THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 853/2013

In the matter between:

THE COMPETITION COMMISSION **APPLICANT**

and

COMPUTICKET (PTY) LTD **RESPONDENT**

Neutral citation:	*The Competition Commission v Computicket* (853/13) [2014] ZASCA 185 (26 November 2014).
Coram:	Brand, Ponnan, Theron, Zondi JJA *et* Fourie AJA
Heard:	**12 November 2014**
Delivered:	**26 November 2014**

Summary: Competition Act 89 of 1998 (the Act) – after the amendment to s 168(3) of the Constitution in terms of the 17th Constitution Amendment Act 2012 – appellate jurisdiction of the SCA confined to matters contemplated in s 62(2) of the Act – meaning of 'constitutional matter' in s 62(2)(*b*) of the Act – whether appellate jurisdiction in 'constitutional matters' reserved for the Constitutional Court exclusively in terms of s 63(2) of the Act – application for leave to appeal – consideration of prospects of success on appeal.

ORDER

On appeal from: Application for leave to appeal to this court against a judgment and order of the Competition Appeal Court of South Africa (Swain AJA, Davis JP and Dambuza JA, concurring):

The application for leave to appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Brand JA (Ponnan, Theron, Zondi JJA *et* Fourie AJA concurring):

[1] This is an application for leave to appeal to this court against a judgment and order of the Competition Appeal Court (the CAC) which overturned the dismissal of an interlocutory application by the Competition Tribunal (the Tribunal). The applicant is the Competition Commission (the Commission) and the respondent is Computicket (Pty) Ltd (Computicket). The matter has its origin in five complaints which were submitted to the Commission against Computicket in terms of s 49B of the Competition Act 89 of 1998 (the Act). These complaints arose from the exclusivity clauses contained in contracts entered into by Computicket with theatre owners, festival event organisers and others in the entertainment industry, for the provision of ticket distribution services.

[2] Following upon investigations into these complaints, the Commission decided that prohibited practices by Computicket had been established as envisaged by the Act, in that it had involved itself in exclusionary and anti-competitive conduct. In consequence the Commission filed a referral of these complaints to the Tribunal in terms of s 50(2)(*a*) of the Act. After pleadings had been closed and discovery completed, but before any evidence was led, Computicket brought an application before the Tribunal to review and set aside the decision by the Commission to refer

the complaints, on the basis that, in taking that decision, the Commission had failed to act reasonably, objectively and in good faith.

[3] But, before the Tribunal could hear the review application, Computicket launched an interlocutory application which moved proceedings a step even further away from the hearing on the merits of the case. In this interlocutory application, which led to the present proceedings, Computicket essentially sought production of the record on which the challenged decision was based. In the event, the Tribunal refused to grant the relief sought. An appeal to the CAC against that refusal proved to be successful. The CAC granted the following order:

'(a) The appeal is upheld and . . . the Tribunal's decision is substituted by the orders in paragraphs (b), (c) and (d) below.

(b) The respondent [the Commission] is directed to discover the reports and recommendations which were placed before the Competition Commissioner and/or the Executive Committee of the Competition Commission, when the decision was taken to refer the complaints of alleged dominance against the appellant to the Competition Tribunal, save however that the respondent is not obliged to produce the contents of such reports and recommendations in accordance with Rule 14 of the Rules of the Commission, except to the extent and in the respects set out in paragraph (c).

(c) The respondent is directed to discover and produce for inspection all of the evidence which was placed before the Competition Commissioner and/or the Executive Committee of the Competition Commission, when the decision was taken to refer the complaints of alleged dominance against the appellant, to the Competition Tribunal, including the evidence upon which the reports and recommendations referred to in paragraph (b) were based.

(d) The appellant is awarded costs such costs to include the costs of two counsel.'

