



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Civil Case No. 1639/2012

In the matter between

PICK’N PAY RETAILERS (PTY) LIMITED

1ST APPLICANT

THE HAMMOND BROTHERS (PTY) LIMITED

2ND APPLICANT

And

THE GABLES (PTY) LIMITED

1ST RESPONDENT

OK BAZAARS T/A SHOPRITE

2ND RESPONDENT

THE SWAZILAND COMETITION COMMISION

3RD RESPONDENT

Neutral citation: *Pick’ n Pay Retailers (Pty) Limited and another vs The Gables (Pty) Limited and two others (1639/2012)* March 2013 [SZHC]

Coram: **OTA J.**

Heard: **1st March 2013**

Delivered: **11th March 2013**

Summary: The Swaziland Competition Act 2007: whether ousts the inherent jurisdiction of the High court to determine competition issues: exclusivity clause in lease: investigation into same pending before the Competition Commission before action launched in court: better approach of courts in the circumstances: disputes of fact: principles thereof.

OTA J.

[1] When this matter served before me on the 1st of March 2013, I made the following orders:-

1. *That the main application under Case No. 1639/2012 be and is hereby struck off the roll pending the outcome of the investigation by the Intervening Party (Swaziland Competition Commission) and may be re-instated thereafter.*
2. *The question of costs to be determined in the cause on the reinstatement of the main application or in the alternative.*
3. *Any party is at liberty at the conclusion of the investigation by the Intervening party to apply for costs.*

[2] I reserved my reasons for the foregoing orders which I now proceed to advance.

[3] It is apposite for me at this juncture to give a short description of the parties herein for a better understanding of the issues at hand.

[4] The 1st applicant is PICK’N PAY RETAILERS (PTY) LIMITED, a company registered and incorporated according to the Company Laws of the

Republic of South Africa and which carries on business at Pick'n Pay Office Park, 2 Allum Road, Kensington, Bedford View, Republic of South Africa.

[5] The 2nd Applicant is THE HAMMOND BROTHERS (PTY) LIMITED, a company duly registered and incorporated in terms of the Company Laws of Swaziland, a franchisee of the 1st Applicant with its principle place of business at The Gables (Pty) Limited in Ezulwini, in the District of Manzini Swaziland.

[6] The 2nd Respondent is OK BAZAARS T/A SHOPRITE, a company registered and incorporated as such, according to the Company Laws of the Kingdom of Swaziland, with the registered address being Xpedia Consulting, 2nd floor, Development House, Swazi Plaza, Mbabane, Swaziland. 2nd Respondent did not participate in these proceedings. It chose to abide by the decision of the court.

[7] The 3rd Respondent is the SWAZILAND COMPETITION COMMISSION, a statutory body established in terms of section 6 of The Swaziland Competition Commission Act, Act No. 8 of 2007, with its principle place of business at Ground floor, Mv-Tel Building, Sidwashini, Mbabane.

- [8] What appears to be the genesis of this whole matter is a lease agreement which the 2nd Applicant as lessee and as a franchisee of the 1st Applicant, signed in the year 2001 with the 1st Respondent as lessor. The lease was for a duration of 10 years subject to two options of renewal each for 5 years and was to commence on the 21st of November 2001 and terminate on the 31st of October 2011.
- [9] The property to be leased to the 2nd Applicant was described as the Gables Portion 60 (a portion of portion 21) of Farm 51, in the District of Hhohho, Swaziland. By the tenor of the lease agreement, the 2nd Applicant was to use the supermarket only for the purpose of conducting a Pick'n Pay family supermarket and same was to include the activities of conducting a butchery, bakery, the sale of food stuff and food products, the sale of clothes, and any other business allied or incidental to those.
- [10] The lessor was also to ensure that the supermarket was constructed in compliance with the building specification and the National building regulations and all other lawful requirements of all authorities.

