellant, Goodyear South African (Pty) Ltd (Goodyear), is one amongst five respondents in an ongoing case in which several tyre manufacturers are alleged to have contravened section 4(1)(b)(i) of the Competition Act, no 89 of 1998 (the Act). The appellant is appealing the directive because the member of the Tribunal had ruled that it could not have its expert witness statement admitted. The case had been referred to the Tribunal by the Competition Commission (Commission).[2] The Commission is the first respondent in the appeal which it opposes. The other respondents have not opposed the appeal.

[3] Section 4(1)(b)(i) makes an agreement between competitors to fix prices a contravention of the Act.

[4] The essence of the case is that the respondent firms were competitors, who from 1999 to 2007, were involved in a cartel to increase the list prices of tyres sold to tyre dealers in South Africa, as well as to time when increases would be implemented. Goodyear denies the allegations and contends that the price increases that occurred were made by it unilaterally and in response to increases in raw material prices.

[5] What is immediately apparent from the time period in which the contravention is alleged to have taken place is that this complaint has taken years to get to trial. In October 2006 the Commission first took up the case when it received a complaint from a customer called Parsons Transport which owns a fleet of trucks. Since then, the Commission has added to the complaint and acquired further evidence through raids on some of the respondents' premises. During this period there have been

[1] The Tribunal is constituted in terms of section 26 of the Competition Act, 89 of 1998.
[2] The Commission is established in terms of section 19 of the Act.

several interlocutory skirmishes which have taken the matter to this court and even to the Constitutional Court. The fortunes of either side have fluctuated in this litigation, and each blames the other for the length of time it has taken to get the complaint to trial. It is not necessary for me to apportion blame. The only relevance of the effluxion of time at the present moment is Goodyear's explanation for why it needs to call an expert witness to supplement the testimony of its factual witnesses and the Commission's concern about further delay.

The pre-hearing

[6] This background in the matter leads me to describe what happened at the pre-hearing. The practice of the Competition Tribunal is to regulate its forthcoming hearings in what are termed pre-hearing conferences, presided over by a single member of the panel who will hear the matter subsequently. The purpose of these conferences is to attend to the necessary procedural housekeeping to ensure that the trial before the full panel comprising three members, can run smoothly.

[7] On the 14 December 2021 the presiding member held a pre-hearing to make final preparations for the hearing of this matter. Present were the legal representatives of the Competition Commission and three of the respondents who were still opposing the matter. [3]

[8] Goodyear's counsel informed the presiding member that it intended to call an economist as one of its witnesses. The pre-hearing took place on a Tuesday. On the previous Friday afternoon, Goodyear's attorneys had filed its economist's report and indicated that it intended to call the economist because, as was put by its counsel Mr Gotz at the pre-hearing, it would be difficult for its factual witnesses to deal with matters they had not thought about for fifteen years. The expert he explained, was briefed to deal with the extent of the difference between the net price and the list price. Also, to deal with trends in raw material price increases.

[9] The Commission objected to the calling of the witness. Its reasons were both procedural and substantive. The hearing was due to commence on 1 February 2022 and the Commission was concerned that this might delay the case. Moreover, the Commission had to consider whether it needed to brief its own expert in

[3] The fourth respondent Bridgestone has applied for and was granted conditional immunity. Paragraph 23 of the Complaint referral, record page 88.

response - leading to further delay. The Commission was highly critical of the manner in which Goodyear had gone about bringing the application.

[10] According to the Commission, *"Goodyear had not asked the Tribunal for provision to be made in the timetable for the filing of an expert witness statement, neither during the previous pre-hearings when the filing of witness statements was discussed (as early as December 2016 and again in May 2017), nor when the timetable was agreed for the filing of supplementary witness statements and the holding of the hearing (in March 2021)*."[4]

[11] The Commission also queried if this was evidence that was properly the domain of an expert, given that it appeared from its first reading of the report, to be factual, not opinion evidence.

[12] As is evident from the transcript of the pre-hearing, there was much back and forth argument between the respective legal representatives about this issue.

[13] At the end of the hearing, as is Tribunal practice, a directive was sent to all the parties indicating what rulings had been made by the member at the pre-hearing. The directive stated the following on the Goodyear application:

[14] "The economic report that was filed by Goodyear on 10 December 2021 will not be admitted as an expert witness statement for the purpose of these proceedings." [5]

[15] The appeal is against this part of the directive. Goodyear goes on to argue that the direction is incorrect because:

a. It is not competent for a single member (as opposed to the full panel) to give such a ruling; and
b. Even if it is, the ruling infringes on Goodyear's fair hearing rights because it denies it the ability to defend itself in the proceedings.

Issues to be decided

[16] The key issue in the appeal is whether the directive is of a final nature.

[17] The language of this ruling suggests it was made as a final ruling. However, in the course of the pre-hearing the presiding member appeared to suggest that she had not taken a final view of the matter and any direction was of an interim nature.

[4] See Commission heads of argument paragraph 6
[5] Record page 2 paragraph 6.

