IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

20/4/2016.

Case no. 47050/13

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE : YES/ NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED

20/04/2016 .....

DATE SIGNATURE

GAUTENG DIVISION, PRETORIA

IN THE MATTER BETWEEN:

MONDI LIMITED	1st APPLICANT
HATHORN, DAVID	2nd APPLICANT

and

THE COMPETITION COMMISSION	1st RESPONDENT
SAPPI SOUTHERN AFRICA LIMITED	2nd RESPONDENT

JUDGMENT

LEGODI J;

HEARD ON: 18 March 2016

JUDGMENT HANDED DOWN ON: 20 April 2016

[1] The judgment and order which was handed down by this court on 12 November 2014 has become the subject of an application for leave to appeal by both the Competition Commission (the Commission) and Mondi Limited (Mondi). The order made by this court in the interlocutory application was crafted as follows:

"57.1 The Commission (the first respondent) is hereby ordered to furnish Mondi (the first applicant) with the Genesis Report insofar as it has already been in the public domain.

57.2 Mondi is entitled access to the record and in particular to documents referred to in what is titled 'Schedule of documents in the Commission's record' subject to the following qualifications:

57.2.1 to all documents marked "confidential", except insofar as a claim of confidentiality on such documents complies with paragraphs (a) and (b) of section 44(1) of the Act, in which event;

57.2.1.1 The applicants shall request for disclosure of such documents in terms of section 45 of the Act.

57.3 Insofar as the documents marked "restricted" are concerned, the Commission shall allow access to all documents belonging to or generated by Mondi & Sappi except insofar as such documents are not relevant to the initiation of complaint in question. The other access relating to 'restricted documents', shall be limited to the portions only of each document upon which reliance was placed in taking the decision to initiate the complaint, unless is not possible to excise such portions from the main document; and

57.3.1 Such documents will only be made available to the applicants' Attorneys; and

57.3.2 The applicants' attorneys shall not disclose such documents to the Applicants or any other party save for the applicants' counsel.

57.4 The Commission is hereby ordered to deliver the documents mentioned in paragraphs 57.1, 57.2 to 57.3.2 of this order within seven days from the date of handing down of this order.

57.5 The Commission is ordered to pay the costs of this application including the costs of two counsel".

[2] Having handed down the judgment, the Commission approached the constitutional court for leave to appeal against *"the entire order and judgment including the order of costs"* granted by this court. On 2 February 2015 the constitutional court dismissed the application on the ground that the appeal *"bears no prospects of success".*

[3] The application for leave to appeal directly to the constitutional court was premised on several grounds. I do not find it necessary to specifically refer to those grounds. However, at the start of the hearing of this application for leave to appeal, I enquired from counsel on behalf of the Commission the basis on which the Commission seeks to rehash the application for leave to appeal before this court after the constitutional court had ordered that the appeal bears no prospects of success. In particular , I inquired whether the grounds of appeal intended to be argued before this court are in anyway different to the grounds of appeal upon which the constitutional court was approached. Furthermore, counsel for the Commission was asked whether the orders appealed against in the present application are the same as those appealed against and sought to be

considered by the constitutional court. I may mention that both parties indicated that they are not persisting with an appeal against paragraph 57.1 of the order, in my view, correctly so, as no confidentiality can be claimed on the genesis report which is in the public domain.

[4] The Commission approached the constitutional court directly on two bases: First, that the application raises constitutional issues, more particularly:

(a) The ambit of the high court and the tribunal to review the exercise of public power in terms of the constitutional principle of legality.

(b) The jurisdiction of the high court.

(c) That the case advanced by Mondi and upheld by the high court was predicated on the principle of legality.

(d) The power of the commission to refuse to disclose the record of a decision to initiate a complaint.

5. The second approach directly to the constitutional court was stated as follows:

"69. This court has explicitly recognised the important role played by the tribunal in dealing with competition matters in the public interest. The same holds true for the commission. I submit, therefore, that the present case also raises an arguable point of law of general public importance as envisaged 167 (3) (b) (ii) of the constitution".