[11] I should mention also here that a very vital provision of the 2001 agreement, one which has now slithly reared up as a controversial ghost in subsequent relations between the parties, was contained in clauses 26.3 to 26.4 thereof, which state as follows:-

“26.3 *Save in respect of the supermarket, the lessor shall not permit the following business to be conducted on the property*

26.3.1 *a supermarket, or*

26.3.2 *a store with either a single or several food department, the aggregate square meterage of which exceeds 100 (one hundred) square meters, or*

26.3.3 *a café or delicatessen which sells fresh fish or meat or*

26.3.4 *a grocery, fresh fish shop, butchery, bakery or fruit and vegetable shop.*

26.4 *No kiosks or structures may be placed or constructed in the shopping centre within a distance of 30 (thirty) meters of the supermarket’s entrance without the lessee’s prior written approval”*

[12] It is the foregoing provision, which we have now come to know and recognize as the exclusivity clause that generated the acrimony that has dragged the parties into court.

[13] I should mention that at some period during the tenure of the 2001 lease, the 1st Respondent requested and was permitted by the Applicants to allow Woolworths Clothing and Food Court, to be established in the property.

[14] It appears that in 2009, 7 years into the life span of the 2001 lease agreement, the 1st Respondent agreed with the 1st Applicant that the latter could relocate to other premises in the same property. The relocation necessitated change in some of the terms of the lease agreement. It was this factor that led to the parties signing what they termed heads of agreement on the 23rd, 24th and 27th of October 2009, to develop and lease relating to the leasing of the supermarket inclusive of the terms of occupancy of the new area. The heads of agreement, it is common cause, is an agreement to enter into a new agreement. It appears that prior to the commencement of the new lease, the terms and conditions contained in the 2001 lease agreement was to prevail between the parties, as per the heads of agreement.

[15] It is apparent from the papers that the 2nd Applicant duly prepared a new lease agreement which incorporated exclusivity clauses akin to that in the 2001 lease, contending that this was the agreement between the parties as per the heads of agreement. The 1st Respondent for its part refused to sign

the new lease agreement contending for a relaxation of the exclusivity clause on the grounds that it was quite entitled to negotiate the terms and conditions of the new lease which it says had not been settled or concluded by the parties. This state of affairs, generated a series of communication between the parties which demonstrate a dogged reliance of the parties on their respective posture, ultimately leading to an impasse.

[16] It appears that a shadow lurking in the dark of the grouse between the parties, is that the 1st Respondent began a new construction in the property with a view to negotiating an agreement with the 2nd Respondent OK Bazaars t/a Shoprite (Shoprite), to operate a supermarket therein. This development did not sit well with the Applicants who viewed it as a violation of the exclusivity clause. The 1st Respondent however holds to the contrary thus the impasse.

[17] I should mention here that in 2007 during the life span of the 2001 lease, the 3rd Respondent, The Competition Commission (the Commission), was established in terms of section 6 of the Swaziland Competition Commission Act, Act No. 8 of 2007. (The Act). Section 11 of the Act empowers the

Commission to *”monitor, regulate, control and prevent acts or behavior which are likely to affect competition in the country”*.

[18] In the wake of the acrimony between the parties with respect to the exclusivity clause and its inclusion in the new lease, the 1st Respondent initiated a complaint to the Commission pursuant to Regulation 12 (2) of the Competition Commission Regulations, wherein it called upon the Commission to investigate the exclusivity clause to ascertain if it violates the Act.

[19] It is on record that on the 24th of September 2012, the Commission addressed a letter to the 2nd Applicant advising it that it was desirous of investigating the agreement between the 2nd Applicant and the 1st Respondent for possible violation of the Act and requesting the 2nd Applicants response to certain information in relation to the proposed investigation.

