BEFORE THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CASE NO.: 49/CR/Apr00

In the application of:

AMERICAN NATURAL SODA ASH CORPORATION	**First Applicant**
CHC GLOBAL (PTY) LTD	**Second Applicant**

and

THE COMPETITION COMMISSION OF SOUTH AFRICA	**First Respondent**
BOTSWANA ASH (PTY) LTD	**Second Respondent**
CHEMSERVE TECHNICAL (PTY) LTD	**Third Respondent**

Panel	**:**	**Y Carrim (Presiding Member), M T K Moerane (Tribunal Member), M R Madlanga (Tribunal Member).**
Heard on	**:**	**21 July 2008**
Decision on	**:**	**13 August 2008**

DECISION AND REASONS

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[1] If there ever was a Methuselah[1] of proceedings of the Competition Tribunal (the Tribunal), this is it. This application is directly connected to a complaint against American Natural Soda Ash Corporation and CHC Global (Pty) Ltd

[1] According to the Holy Bible Methuselah is said to have lived for nine hundred and sixty-nine years (*Genesis* 5:27)

(ANSAC and CHC Global respectively, but collectively referred to as the applicants) (the complaint) that was referred to the Tribunal by the Competition Commission (the Commission) as far back as 23 March 2000. The Commission decided to withdraw its complaint referral after Ansac had filed an application to request further particulars. The commission filed a fresh referral on 14 April 2000. In fact, the complaint against the applicants is the first ever complaint to be referred to the Tribunal by the Commission. That complaint is still live and a hearing on the merits commenced before another panel of the Tribunal only on 23 July 2008, two days after this application was heard.

[2] This application is a motion brought by the applicants for a consent order in terms of section 49D of the Competition Act 89 of 1998 (the Act). The respondents resist the application on a number of points *in limine* the nature of which is dealt with later.

[3] As indicated above, on 23 March 2000 (and subsequently on 14 April) the Commission referred a complaint against ANSAC to the Tribunal. The complaint was that ANSAC, a Webb-Pomerene Association,[2] is a cartel that operates in contravention of section 4(1)(b)(i) of the Act and that it was aided and abetted in that conduct by CHC Global, a South African company, which acted as ANSAC's agent in distributing ANSAC's members' products within South Africa. This referral was pursuant to a complaint lodged with the Commission in late 1999 by Botswana Ash (Pty) Ltd (Botash)[3] and Chemserve Technical Products (Pty) Ltd (Chemserve).[4]

[4] After the complaint referral to the Tribunal, the Commission and the applicants engaged in protracted settlement negotiations that culminated in an agreement that was signed by the Commission and the applicants on 14 June 2002. Five days later, on 19 June 2002, the Commission wrote the applicants

[2] It is a corporation set up in accordance with the provisions of the United States Export Trade Act. 1918, commonly called the Webb-Pomerene Act
[3] The second respondent, a company registered in Botswana .
[4] The third respondent, also a company registered in Botswana, and which distributes Botash's products within South Africa.

a letter in terms of which it withdrew from the agreement. It is this agreement that is the subject of the present application.

[5] The applicants now bring this application some six years after this withdrawal, and after some skirmishes that, *inter alia,* involved an appeal by the applicants to the Competition Appeal Court (the CAC) on an interlocutory issue[5] that related to the complaint now being heard by the Tribunal, a direct approach to the Supreme Court of Appeal (SCA) when they were not successful on that issue, an application for leave to appeal before the CAC after the SCA had ruled, on 2 June 2003, that the direct approach was incompetent and that leave had first to be sought from the CAC, an application to the SCA for leave to appeal after the CAC had refused leave on 30 October 2003 and the prosecution of an appeal before the SCA after leave had been granted on 8 March 2004. I might mention that the proceedings before the SCA were concluded on 13 May 2005 when that Court handed down its judgment.[6]

[6] It is perhaps worth mentioning that whilst all the above legal battles were going on, during 2005 the applicants engaged the Commission in fresh settlement negotiations. These came to naught.

[7] The date of this application is 31 January 2008. The Commission resists it on the following points *in limine*:

(a) The amended conduct to be engaged in by the applicants as envisaged in the settlement agreement "remains in contravention of section 4(1)(b) of the Act" and, therefore, it is not competent for the Tribunal to confirm the agreement;

[5] Totally unrelated to the agreement or the Commission's withdrawal therefrom.
[6] Without purporting to be exhaustive, there were other interlocutory battles that also post-date the Commission's withdrawal from the settlement agreement. These too were unrelated to the agreement. These involved a ruling by the Tribunal against the applicants on 7 August 2006, an appeal to the CAC, which was dismissed on 5 January 2007 and an application for leave to appeal which was refused on 11 June 2007.

