THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 836/2023

In the matter between:

DOORWARE CC **APPLICANT**

and

MERCURY FITTINGS CC **RESPONDENT**

Neutral citation: *Doorware CC v Mercury Fittings CC* (Case no 836/2023) [2025] ZASCA 25 (27 March 2025)

Coram: MOKGOHLOA ADP, SCHIPPERS and WEINER JJA and MODIBA and NORMAN AJJA

Heard: 27 February 2025

Delivered: 27 March 2025

Summary: Application for leave to appeal – dispute as to whether agreement exists – referred to oral evidence – interim interdict granted – applicant not establishing exceptional circumstances justifying reconsideration of decision refusing leave to appeal – interim interdict not appealable.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Oosthuizen-Senekal AJ, sitting as court of first instance):
The application is struck from the roll with costs.

JUDGMENT

Mokgohloa ADP (Schippers and Weiner JJA and Modiba and Norman AJJA concurring):

[1] This is an application for leave to appeal, referred to this Court for reconsideration in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013.

[2] The applicant, Doorware CC (Doorware), appeals a decision of the Gauteng Division of the High Court, Johannesburg (the high court), which made an order referring a dispute relating to the existence of an agreement between the parties to oral evidence. The high court also granted an interdict in favour of the respondent, Mercury Fittings CC (Mercury Fittings), in terms of which Doorware was interdicted from: (i) conducting business in the Western, Eastern and Northern Cape which, according to an oral agreement between the owners of Mercury Fittings and Doorware, are the areas of business of Mercury Fittings; (ii) selling any product in the QS Product range from Doorware's office in Muizenberg, Cape Town; and (iii) opening offices in the restricted areas (the interim interdict).

The facts

[3] Mr Andrew Osborne-Young (Mr Osborne-Young) was the sole member of Mercury Fittings and Mr Martin Humphry (Mr Humphry) owned Doorware. During 2002, the parties decided to join forces to import, sell and distribute stainless-steel ironmongery and door controls, called Quicksilver (QS). The parties agreed that they would conduct their businesses independently from each other, and that they would not compete in certain geographical areas. To this end, they agreed that Mercury Fittings would trade in the Western, Northern and Eastern Cape, and Doorware would cover the rest of South Africa.

[4] The parties further agreed to supply QS goods to Massmart Holdings Ltd (Massmart) under the name of Mercury Fittings. This was because Mr Osborne-Young had a legacy account and vendor number with Massmart. They agreed that each of them would supply goods to Massmart within their geographically allocated areas; that Doorware would submit its invoices to Mercury Fittings for inclusion in the latter's statement to Massmart; and that Mercury Fittings would do a reconciliation and pay the amounts due to Doorware. Mr Osborne-Young passed away on 7 July 2021. Thereafter, his wife took over control of the business and appointed a CEO to assist in the running of Mercury Fittings.

[5] On 24 August 2021 Mr Humphry sent a proposed Memorandum of Understanding (MOU) to Mercury Fittings. In his answering affidavit, Mr Humphry stated: 'I would like to enter into a new agreement with him (acting as AOY's executor) setting out how I foresaw a future possible relationship between the two close corporations and how we should merge the QS brand going forward'. This MOU was never signed.

[6] During August 2022, Ms Rebecca Humphry (Rebecca), Mr Humphry's daughter and the CEO of Doorware, changed the supply, payment and contact details of Mercury Fittings' account with Massmart. In January 2023, Doorware opened an office in Cape Town, which in terms of the oral agreement, is Mercury Fittings' area of business. Consequently, Mercury Fittings launched an urgent application to interdict and restrain Doorware from breaching the terms of the oral agreement.

[7] In opposing the application in the high court**,** Doorware denied the existence of an agreement between the parties and stated that the agreement between Mr Osborne-Young and Mr Humphry was 'a gentlemen's agreement', which came to an end upon the former's death. It submitted that there were disputes of fact which were not capable of being resolved on the papers.

[8] The high court found that there were factual disputes regarding the existence of the agreement between the parties; and that the manner in which they conducted their businesses over two decades could not be ignored. It therefore referred the dispute regarding the existence and the nature of the agreement, and whether it is binding on their heirs and successors in title, to oral evidence.

Has Doorware established exceptional circumstances?

[9] Section 17(2)*(d)* of the Superior Courts Act 10 of 2013 (Superior Courts Act) authorises the two Judges of Appeal considering an application for leave to appeal, to dispose of the application without the hearing of oral argument.

[10] Section 17(2)*(f)* provides:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be

final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'[1]

[11] The first inquiry is thus whether there are exceptional circumstances that justify reconsideration of the decision refusing Doorware leave to appeal. In *Motsoeneng*,[2] this Court held that the power to decide whether there are exceptional circumstances vests in the Court to which the referral is made in terms of s 17(2)*(f)*. If the applicant fails to meet this requirement, the application for reconsideration cannot succeed.