[20] The record demonstrates that on the 27th of September 2012, apparently after the 2nd Applicant had received the notification of the intended investigation by the Commission, the Applicants launched the main application against the 1st Respondent seeking the following reliefs:-

1. *Interdicting and restraining the Respondent from breaching the exclusivity clause entrenched in the agreements signed between the parties.*
2. *Interdicting and restraining the Respondent from permitting the business of a supermarket or hypermarket to be conducted at its property at the Gables Shopping Centre or any neighbouring property onto which the Gables Shopping Centre is expanded, save for and excluding the supermarket business being the subject matter of the agreement between the Applicants and Respondent and the Woolworths Store.*
3. *Interdicting and restraining the Respondent from leasing out its property at the Gables Shopping Centre or any neighbouring property onto which the Gables Shopping Centre is expanded to Shoprite Checkers and / or any supermarket or hypermarket, save for the supermarket business being the subject matter of the agreements between the Applicants and Respondent and the Woolworths Store, or to a store with either a single or several food department or a grocery store or butchery or delicatessen or a bakery or a fruit and vegetable shop.*

4. *Compelling and directing the Respondent to comply with the terms of the lease agreement and the agreement dated the 23, 24 and 27 October 2009 in existence between the parties.*
5. *Alternatively compelling and directing the Respondent to make a written undertaking to the 1st Applicant that it will not allow a hypermarket or supermarket or a store with either a single or several food departments to operate in its premises in terms of the clauses of the agreements on existence between the parties.*
6. *Declaring that the Heads of Agreement with its annexures (Annexure A, B and C) signed by the parties on the 23rd , 24th and 27th of October 2009, is binding upon the parties.*
7. *Compelling the Respondent to complete the building and delivery yard according to the building specification.*
8. *Compelling the Respondent to sign the Notarial Lease Agreement.*
9. *Costs of suit on an attorney and own client scale.*
10. *Further and /or alternative relief.`*

[21] In the wake of the foregoing application, the Commission took up arms, sought to intervene and was allowed by the court and on the consent of the parties, to intervene in the proceedings as the 3rd Respondent. Among the reliefs contended for by the Commission are the following:-

1. *The main application under Case No. 1639/12 be and is hereby dismissed .*
2. *Alternatively, that the main application under Case No. 1639/2012 be and is hereby struck off the roll and may be re-instated depending on the outcome of the investigation by the Intervening Party – check point.*

[22] The Commission's contention is that the act of the Applicants in rushing to court when the investigation of the exclusivity clause was already pending before it, was to circumvent the investigation by the Commission. That a likely result of this court determining the main application would be that the court may issue orders that would impact on the investigation or altogether have the effect of quashing it. This, the Commission contends, would ultimately prevent it from discharging its obligation in terms of the Act.

[23] The Commission further posited, that by the terms of the Act, it has exclusive jurisdiction over all competition matters in the land. That the High Court has only appellate jurisdiction in the matter pursuant to section 40 of the Act. That the Act contains provisions limiting the jurisdiction of ordinary courts and conferring exclusive jurisdiction on the Commission in respect of competition matters. The Commission, as appears

on the papers, therefore, holds the view that the High Court has only appellate jurisdiction in this matter, even though Mr Magagula who appeared for the Commission sought to distance himself from this proposition when this matter was argued before me on the 1st of March 2013. The same proposition is however evident in the heads of argument which Messrs Magagula and Hlophe filed on behalf of the Commission on the 22nd of February 2013.

[24] I will re-vert back to these issues in a moment, but let me first state that the 1st Respondent on the papers appears to have adopted the same position as the Commission. In paragraph 79 of its heads of argument, the 1st Respondent categorically associated itself with the submissions made by the Commission in its heads of argument and went further to expatiate on the exclusive jurisdiction of the Commission to determine matters regulated by the Act. The 1st Respondent finally enjoined this court to respect that exclusive jurisdiction and hold that the determination of the main application should abate and follow conclusion of the Commission's investigation into the lawfulness of the exclusivity provisions. The 1st Respondent also drew the courts attention to several disputes of fact on the question of the

exclusivity clause which it contends cannot be resolved on the papers filed of record.