(b) It is competent for the Commission to withdraw from the settlement agreement at any time before its confirmation by the Tribunal as a consent order in terms of section 58(1)(b) of the Act; and

(c) The applicants have, by their conduct, waived their rights to the settlement of the complaint on the terms contained in the settlement agreement.

[8] The Commission has intimated that the hearing of evidence may be necessary to determine whether the amended conduct of the applicants envisaged in the agreement constitutes a contravention of section 4(1)(b) of the Act. In the founding papers the applicants also suggested that it may be necessary for this Tribunal to hear evidence on the impugned conduct in order to determine whether the agreement constitutes an "appropriate order" as contemplated in section 49D(1). In support of this the applicants filed an expert economist's report and a list of witnesses that they intended calling should the Tribunal wish to hear such evidence. Botash and Chemserve have equally filed an expert report. Indeed, should the Tribunal reach a stage where it must consider whether it is "satisfied that the [proposed order] is appropriate" (*a la GlaxoSmithKline* (see below)), it seems appropriate that evidence be heard. However, given the Presiding Member's direction referred to below and the decision reached in this matter, it is not necessary to deal with this issue any further.

[9] Botash and Chemserve also resist the application on the basis of, *inter alia*, a point *in limine*. Relying on *GlaxoSmithKline South Africa (Pty) Ltd v David Lewis NO & Others*,[7] they contend that the Commission does not have the power to "agree on the terms of an appropriate order" (as envisaged in section 49D(1) of the Act) after the Commission has referred a complaint to the Tribunal because the words "during, on or after completion of the investigation of a complaint" in section 49D(1) relate only to a time corresponding to the investigation of a complaint by the Commission. In this regard Botash and Chemserve emphasise the fact that the Commission

[7] A judgment of the CAC in Case Number 61/CAC/Apr06, delivered on 6 December 2006.

referred the complaint on 23 March 2000 whereas the agreement was concluded subsequent thereto, on 14 June 2002.[8]

[10] On 17 July 2008 the applicants' attorneys wrote a letter to the other parties and the Tribunal, *inter alia*, stating the following:

> "4. *We concede that GlaxoSmithKline precludes the conclusion of the consent order agreement after the referral of a complaint to the Tribunal and that the Tribunal is bound by this decision until such time as it is reversed on appeal. In the appeal we will respectfully argue that GlaxoSmithKline is wrong and does not correctly articulate the legal position.*
>
> *…*
>
> *6. [T]he applicants in the consent proceedings submit to a ruling by the Tribunal in proceedings dismissing the consent order proceedings for want of jurisdiction."*

[11] The Presiding Member of this panel, Ms Yasmin Carrim, directed that argument be presented on all the points *in limine*, thus obviating the hearing of evidence at this stage.

[12] I agree that the application must fail on the basis of the decision in the *GlaxoSmithKline* case and I need say no more on this. There is yet another basis on which the application must fail. I deal with it below.

[13] Section 49D(1) of the Act confers the power to confirm an agreement on the terms of an appropriate order on the Tribunal in the following terms:

> *"If, during, on or after completion of the investigation of the complaint, the Competition Commission and the respondent agree on the terms of*

[8] It is correct that the effect of the *GlaxoSmithKline* judgment is that after it has referred a complaint to the Tribunal the Commission cannot conclude an agreement on the terms of an appropriate order in terms of section 49D of the Act.

an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b)."[9]

[14] Section 49D(2) sets out the types of orders that may issue from the Tribunal after hearing a motion in terms of section 49D(1). Section 49D(2) provides:

"*After hearing a motion for a consent order, the Competition Tribunal must -*

(a) make the order as agreed to and proposed by the Competition Commission and the respondent;
(b) indicate any changes that must be made in the draft order before it will make the order; or
(c) refuse to make the order."

[15] Reading subsections (1) and (2) together it seems to me that when the motion is brought in terms of subsection (1), there must be both agreed terms and a proposal of those terms, it being proposed that the agreed terms be made an order of the Tribunal. Each of the phrases "as agreed to" and "proposed by" in subsection (2) must have been intended to convey separate meanings and none of them is superfluous or mere surplusage. Steyn[10] has the following to say:

"*If, then, the intention of the legislature must in the first place and in the main be sought in his words, it would well follow, not only that all his words should be observed thoroughly and accurately, but also that the legislature, aware of the fact that his words constitute the main*

[9] Section 58(1)(b) provides:

" *In addition to its other powers in terms of this Act, the Competition Tribunal may –*

(a) …
(b) confirm a consent agreement in terms of section 49D as an order of the Tribunal; …"

[10] *Uitleg van Wette* p. 17

evidence of the content of his sovereign will, will choose them circumspectly and meticulously, and will not insert any idle or meaningless word in the manifestation of his will."[11]

[16] Lourens du Plessis[12] expresses himself in the following terms:

"[A]ll language used, that is, every linguistic signifier and the syntax must be taken seriously. … [D]ifferent words or signifiers are meant to generate different meanings because they are meant to express different ideas or to refer to different situations. Words should therefore not lightly be construed as superfluous."[13]

[17] According to the *Compact Oxford English Dictionary*[14] "propose", *inter alia,* means:

*"**1** put forward an idea or plan for consideration. **2** nominate someone for an office or position. **3** put forward a motion to a law-making body or committee."*

[18] From this it is quite plain that the proposal must be to somebody. In terms, agreement must be between the Commission and the respondent (paragraph (a) of subsection (2)). Surely, the proposal of the order must be to the Tribunal. This is not only obvious, but it also accords with the meaning of "propose" quoted above.