[6] For the reasons mentioned in paragraph 4 and 5 above, I was prompted to ask counsel to enumerate grounds of appeal which do not fall under the categories of "constitutional matters" and "arguable point of law of general public importance as envisaged in section 167 (3) (b) (ii) of the Constitution", bearing in mind that

reasonable prospects of success must be shown. I think, it would be fair to say that counsel for the Commission was unable to do so. Because of the importance of the issue, I requested for written heads to be filed on behalf of the Commission in addition to the oral submissions made. This has now been done. This court felt constrained to deal with issues or grounds of appeal upon which the constitutional court had already pronounced itself and found that the appeal bears no prospect of success.

[7] Counsel for the Commission argued, as he also did in his written heads, that a distinction must be drawn between the jurisdiction of the supreme court of appeal and that of the constitutional court in hearing the appeals. In the written heads and in dealing with "no jurisdiction" possibility, the Commission stated:

"6. The Constitutional Court derives its jurisdiction from section 167 (3) (b) of the Constitution which provides:

(3) The Constitutional Court-

(a) ...

(b) may decide-

(i) constitutional matters, and

(ii) any other matter if the constitutional court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the constitutional court.

7. By contrast, the jurisdiction of the SCA is different. Section 168(3)(a) of the Constitution provides that the SCA may decide appeals in any matter arising from the High Court of South Africa".

[8] Perhaps it is necessary to also refer to section 17 of Superior Courts Act no 10 of 2013 and in particular the circumstances under which leave to appeal may be granted:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) The appeal would have reasonable prospects of success, or

(ii) There is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration,

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a) and

(c) where the decision sought to be appealed does not dispose of the issues in the case between the parties"

[9] Subsection (2) inter alia, provides:

"(a) Leave to appeal may be granted by the judge or the judges against whose decision on appeal is to be made, if not readily available by any other judge or judges of the same court or division.

(b) If leave to appeal in terms of paragraph (a) is refused, it may be granted by the supreme court of appeal on application filed with the registrar of that court within one month after such refusal, or such long period as may on good cause be allowed , and the supreme court of appeal may vary the order as to costs made by the judge or judges concerned in refusing leave."

[10] It is clear from paragraph (b) quoted above that the supreme court of appeal would also be constrained to hear leave to appeal where the constitution court

refused such leave on the ground that the appeal "bears no prospects of success" as envisaged in subsection (1)(a) (i) of section 17 of the Superior Courts Act quoted above.

[11] To expand more on the issue, the decision to refuse leave to appeal in the present matter was taken by eleven judges of the Constitutional Court and of importance stated:

"The constitutional court has considered this application for leave to appeal. It has concluded that the application should be dismissed as it bears no prospects of success.

Order:

The application is dismissed with costs".

[12] I think it will be fair to conclude that the Constitutional Court did not just simply dismissed the application, but it also gave the reasons for the dismissal stated "as it bears no prospects of success". I deal later hereunder in some detail for coming to this conclusion.

[13] Counsel for the Commission in his written heads sought to explain the order of the constitutional court as follows:

"4.4.The issue, for present purposes is whether this order precludes leave to appeal being granted to the SCA. We submit that it does not. We submit that they may well be a variety of reasons why the Constitutional Court dismissed the application for leave to appeal. These are:

4.4.1. First, that the Constitutional Court does not have jurisdiction to hear the appeal.

4.4.2. Second, that the Constitutional Court did not consider that a direct appeal was justified.

4.4.3 Third, that the Constitutional Court dismissed the application on merits.

5. It is only in circumstances that it can be concluded with confidence that the Constitutional Court dismissed the application on its merits, that the High Court would be bound by such a finding. For the reasons that follow however, it is submitted that it is not possible to reach the conclusion that the application was dismissed on its merits"

[14] In my view, once one cannot conclude "with confidence" and "is not possible to reach the conclusion that the application was dismissed on its merits", that should be sufficient to disqualify this court to hear the application. In any event, the Commission, if it really wanted not to second-guess the order of the Constitutional Court, it had the opportunity to approach the Constitutional Court for if a court is approached within a reasonable time, it would have the power to correct, alter or supplement its own judgment or order in accessory or consequential matters, for example, costs or interest on the judgment debt, which inadvertently the court may have omitted to grant. The second is that a court may clarify its judgment or order if on proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain. (See Sias Moise v Transitional Local Council of Greater Germiston Case ZACC 54/00) at paragraph 4.