[25] It is also worth mentioning, even though these are not the issues arising in this judgment, that over and above the issues pertaining to the Commission, the 1st Respondent raised several legal defences against the agreements sought to be enforced by the Applicants, which I summarize as follows:-

1. The 2001 lease and 2009 heads of agreement are void *abinitio* and of no force and effect for non-compliance with section 8 of the Land Speculation Control Act of 1972.
2. The 2001 lease and 2009 heads of agreement are of no force and effect for not having been executed before a Notary Public pursuant to section 30 (1) of the Transfer duty Act of 1902.
3. The new lease agreement is inchoate as it has not been executed before a Notary Public in terms of section 30 (1) of the Transfer of Duty Act of 1902.
4. The exclusivity right, if any, contained in the 2009 heads of agreement is limited to the property described as portion 60 (a portion

of portion 21) of Farm 51, Hhohho Swaziland, held under deed of transfer number 107 of 2001.

[26] For their part the Applicants contend that the jurisdiction of the High Court is not ousted by the Act. That they were still entitled to approach the court notwithstanding that the Commission had already initiated investigation into the lawfulness of the exclusivity clause.

[27] Furthermore, the Applicants, whilst disputing that the exclusivity clause contravenes the Act, also initially contended that the exclusivity clause had no competition connotations to it at all with which the Commission should concern itself. They therefore doggedly contended that the main application should not be dismissed or struck off the roll pending the conclusion of the investigation by the Commission.

[28] It is worthy of note that in the initial stages of the heads of argument of the Applicants filed in response to the intervening party's heads of argument on the 28th of February 2013, the Applicants maintained the above stance. However, they made an obvious summersault from their initial position in

paragraphs 12 and 13 of the said heads of argument where they contended as follows:-

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The courts should however recognize the proper role of the intervening party in the Kingdom of Swaziland and that it should “give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field” . this is especially so where there are serious disputes of fact in respect of the allegations pertaining to the alleged violation of the provisions of the Act.

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It is accordingly submitted that the main application should be postponed sine die pending the finalization of the investigation, that leave should be granted to the parties to deliver supplementary affidavits in response to any order or decision by the intervening party and that any party which opposes this relief should be ordered to pay the costs of the applicant including the costs occasioned by the employment of two counsel”

[29] The foregoing assertion is a clear concession by the Applicant for the Commission to conclude its investigation before the main application is heard in the light of the circumstances of this case.

[30] It was this concession that propelled me to invite argument on this question, consequently leading to the orders which I regurgitated in paragraph [1] of this judgment.

[31] Now, there are certain issues arising herein which I will proceed to address *ad seriatim*.

1. **Is the High Court's original jurisdiction ousted by the Act?**

Before answering the above poser, let me interpolate here to observe that, it is a cardinal duty of every superior court of record to guard its jurisdiction jealously except where that jurisdiction is ousted by clear and unambiguous words of statute. I adumbrated on this issue in my decision in the case of **Sikhumbuzo Thwala v Philile Thwala Civil Case No. 101/12, paragraph 13 - 18**, judgment of the 8th of February 2012 (unreported), where I stated as follows:-

“[13] ----- it is thus a trite principle of law, that a statute purporting to oust or restrict the jurisdiction of the court must demonstrate such ouster in clear and unambiguous language. Once it is apparent from the language of such a statute when juxtaposed with the facts of the case, that such an ouster was intended, then it is imperative for the court to decline jurisdiction. This is due to the fact that, in as much as the court has the duty to guard its jurisdiction jealously, it is not however the duty of the court to expand its jurisdiction, that lies within the province of legislation. I had the occasion very recently, in the case of **Big Games Park Trust t/a Mlilwane Wildlife**

Sanctuary and Fikile Zandile Mabatha and others, judgment of the 6th of February 2012, to deal with the principles that must guide the court in ascertaining whether a statute ousts the jurisdiction of the court. In that case, I made reference to several English authorities which demonstrate this principle, in pages 10 to 13 as follows:-

“

[14] In **Re Boaler (1915) 1KB 21 at 36 Scrutton J**, demonstrated this position of the law in the following language:

One of the value rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him or if he alleges that a wrong punishable criminally has been done to him by another subject of the King. This right is sometimes abused and it is, of course quite competent to parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts and should not be extended beyond its least onerous meaning unless clear words are used to justify such an extension”.