[4] The Commission applied to the CAC for leave to appeal to this court against that order. The application was, however, refused on 20 September 2013. Following upon the refusal, the Commission brought an application for the same relief in this court. In the event, two of our colleagues referred that application for oral argument in terms of s 21(3)(*c*)(ii) of the Supreme Court Act 59 of 1959. During the course of hearing that argument, counsel for both parties also accepted the invitation to address us on the merits of the appeal. Before considering these arguments, there is, however, another matter. In its judgment refusing leave, the CAC raised an issue which appears to be antecedent to all others. It is this: would this court have

jurisdiction to hear the appeal proposed by the application in the light of the 17th Constitution Amendment Act which took effect on 23 August 2013?

Jurisdiction of this court

[5] In considering this issue the starting point seems to lie in ss 62 and 63 of the Act. They provide in relevant part:

'62 Appellate jurisdiction

(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:

(a) Interpretation and application of Chapters 2, 3 and 5, other than –

(i) a question or matter referred to in subsection (2); or

(ii) . . .

(b) the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2).

(2) In addition to any jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over –

(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act;

(b) any constitutional matter arising in terms of this Act; and

(c) the question whether a matter falls within the exclusive jurisdiction granted under subsection (1).

(3) The jurisdiction of the Competition Appeal Court –

(a) is final over a matter within its exclusive jurisdiction in terms of subsection (1); and

(b) is neither exclusive nor final in respect of a matter within its jurisdiction in terms of subsection (2).

(4) 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 Constitutional Court, subject to section 63 and their respective rules.

(5) . . .

63 Leave to appeal

(1) The right to an 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;

(b) is not limited by monetary value of the matter in dispute; and

(c) exists even if the matter in dispute is incapable of being valued in money.

(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.

(3) . . ..'

[6] Section 62 undoubtedly constitutes a statutory endeavour to vest final appellate jurisdiction with regard to matters referred to in sub-section (1) in the CAC. Conversely, the legislature's clear intent was to confine the appellate jurisdiction of this court and the Constitutional Court to matters referred to in s 62(2). Nonetheless, despite this clearly expressed limitation it was held in *American Natural Soda Ash Corporation & another v Competition Commission & others* 2005 (6) SA 158 (SCA) that this court also has jurisdiction to hear matters contemplated in s 62(1). This decision followed upon the earlier judgment of *National Union of Metal Workers of SA & others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) which concerned the provisions of similar import in s 183 of the Labour Relations Act 66 of 1995. Both these decisions were premised on s 168(3) of the Constitution before its amendment by s 4 of the 17th Constitution Amendment Act. In its unamended form s 168(3) provided:

'The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only-

(a) appeals;

(b) issues connected with appeals; and

(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.'

[7] In the light of s 168(3) this court held in *Fry's Metals*, as it was subsequently conveniently summarised in *American Natural Soda Ash* (at para 11):

'In *National Union of Metalworkers v Fry's Metals*, which was argued before the same panel in the same week as the present application, we held that:

[11.1] Any legislative endeavour to vest final appellate jurisdiction in an appeal Court other than this Court has to be judged in the light of the appellate structures created by the Constitution.
[11.2] The Constitution provides not only that this Court "may decide appeals in any matter", but that it "is the highest Court of appeal except in constitutional matters" (s 168(3)): this provision superseded both the statutory and common-law sources of this Court's jurisdiction, and there can be no reason to give it less than its full meaning in relation to both constitutional and non-constitutional matters.
[11.3] The Constitution's typology of final appellate Courts is exhaustive: it does not envisage other final appeal Courts with authority equivalent to that of this Court and of the CC.
[11.4] This Court's appellate powers do not derive from any particular statute, but from the Constitution itself.
[11.5] The Constitution does not envisage that legislation can assign the jurisdiction of this Court piecemeal or wholesale to other specialist tribunals with final appellate jurisdiction.
[11.6] The Legislature may create rights that are not appealable; but once appellate jurisdiction falls to be exercised, this Court is empowered to exercise it finally (apart from the CC), since final appellate tribunals with authority similar to this Court are not envisaged in the Constitution.'