[12] The grounds for reconsideration are that this application raises a legal argument that has not been canvassed in the high court; and that it is in the interests of justice that leave to appeal be granted. Doorware's counsel submitted that the interim interdict was wrongly issued because it is contrary to Chapter 2 of the Competition Act 89 of 1998 (the Competition Act), which is a function exclusively within the jurisdiction of the Competition Tribunal as contemplated in s 27(1)*(c)* of the Competition Act.[3]

[13] It was further submitted that the oral agreement entered into between the parties constitutes a prohibited restrictive horizontal practice as contemplated in s 4(1)(*b*) of the Competition Act because: (i) the parties are in a horizontal relationship with one another in that they are competitors; (ii) they divided

[1] Section 17(2)*(f)* has been amended on 3 April 2024. The proviso now reads:
'Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'
[2] *Motsoeneng v South African Broadcasting Corporation Soc Ltd and Others* [2024] ZASCA 80 para 14
[3] Section 27(1)*(c)* of the Competition Act provides inter alia that the Competition Tribunal may adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred and if so, to impose any remedy provided for in the Act.

geographical areas of South Africa in order to avoid unnecessary competition in the country; and (iii) they agreed that each party would have exclusive rights to sell and market the QS products within their allocated geographical areas.

[14] These grounds do not constitute exceptional circumstances. Section 65(2) of the Competition Act provides:

'(2) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.'

[15] Section 65(2) requires that a party who alleges that conduct is prohibited in terms of the Competition Act, to raise that issue. Doorware failed to raise this issue in the high court and has provided no explanation for its failure to do so. Consequently, that court was not placed in a position to decide whether the issue had been raised frivolously or vexatiously; and that its resolution was required to determine the outcome of the case.

[16] The s 4(1)*(b)* point also does not constitute an exceptional circumstance, for the simple reason that Mercury Fittings should have been given notice of the point. It is settled law that the affidavits in application proceedings constitute both the pleadings and the evidence.[4] Had Mercury Fittings been given notice, it could

[4] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para 28 where Cloete JA said: 'In motion proceedings the affidavits constitute not only the evidence, but also the pleadings.'

have dealt with the s 4(1) defence in the proceedings before the high court. Litigation by ambush is not permissible.[5]

[17] In any event, the s 4(1) point has no merit. Section 4(1)*(b)* of the Competition Act provides:

'(1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if-
(a) . . .
(b) It involves any of the following *restrictive horizontal practices*:
(i) directly or indirectly fixing a purchase or selling price or any other trading condition;
(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or
(iii) collusive tendering.'

[18] The parties were not in a horizontal relationship, defined as 'a relationship between competitors'. They were not competitors. Rather, they agreed to offer the same goods at the same prices in different geographical areas of the country for reasons of practicality, convenience and efficiency. This is evident from Mr Humphry's answering affidavit where he stated:

'12.12 As AOY [Andrew Osborne-Young] lived in Cape Town and I lived in Johannesburg, we decided that in the interest(s) of practicality and expediency, we would combine our efforts to sell within our respective areas and to grow the QS brand without adding transport costs to the cost of the product. This meant that AOY would service the Western, Eastern and Northern Cape and I would service the remainder of South Africa;
12.13 The primary consideration in the above regard was each company's ability to service customers best from their geographical location.'

See also *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) para 171.
[5] In *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] SCA 153 (RSA) at para 43 referencing '*Transnet Ltd v Rubenstein*... the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[19] Further, in *American Natural Soda Ash Corporation and Another v Competition Commission and Others*,[6] this Court held that the process to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct involves two enquiries: (i) the scope of the prohibition, which is a matter of statutory construction; and (ii) the nature of the conduct complained of, which is a factual enquiry. Therefore, it is open to Mercury Fittings to place facts before a court to contradict the allegations by Doorware that (i) the parties are in a horizontal relationship and are competitors; (ii) that they divided geographical areas to avoid competition; and (iii) that the arrangement between them is not anti-competitive. For these reasons, this Court cannot decide the s 4(1)(*b*) point. There is nothing that prevents Doorware from raising the point in the high court proceedings as an alternative to its defence that no agreement was concluded between the parties.

The interim interdict is not appealable

[20] In *Von Abo* this Court summarised the approach to the appealability of an order as follows:

'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the right of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'[7]

[6] *American Natural Soda Ash Corporation and Another v Competition Commission and Others* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005] 3 All SA 1 (SCA); 2005 (6) SA 158 (SCA); 2005 (9) BCLR 862 (SCA) at para 47.

[7] *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261; affirmed in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) para 42.

[21] It is not in the interests of justice that leave to appeal should be granted against the interim interdict. The order granted by the high court is neither final in effect, nor definitive of the rights of the parties. On the contrary, the main dispute between the parties - whether they concluded an agreement and whether it is binding on their heirs - is pending before the high court; and, we have been informed, before the Competition Tribunal. It is in the interests of justice that there should not be any further delay in deciding this issue, and piecemeal appeals should be avoided. For these reasons, the interim interdict is not appealable.

[22] In the result, the following order is issued:
The application is struck from the roll with costs.

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F E MOKGOHLOA
JUDGE OF APPEAL

Appearances

For the appellant:	Adv JJ Brett SC (with Adv L F Laughland)
Instructed by:	Adams Attorneys, Johannesburg
	Honey & Partners Incorporated, Bloemfontein
For the respondent:	P Tredoux
Instructed by:	STBB Smith Tabata Buchanan Boyes Inc, Claremont
	EGCM Attorneys, Bloemfontein.