[15] Furthermore, in **Goldsack v Shore (1050) 1KB 708 at 172, Evershed MR**, declared thus:-

-----the jurisdiction of the Kings Courts must not be excluded unless there is quite clear language in the Act alleged to have that effect

[16] Similarly, in **Commissioner of Customs and Excise v Cure and Deeley Ltd (1962) 1QB 340 at 357**, the court held that

It is an important rule of interpretation of statute that a strong leaning exists against construing statute so as to oust or restrict the jurisdiction of the superior courts. It is also well known rule that a Statute should not be construed as taking away the jurisdiction of the courts in the absence of the clear and unambiguous language to that effect

[17] Then there is the case of **Anisminic v Foreign Compensation Commission (1969) 1 All ER 208**, where **Lord Reid** stated as follow:-

It is well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly ----- meaning I think that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court

[18] The foregoing position was amplified by **Halsburg's Laws of England Vol 9, 3rd edition**, as follows:-

the right of the subject to have access to the courts may be taken away or restricted by Statute but the language of any such statute will be jealously watched by the courts and will not be extended beyond its least

onerous meaning, unless clear words are used to justify such extension”

[32] It is abundantly clear from the authorities exhaustively paraded above, the jurisprudential accord is that the original jurisdiction of a superior court can only be ousted by clear and unambiguous words of statute.

[33] It is by reason of the foregoing, that I agree with Advocate Smith who appeared for the Applicants, that there is no provision in the Act that clearly either confers exclusive jurisdiction on the Commission with respect to all competition matters in Swaziland or which ousts the original jurisdiction of the High Court in relation thereto.

[34] Section 40 of the Act upon which the 1st and 3rd Respondents respectively placed vociferous reliance in contending this issue, does not convey such ouster. All that section 40 does is to confer appellate jurisdiction on the High Court in the following words:-

“The Commission shall have power to issue orders or directives it deems necessary to secure compliance with this Act or its decisions and any person aggrieved by a decision of the Commission made under this Act or under any regulation made hereunder may, within thirty days after the date

on which a notice of that decision is served on that person, appeal to the court”

[35] The above legislation in my view, in no wise ousts the unlimited original jurisdiction of the High Court over all civil and criminal causes in the land, which jurisdiction is statutorily derived from Article 151 (1) (a) of the Constitution of the Kingdom Act no. 001 of 2005, in the following language:-

“ (1) *The High court has*
(a) *Unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution”*

[36] This unlimited jurisdiction is also known as the inherent jurisdiction of the High Court as elucidated by **Harms** in the text **Civil Practice in The Supreme Court, page 83** as follows:-

“Apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled to entertain or give. It is this reservoir of power which is referred to when one speaks of inherent jurisdiction of the Supreme Court, and which distinguishes the Supreme Court from inferior courts”

[37] It is this original inherent jurisdiction that entitles an aggrieved party, if it so desires, to take its dispute to the High Court, if it thinks that the dispute is of a nature suited for settlement by the process of the court.

[38] I am thus firmly convinced, that the Applicants were well within their rights, irrespective of section 11 (1) of the Act which empowers the Commission to “*monitor, regulate, control and prevent acts or behavior which are likely to adversely affect competition in the country*” and notwithstanding the fact that the Commission had already initiated investigation with respect to the exclusivity clause, to approach this court in the absence of any ouster of the courts jurisdiction. I should also mention that I see nothing in section 11 of the Act which ousts the original jurisdiction of the High Court.

[39] To hold to the contrary is clearly inconsistent with Article 151 (1) (a) of the Constitution. Therefore, such a view certainly cannot lie.