[8] In *American Natural Soda Ash* this court then proceeded to explain that s 62 of the Act is governed by the same reasoning as s 183 of the Labour Relations Act and that in consequence (para 14):
'The apparent attempt to vest exclusive jurisdiction in the CAC . . . must thus be read so as to be consistent with the Constitution, and the finality conferred on the CAC by s 62(3)(*a*) is thus subordinate to the appellate powers the Constitution confers on this Court. It follows that this Court has jurisdiction to consider the substance of the application for leave to appeal.'

[9] However, as we now know, s 168(3) of the Constitution, which formed the bedrock of both *Fry's Metals* and *American Natural Soda Ash*, was materially amended by s 4 of the 17th Constitution Amendment Act. After that amendment, it now reads:
'The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in

respect of labour or competition matters to such extent as it may be determined by an Act of Parliament

The Supreme Court of Appeal may decide only-

(i) appeals;

(ii) issues connected with appeals; and

(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.' (My emphasis.)

[10] In *National Union of Public Service and Allied Workers obo Mani & others v National Lottery Board* 2014 (3) SA 544 (CC) (para 40, note 26), Froneman J held, albeit *obiter*, that as a result of the 17th Constitution Amendment Act the right of appeal against a judgment of the Labour Appeal Court to the Supreme Court of Appeal, no longer exists. Not only do I find myself in respectful agreement with this conclusion, but I also believe that it is of direct application in this case. It is true that Froneman J was dealing with the Labour Relations Act and that the wording of the relevant section of that Act – s 183 – is quite different to s 62. Nonetheless, I do not believe that the difference impacts on the principle that concerns us.

[11] *Soda Ash*, drawing on *Fry's Metals*, held that s 168(3) of the Constitution superseded both the statutory and common-law sources of this court's jurisdiction and that this court derived its jurisdiction in respect of competition matters from that provision. The effect of the amendment is that this court can no longer rely on that provision as the source of its jurisdiction. This court's jurisdiction must accordingly be sourced in the Act.

[12] As I see it the judgment of the CAC under consideration falls within the ambit of s 62(1)(*b*) in that it was given in the exercise of its 'functions' referred to in s 37(1)(*b*)(ii) of the Act. This court's jurisdiction therefore turns on whether the CAC's decision to order the discovery and production of documents pursuant to s 37(1)(*b*)(ii) can be said to constitute a 'matter referred to in s 62(2)'. For the sake of convenience, I repeat the three categories mentioned in that sub-section:

(a) The question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of this Act;

(b) Any constitutional matter arising in terms of this Act; and

(c) The question whether a matter falls within the exclusive jurisdiction granted under sub-section (1).

[13] In arguing that the decision of the CAC is covered by s 62(2), the Commission did not place any reliance on s 62(2)(*c*). It was clearly right in not doing so. It did, however, rely on sections 62(2)(*a*) and (*b*). With regard to s 62(2)(*a*) I accept, at least for the sake of argument, that the application for the review of the Commission's decision to refer – which is still to follow – would constitute a 'question whether action proposed to be taken by the Tribunal is within its jurisdiction in terms of the Act'. I say that because, if the complaints were not properly referred by the Commission in terms of s 50(2), the Tribunal would have no jurisdiction to entertain them. But the question is whether the interlocutory application to compel discovery and production of documents which precedes the review application – as opposed to the review application itself – can also be brought home under s 62(2)(*a*). I do not think so. It is true that the interlocutory application is incidental to the review application – in the sense that, but for the latter, the former serves no purpose. Yet, that does not mean that the two are the same, or that one can simply conflate the two. Because they are discrete proceedings which are to be determined separately, considerations pertaining to the one cannot willy-nilly be transposed onto the other. The fundamental difference is that, unlike the review application, the outcome of the interlocutory application can have no effect on the jurisdiction of the Tribunal. Ergo it cannot be said to involve a question concerning jurisdiction as envisaged by s 62(2)(*a*).