[18] For instance, after initially stating that the witness statement would not be permitted, she went on to say that "*... if the Tribunal feels at a later stage we cannot proceed without the assistance of an expert, well then we will at least come back to this point. But for now, we are no- I am not allowing it."*[6]

[19] Later she suggested that the matter would be left to the Commission and the legal team for the other respondent to look at and come back to her if *"… they wanted to re-open the debate*".[7]

[20] The Commission relies on these passages in the transcript to argue that the directive was not final in nature. If it is not final in nature it argues, it is not appealable as it is not a final decision of the Tribunal. Only final orders are appealable to this Court in terms of section 37 of the Act, as I will go on to discuss. Second, even it is appealable, it was competent for a single member to have made such a decision and it was correctly made.

[21] But Goodyear argues that we must only have regard to the written directive and that from its language it is made clear that the direction is final in nature.

What has transpired since the pre-hearing

[22] Before analysing the respective arguments, some background is necessary to explain the context in which the decision was made.

[23] The pre-hearing was held on 14 December 2022 and the notice of appeal was filed on 12 January 2022.[8] The hearings however commenced on 1 February and the matter is now part heard and will recommence in September 2022. In the meantime, since the appeal was filed, the Tribunal panel has heard evidence from all the Commission's witnesses and some of the respondents, witnesses including one factual witness who testified on behalf of Goodyear.

[24] This means there is still an opportunity for Goodyear's expert to testify if this is permitted but it may also mean that Goodyear's assumptions on why it needed to lead this evidence may have changed.

The directive

[6] Transcript of pre-hearing , record page 51.
[7] Ibid page, 53.
[8] It is dated 12 January 2021, but this must be an error.

[25] No reasons are given after pre-hearings to explain why directions have been made. Some explanation may be given by the member during the course of the pre-hearing, but this is not a prerequisite

[26] Since the nature of a pre-hearing is informal there is always a certain amount of give and take between both parties and the presiding member about issues. For this reason, I do not consider that the remarks made in the course of discussion by the member are anything other than attempts to resolve or clarify issues. What matters ultimately is how the direction was formulated when it was issued to the parties. As in this case, the directive is typically made in writing after the pre-hearing, and no doubt also after reflection by the member over what had been argued.[9]

[27] This means that in deciding whether the direction was of a final or interim nature, I must have regard to the written direction and not what may have been suggested by the member in the course of the pre-hearing.

[28] I repeat again for convenience the terms of the direction.

[29] "The economic report that was filed by Goodyear on 10 December 2021 will not be admitted as an expert witness statement for the purpose of these proceedings."

[30] It is clear from this language that the decision on the expert report was final in its effect. This has a bearing on two issues that are germane to this appeal. (i) Whether the direction is appealable in terms of section 37 of the Act. (ii) Whether it is a decision that can be made by a single member.

[31] Since the answer to both these questions is determined by the same exercise in classification they can be considered together.

The legislative framework

[32] This court's appellate jurisdiction derives from section 37(1) of the Act.

[33] That section states:

37 (1) The Competition Appeal Court may-

(a) review any decision of the Competition Tribunal; or

(b) consider an appeal arising from the Competition Tribunal in respect of-

(i) <u>any of its final decisions</u> other than a consent order made in terms of section 63; or

[9] The direction is dated on 15 December which means it was made one day after the pre-hearing.

(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal. (My emphasis).

[34] The Commission argues that the directive is not a "*final decision*" of the Tribunal and hence is not appealable in terms of 37(1)(b)(i) nor is it a decision contemplated in 37(1)(b)(ii) because there is nothing in the Act that permits a directive arising from a pre-hearing to be taken on appeal.

[35] In contrast to the approach of the Commission, Goodyear argues that the decision is a final one. This has two consequences it argues. First, the decision is therefore appealable and secondly, it is not a decision that could have been made by a single member at a pre-hearing. I turn now to this latter argument.

[36] Ordinarily decisions of the Tribunal are made by a panel comprising three members.[10] However, the Act also permits certain decisions to be made by a single member. It is not in dispute that a pre-hearing conference is a hearing that can competently serve before a single member. Indeed, this is the manner in which the Tribunal typically functions, and its Rules explicitly provide for this.[11] The question rather is whether a decision of this nature is one that could be made by a single member if it had a final effect.

[37] The relevant provision in the Act which govern what matters can be determined by a single member is section 31(5).

31(5) The Chairperson of the Competition Tribunal, or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order of an interlocutory nature that, in the opinion of the Chairperson, does not warrant being heard by a panel comprised of three members, including-

(a) extending or reducing a prescribed period in terms of this Act;

(b) condoning late performance of an act that is subject to a prescribed period in terms of this Act;

(c) granting access to information contemplated in sections 44 to 45A and any conditions that must be attached to the access order; and

(d) compelling discovery of documents. (My emphasis).