[15] It is also worth referring to the case of Molaudzi v S [2014] ZACC 15, 2014 (7) BCLR (CC) (Molaudzi, first Judgment) at paragraph 2 in which the Constitutional Court in dismissing an application for leave to appeal expressed itself as follows:

"The applicant now seeks leave to this Court essentially on the basis that he was wrongly convicted. The application cannot succeed. It is based on an attack on the factual findings made in the trial court. That does not raise a proper constitutional issue for this court to entertain. In addition, there are no reasonable prospects of success. The full court considered the arguments on appeal and properly rejected them. The application for leave to appeal must thus be dismissed".

[16] I understood the Commission's contention to be that on probability, the constitutional court dismissed the application for leave to appeal in the present case on the basis that the appeal did not raise constitutional *matter* and that therefore it did not have the jurisdiction to entertain the application for leave to appeal. The other contention as understood it, was that the grounds for direct access were not established.

[17] Starting with the latter, the Commission referred this court to the case of Mazibuko v Sisulu 2013 (6) SA 249 (CC) wherein it was held:

"[19] The application for leave to appeal directly to this court means that we have not had the benefit of the issues being considered by a full Court or the supreme court of appeal. This court, on a multi-staged litigation process, and that especially, where the issues are of great complicity and importance, the more compelling the need becomes for this court to be assisted by the views of other courts".

[18] Then the Commission in seeking to support the statement above, stated in its written heads as follows:

"13 As indicated above, this is precisely of one of the grounds of opposition raised by Mondi. It is quite clear that the present matter does indeed raise issues of great complicity. It follows, therefore, that the Constitutional Court may well have dismissed the application for leave to appeal, because of the bypassing of the SCA."

[19] I must say, I know of some cases were the Constitutional Court refused to deal with direct applications for leave to appeal in situations where the issues are of great complicity and importance. The matter of Mark Shuttleworth v Reserve Bank is one of those matters. In the Mark Shuttleworth's case, he was represented by the same counsel, Mr Gilbert Marcus, who is the counsel in the present case. Mr Shuttleworth directly approached the Constitutional Court for leave to appeal against the order and judgment of this court. The Constitutional Court declined to hear the application for leave to appeal and referred it back to this court to hear the applications for leave to appeal lodged by both Mark Shuttleworth and the Reserve Bank.

[20] The point I am driving at is this: In all probabilities, if the constitutional court felt that the case raised complex and important issues for which it needed the views of the SCA and or the views of the full court of this division, it would not have dismissed the application on the ground that the appeal "bears no prospects of *success.*" Instead, it would have refused to hear the leave to appeal and would have referred it back to this court to hear the application for leave to appeal as per the notice of conditional application for leave to appeal filed with the registrar of this court on 21 November 2014.

[21] Furthermore, if the constitutional court dismissed the leave to appeal on a "no jurisdiction" possibility as suggested by counsel on behalf of the Commission, the order of the Constitutional Court would have been framed clearly to convey that message. Put simply, the constitutional court would unlikely have pronounced or expressed itself that the appeal "bears no prospects of success" in one sentence without motivation, if its order was indeed based on the fact that it has no jurisdiction and or that direct access was not justified. I am therefore not satisfied that this court is competent to hear the Commission's leave to appeal. On this point alone, its attempt to revert its application for leave to appeal in this court, must fail.

[22] This is really the end of the case for the Commission. However, in the event I was to be wrong, I have decided to deal with the merits of the appeal. I now turn to the stage when the Commission directly applied to the Constitutional Court for leave to appeal. In the founding affidavit deposed to on 2 December 2014 by the Commissioner Thembi Nkosi Bonagele in that application, it was stated:

"[18] The Commission respectfully submits that, in the circumstances a direct appeal to the court is appropriate particularly since it concerns the respective power of the tribunal and CAC on the one hand and the High Court on the other in addition, because the SCA has already determined some of these issues adversely to the Commission in Computicket matter no useful purpose would be served in requiring this matter to go to the SCA first. Out of caution, the commission has conditionally applied the High Court for leave to appeal to the SCA, should this application be refused".