[14] With reference to s 62(2)(*b*) the Commission's argument as to why this is a 'constitutional matter' relied first and foremost on the proposition that Computicket's review application is based on the constitutional principle of legality as recognised, for example, in *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 47. The premise of the argument that the review application rests on the legality principle is undoubtedly correct. Yet the further progression of the Commission's argument again conflates the interlocutory application with the review application. Once the two are distinguished, as they

should be, it becomes clear that while the latter relies on the legality principle the former does not.

[15] The second string to the Commission's constitutional bow was that the right to discovery and production of documents which Computicket seeks to enforce in the interlocutory application ultimately derives from the right to a fair hearing in terms of s 34 of the Constitution. This, so the argument went, renders the interlocutory application in itself a 'constitutional matter'. Again, the premise of the argument cannot be faulted. After all, the proposition had been confirmed in terms by this court (see eg *Bridon International GMBH v International Trade Administration Commission & others* 2013 (3) SA 197 (SCA) para 32). But I do not believe that the concept of a 'constitutional matter' can be afforded that wide meaning in s 62(2)(*b*). I say that because in that wide sense, most, if not all disputes can ultimately be traced back to the Constitution. It would for example, also include a rather mundane application to compel further particulars. At the same time, that would render the exclusive jurisdiction of the CAC in certain matters – which is the main theme of s 62 – illusory (cf *S v Boesak* 2001 (1) SA 912 (CC) para 15). This means that 'constitutional matters' in s 62(2)(*b*) must be afforded a narrower meaning. I find support for this approach in the following statement by the Constitutional Court in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) at paras 36-40:

'. . . Philosophically and conceptually it is difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy. All law is after all subject to the Constitution and law inconsistent with the Constitution is invalid. Nevertheless the jurisdiction of this Court is expressly restricted to only those matters outlined in s 167(3)*(b).*

. . .

While the conception of a constitutional matter is broad, the term is of course not completely open. The fact that s 167(3)*(b)* of the Constitution limits this Court's jurisdiction to constitutional matters presupposes that a meaningful line must be drawn between constitutional and non-constitutional matters and it is the responsibility of this Court to do so.

. . .

A contention that a lower Court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in

constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a *bona fide* constitutional question.'

[16] Applying this narrower interpretation I do not believe that the present matter falls within the ambit of 'a constitutional matter'. Computicket's right to a fair hearing was never in dispute. Nor was its right, in principle, to discovery and production of documents. Indeed, in this case the discovery process had been completed. What Computicket essentially sought and obtained was an order for identification or specification of the documents – presumably already discovered by the Commission – that were before the Commission when it took the referral decision which is the subject of the review application. That, as I see it, does not involve a constitutional issue and therefore does not fall within the ambit of a 'constitutional matter' as contemplated by s 62(2)(*b*).

[17] On that basis alone, I remain unpersuaded that this court would have jurisdiction to hear the proposed appeal. But there is more. On my understanding of s 63(2) it reserves appeals on constitutional matters exclusively for the jurisdiction of the Constitutional Court. What s 63(2) contemplates is 'an appeal in terms of s 62(4) . . .'. That is 'an appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of sub-section (2)', either to this court or the Constitutional Court. Section 63(2) then provides that such an appeal 'may be brought to the Supreme Court of Appeal or, if it concerns a constitutional matter, to the Constitutional Court . . . '. Literally understood it leaves no room for an interpretation which effectively adds an 'also' prior to 'to the Constitutional Court', ie that if an appeal concerns a constitutional matter it may be brought to this court and <u>also</u> to the Constitutional Court. Moreover, on a purposive approach it makes sense to me that a disgruntled litigant who seeks to appeal from the decision of the CAC, is compelled to decide whether to direct his or her appeal to this court or the Constitutional Court, the dividing line being whether the matter is constitutional or not. The underlying motivation would be that there is no reason why a case which had already gone through two courts deserves consideration by two further courts. This means that even if the present matter does fall within the ambit of 'constitutional' as contemplated by s 62(2)(*b*) – which, in my view, it does not– the

jurisdiction of this court to hear the proposed appeal would in any event be excluded by s 63(2).