[38] Goodyear argues that a direction to exclude certain evidence is not one of the decisions expressly listed in subsection (5). This observation is correct but

[10] Section 31(1)

[11] See Tribunal rules 21 and 22.

following an amendment to the Act in 2018 which came into effect in 2019, the list of matters that can be decided by a single member was expanded by the additions of sub-paragraphs (b) and (c) and a rephrasing of the introductory text that precedes the list. In terms of the amendment the word "*including*" was inserted just prior to the list of enumerated decisions, making it clear that this is not a closed list.[12] However the limiting phrase of an "*interlocutory nature"* was also inserted in the text at the same time. The fact that an issue is not specifically listed does not preclude the Chairperson from directing a single member to hear it, if it does not warrant being heard by a panel. However, despite the fact that the list of orders that might be given by a single member is now unlimited it has been qualitatively limited. The order must be of an interlocutory nature.

[39] In oral argument Goodyear conceded the point that the list is not exhaustive but argued that there was no direction given by the Chairperson that the decision did not warrant being heard by a panel of three members. To this the Commission argued in response that when the Chairperson appointed the member to preside at the pre-hearing this sufficed.

[40] I do not consider we need to go into whether the Chairperson needed to have given a specific direction beyond appointing the member to preside at the pre-hearing – the appointment is not a fact not in dispute.

[41] Section 31(5) makes it clear that a single member may make an order provided it is of an "*interlocutory nature*". If the direction has a final effect, then it is not an interlocutory order and could not be made by a single member.

When is an order a final order?

[42] Courts are reluctant to allow piecemeal appeals. One need look no further than the long litigious history of this matter as testimony to this concern. Hence orders not deemed final were not considered appealable. It is not always clear when an order is final. For a number of years, the leading authority on this point was *Zweni v Minister of Law and Order*[13] in which the then Appellate Division laid down the following criteria for determining the issue. (i) the decision must be final in effect and not open to alteration by the court of first instance;(ii) it must be definitive of

[12] It had been a closed list previously prior to the amendment.
[13] 1993 (1) SA 523 (A) at 532I – 533A.

the rights of the parties; and lastly, (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[43] In *Allens Meshco*[14] this court followed the approach in *Zweni* and added its own observation that:

"The fact that a decision may cause a party inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct is not taken into account in determining appealability. …".[15]

[44] But *Zweni* is no longer the final authority on this issue. More recently in *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service*[16] the court held that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings, it will generally be final in effect.

[45] The approach in *Metlika* was later cited with approval by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[17] where the Court held, after considering several decisions of the Supreme Court of Appeal and prior decisions of the Court that the: *"Zweni requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form."*[18]

[46] What courts now decide as definitive of appealability is not just finality but what is in the interests of justice. As the Court in *Scaw* explained:

"The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case."[19]

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[14] *Allens Meshco (Pty) Ltd and others v Competition Commission and others* [2015] 1 CPLR 27 (CAC).
[15] Ibid paragraph 23.
[16] [2004] 4 All SA 410) in para 24.
[17] 2012 (4) SA 618 (CC)
[18] Paragraph 53.
[19] Ibid paragraph 55.

[47] In the present matter the directive is stated in final terms. Contrary to what the presiding member had said at some stages during the pre-hearing, there is no indication that the directive would be reconsidered at a later stage of the proceedings if the application to lead the evidence was renewed.

[48] If the contentions of Goodyear are correct, then exclusion of the evidence might lead to irreparable harm if Goodyear cannot defend itself adequately without this evidence on the unusual facts of this case. (I pause to state I take no view on the correctness of this contention by Goodyear as this court has not only not had sight of the expert report, but we also have not had access to any of the testimony in the case thus far. Both are relevant considerations which we cannot pronounce upon.)

[49] Since there is no indication that the order would be reconsidered later in the proceedings it is in the '*Metlika* sense' final. The decision is therefore appealable in terms of section 37(1)(b)(i) of the Act. It is also for the same reason because it is final in effect, not an interlocutory decision and thus could not be made by a single member sitting alone in terms of section 31(5) of the Act.

Nature of relief

[50] In the Notice of Appeal, the order sought is that paragraph 6 of the directive be set aside. In argument Mr Gotz for Goodyear suggested that we could follow the approach taken by the SCA in *Ansac* and give an order to replace that of the member. I do not consider that is necessary. Our approach to the section has been explained in these reasons and it does not require us to go any further to provide a corrected order.[20]

Costs

[51] Although Goodyear has succeeded in its appeal the Commission was entitled to oppose the appeal as it raised important issues for the interpretation of sections of the Act. Moreover, had Goodyear acted with greater urgency in bringing a timeous application before the Tribunal to lead the evidence this issue may have been fully ventilated and not necessitated an appeal at this stage. For this reason, it is only fair that each party is liable for its own costs.

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[20] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and others* 2005(3) SA 1 (SCA) see paragraph 62 and the formulation of the order at paragraph 3.

ORDER

1. Paragraph 6 of the directive issued on 15 December 2021 is set aside.
2. Each party is liable for its own costs.

Date of hearing: 6 May 2022

Date of reasons: 19 July 2022

N. Manoim JA

p.p

S. Potterill AJA

p.p

M. Kubushi AJA

APPEARANCES

For the Appellant:	Adv Anthony Gotz SC, Adv Nicole Lewis and Adv Luyanda Nyangiwe
Instructed by:	Judin Combrinck Incorporated
For the First Respondent:	Adv Daniel Berger SC and Adv Anisa Kessery
Instructed by:	Competition Commission