[23] Computicket judgment was attached to the application for leave to appeal in the constitutional court and the statement above was preceded by another statement critical of the SCA's decision in the aforesaid Computicket matter cited neutrally as, The Competition Commission v Computicket (853/13) [2014] ZA SCA 185 (26 November 2014) handed down few days after the main judgment in the present case was handed down (12 November 2014). The critical statement is coached as follows:

"14 This cumulative effect of Computicket and the judgment of the High Court in the present case is as follows:

14.1. Every time the commission initiates a complaint in order to conduct an investigation, the respondent firm may review the initiation and gain access to the record.

14.2. It is free to pursue its review in either the High Court or the Tribunal

14.3. If the Firm chooses to prosecute its review to prosecute its review in the High Court the appellate jurisdiction lies with the SCA.

14.4. if it prosecutes in the tribunal , the appellate jurisdiction is reserved for the CAC and this Court.

14.5. The firm can repeat the entire process by reviewing the referral decision".

[24] One must bear in mind that the decision and the order of this court in the main judgment, is not about the review proceedings, but rather about the interlocutory application for the disclosure of the record upon which the decision to initiate a complaint which is the subject of the review, is based.

[25] It is however interesting to see how the Commission wants to have it both. Its statement quoted in the preceding paragraphs 22 and 23 of this judgment is clear. Firstly, it concedes that the SCA has already adversely ruled against it on some similar issues it has raised in the application for leave to appeal to both the Constitutional Court and to this Court. Secondly, its criticism of the SCA as quoted in paragraph 23 above, suggests a ruling against it was on a wide range of issues similar to those in the present application. That being so, it must be accepted that, there would be no reasonable prospects of success on appeal to the SCA.

[26] The Commission seems to deliberately ignore the essence of the order and decision of this Court in the main judgment. It was made clear that no final determination is made regarding the initiation of the complaint and Mondi`s desire to have the decision in initiating the complaint reviewed and set aside. This court had to deal with the initiation of complaint because the Commission wanted to use that as the basis for refusing to make a disclosure of the record of the decision in terms of Rule 53. This aspects has been dealt with in the main judgment supported, in my view, by the SCA in the prior judgments; and the most recent one being the Computicket matter referred to earlier in this judgment. There is just no merit to the appeal by the Commission.

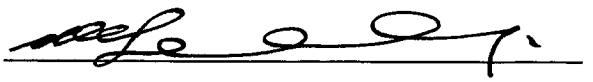
[27] I now turn to deal with prospects of success concerning Mondi`s application.

Counsel for Mondi strongly argued against qualifications set out in paragraphs 57.2.1 and 57.2.1.1 of the order. I was made to understand that the qualifications had posed a prolonged problem as the Commission refuses to furnish documents referred to in the "Schedule of documents in the Commission`s record."

[27] I cannot make it clearer than what is stated in paragraph 46 of the main judgment. Anything short of what is stated therein, should entitle Mondi to the documents. I therefore do not think that that there are reasonable prospects *of* success on appeal. The context to the qualifications should also be seen in the light of the statement, "In their submissions these informants identified the information as confidential in terms of section 44 (1) of the Competition Act 89 of 1998", recorded in paragraph 16 of the Commission`s answering affidavit and quoted in paragraph 44 of the main judgment, unsubstantiated as the averments might have been.

[28] Mondi is at liberty to enforce the order should it feel that the Commission refuses to provide the documents not covered by the qualifications in paragraphs 57.2.1 and 57.2.1.1 of the order read in the context of paragraph 46 of the main judgment. I am also not satisfied that there is any merit to the grounds of appeal regarding the restricted documents.

[29] Consequently both applications for leave to appeal are hereby dismissed and each party to pay its own costs.



M F LEGODI

JUDGE OF THE HIGH COURT

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