The Merits

[18] This is really the end of the matter. Yet, since I hold a firm view that, in any event, the proposed appeal is devoid of merit, I shall state the reasons that led me to that conclusion. However, in the circumstances I shall do so succinctly and without elaboration. The starting point, as I see it, is the concession by the Commission that, although a referral decision in terms of s 50(2) of the Act does not constitute administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000, it is nonetheless reviewable on the basis of the legality principle. This concession was rightly made in accordance with this court's decisions (eg in *Competition Commission of South Africa v Telkom SA Ltd & others* [2010] 2 All SA 433 (SCA) paras 11-12; *Competition Commission v Yara (SA) (Pty) Ltd & others* 2013 (6) SA 404 (SCA) para 26).

[19] As a second step, the Commission also conceded that, since the decision to refer is reviewable, Computicket is entitled, as a matter of principle, to discovery and production of the material that was before the decision-maker when that decision was taken. The correctness of that concession appears, inter alia, from the following statement by Navsa JA in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA) para 37:

'. . . It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed . . ..'

(See also *Bridon International GMBH v International Trade Administration Commission & others* 2013 (3) SA 197 (SCA) paras 31-32.)

[20] At first sight one could be pardoned for thinking that, in the light of these two concessions the Commission would have no answer to Computicket's demand for

the record which formed the basis of the decision it seeks to challenge. Nonetheless, the Commission offered not only one, but two answers. Its first answer was that in order to demand the record, Computicket had to make out a *prima facie* case for review. The only basis relied upon for this contention was that Computicket bears the onus of establishing its review grounds. But as I see it, the basis relied upon amounts to a *non sequitur*. I agree with the CAC's finding that this argument effectively places the cart before the horse. Not infrequently the ability of an applicant for review to discharge the onus resting on it to make out a case, will depend on considerations appearing – or not appearing – from the record of the material upon which the challenged decision had been made. Moreover, upholding the Commission's argument would give rise to a two stage enquiry on the merits of the case: first, without the record to determine whether the applicant had made out a prima facie case. If the applicant clears that hurdle, the second stage enquiry then follows to finally determine the merits, this time with the benefit of the record which had now been made available. The proposed scenario, for which there appears to be no justification in logic, is clearly unsustainable. Finally, the argument under consideration is not supported by Rule 53. In terms of this rule, the obligation to produce the record automatically follows upon the launch of the application, however ill-founded that application may later turn out to be.

[21] For its second answer the Commission relied on the proposition that its decision to refer the complaints is only a preliminary step in a continuing administrative process. Proceeding from this premise the Commission argued that this preliminary step should, as a general rule, not be open to a challenge in review proceedings brought prior to the hearing and determination of the complaint proceedings by the Tribunal. In consequence, so the argument went, Computicket had to put up exceptional circumstances that would justify the court entertaining a review in the middle of an ongoing case. In support of this argument the Commission sought to rely on the well-established principle that trial proceedings, be it criminal or civil, should only be interrupted by way of a midstream review where there are compelling reasons to do so (see eg *Walhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 120A-B; *S v Mhlungu & others* 1995 (3) SA 867 (CC) at para 58).

[22] However, I find the argument fundamentally flawed. The flaw, as I see it, lies in the premise that the decision to refer a complaint is part of an ongoing process. It is not. It is a discrete decision which, in conformity with the Commission's concession – rightly made – is, in itself, subject to a legality review. Once that is appreciated, it follows that in accordance with general principles governing administrative reviews, these review proceedings must commence within a reasonable time after the challenged decision had been communicated to the applicant so as to prevent someone acting upon the supposed validity of the challenged decision (see eg *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46). In this light I believe that were this court to have had jurisdiction to enter into the merits of the appeal, the matter is devoid of substance and the appeal ought on that score as well to have failed.

[23] For these reasons the application for leave to appeal is dismissed with costs, including the costs of two counsel.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	G J Marcus SC, J Wilson, P M P Ngcongo Instructed by: The State Attorney Johannesburg c/o N W Phalatsi & Partners Bloemfontein
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