[19] If I understood the argument on behalf of the applicants correctly, it seems to suggest that both the agreement and proposal came about by means of the conclusion of the agreement on 14 June 2002. The effect of that contention is that whilst the signatories were executing the agreement,

[11] Lourens du Plessis's translation in *Re-Interpretation of Statutes* pp 212 - 213
[12] *Op. cit.* p. 213
[13] It is so, of course, that from time to time there will be instances of tautology in statutory provisions (*id*; see also *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) para 12), but, as a rule of construction, one proceeds from the premise that that is not the case. In the provisions in issue in the instant matter nothing points to obvious tautology, and the usual rule of giving meaning to all words and phrases must apply.
[14] 3rd ed (2005).

unbeknown to the Tribunal, and in its absence, they were, at the same time, proposing to it an order for confirmation in terms of section 49D. That "proposal" remained unaffected by the fact that as early as 19 June 2002 the Commission withdrew from the agreement. The "proposal" was, in fact, so cast in stone that the fact that the Commission was openly opposed to an order in accordance with the agreement (when the Tribunal was eventually approached some six years later) was of no consequence. By some fiction, the Commission's proposal to the Tribunal was something other than what it in fact told the Tribunal it wished for when the applicants eventually brought their section 49D motion.

[20] This is an untenable proposition. It only makes sense that the Tribunal must go by what is being proposed to it by both the Commission and the respondent as an agreed order at the time the order is sought, and not by some historical event supported only by one party at the time of the approach to the Tribunal. In essence, on the applicants' approach the applicants and the respondent would have agreed between themselves and proposed to themselves, something that would not give effect to the word "propose". Until that which you propose has come to the notice of the one to whom you are proposing, you cannot be said to have proposed. Prior to the notice you may well be said to intend to propose. However, section 49D(2)(a) talks of a proposal, and not an intended proposal.

[21] In both subsections (1) and (2) of section 49D the operative words are "consent order".[15] Subsection (1) refers to the confirmation of the agreement as a "consent order". Subsection (2) talks of "a motion for a consent order". The use of "consent" connotes an order taken by agreement. The same dictionary referred to above states that "consent" means "permission" or "agreement". A scenario like the present, where the question whether the order should be confirmed is hotly contested, is the antithesis of consent. In short, this just cannot be the sort of factual matrix envisaged in section 49D. The Tribunal has no power at all to grant an order in terms of section 49D in these circumstances. It lacks jurisdiction, plain and simple.

[15] In fact all the subsections do refer to "consent order".

[22] What section 49D is meant to achieve is clear. It does happen from time to time that the Commission and a given respondent reach agreement on how the complaint in issue should be resolved. Section 49D affords the Commission and such respondent a speedy and simple procedure to finalise the complaint. That procedure is not at all meant for contested proceedings. Indeed, the Tribunal has previously held:

> *"[S]ection 49D provides that the Tribunal may grant a consent order without hearing any evidence. This suggests that the legislature never contemplated that the consent proceeding could itself become a contested proceeding on the merits. The legislative intent appears quite to the contrary."*[16]

[23] In sum, the application must fail also on the ground that the Tribunal lacks competence to grant a consent order in terms of section 49D where, at the time of presentation to the Tribunal, the motion for the order lacks the support of the Commission.

[24] Several other arguments on section 49D were proffered. I do not find it necessary to deal therewith. It is also not necessary to deal with the question of waiver.

[25] Accordingly, the application is dismissed with costs, including the costs of two counsel.

_____ 13 August 2008

M R Madlanga

[16] *The Competition Commission v South African Forestry Company Limited & Others,* Tribunal Case Number 100/CR/Dec00 at para 22

Concurring: M T K Moerane and Y Carrim

Tribunal Researcher:	R Badenhorst
For Applicants:	Adv M Brassey SC assisted by Adv P McNally, instructed by Bowman Gilfillan
For First Respondent:	Adv W J Pretorius assisted by Adv G Malindi
For Second and Third Respondents:	Adv D Unterhalter SC assisted by Adv A Gotz and Adv M Le Roux, instructed by Webber Wentzel Bowens