[40] I find it imperative to state here and as also advanced by the Applicants in their heads of argument, that the situation of the Commission is clearly distinguishable from that of the Industrial Court and Industrial Court of

Appeal, where parliament through the combined effect of section 8 (1) of the Industrial Relations Act and Article 151 (3) (a) of the Constitution, conferred exclusive original and appellate jurisdiction in the Industrial Court and Industrial Court of appeal respectively, over all labour matters in the land.

[41] Section 8(1) of the Industrial Relations Act states:-

“The court shall, subject to section 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this (Act) the Employment Act, the Workers Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at Common Law between an employer and employee in the course of employment or between an employer or employers, association and trade union, or staff association or between an employees association, a trade union, a staff association, a federation and a member thereof” (underline mine)

[42] Article 151 (3) (a) of the Constitution states:-

“
(3) *Notwithstanding the provisions of subsection*

- (1) *the High Court*
- (a) *has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction. (emphasis mine)”*

[43] Commenting on the above legislation in the case of **Swaziland v Constantine Ginindza Civil Appeal No. 33/06, paragraphs 11 and 14, Ramodibedi JA** (as he then was), declared as follows:-

“11 *The effect of this change, read with the use of the word “exclusive” in the section makes it plain in my view that the intention of the legislature in enacting section 8 (1) of the Act was to exclude the High Courts jurisdiction in matters provided for under the Act and thus to confer*

“exclusive jurisdiction in such matters on the Industrial Court”

14 *In my view section 151 (3) does two things in so far as is relevant to this case:-*

- (1) *In plain and unambiguous language, the section ousts the jurisdiction of the High Court in any matter in which the Industrial Court has exclusive jurisdiction. To that extent, therefore, it stands to reason that there can be no question of the High Court and the Industrial Court enjoying concurrent jurisdiction.*
- (2) *In terms of the section the inherent original jurisdiction ordinarily vested in the High Court does not detract from the*

exclusive jurisdiction of the Industrial Court in dealing with matters provided for under the Act”

[44] This is however not such a case. The inherent original jurisdiction of the High Court over competition issues in Swaziland is not ousted either by the Act or the Constitution.

2. **The more prudent approach to the functions of the Commission in the circumstances of this case**

It is thus indisputably evident from my views above that the reason why I granted the orders in paragraph [1] above is far from a conviction that the jurisdiction of the High Court is ousted by the Act in any of the circumstances of this case. One of my reasons for the orders is premised on the contention of the 1st and 3rd Respondents, to which I agree, that since the Commission is a body statutory established and empowered by section 11 of the Act to “*monitor, regulate, control and prevent acts or behavior which are likely to adversely affect competition in the country*” and since the Commission had already initiated investigation in terms of section 11 (2) of the Act into the lawfulness of the exclusivity clause in the agreement prior to

litigation, the more desirable approach would be to allow it conclude its investigation before proceeding with the main application.

[45] Section 30 (1) of the Act prohibits “*Any category of agreements, decisions or concerted practices which have as their object or effect, the prevention restriction or distortion of competition to an appreciable extent in the country or in any substantial part of it-----*” Similarly, section 31 of the Act details a list of acts or behavior which Enterprises shall refrain from if they limit access to markets or otherwise unduly restrain competition , or have or are likely to have adverse effect on trade on the economy in general.

[46] It follows from the above that the Act empowers the Commission to investigate the exclusivity clause in the agreement pursuant to section 11 and within the preview of the terms of the Act to ascertain whether it violates the Act.

[47] The Applicant as I have already demonstrated in this judgment, conceded the fact that the court must have regard to the jurisdiction of the Commission in paragraph 12 of the heads of argument filed on their behalf were it is submitted thus

“The courts should however recognize the proper role of the intervening party in the Kingdom of Swaziland and that it should give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field”

[48] To buttress the foregoing view point the Applicants urged the case of **Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism others (2004) 2ACC15**, which is also urged by 1st Respondent in its heads of argument. In paragraphs 45 and 48 of that decision, **O’Regan J** stated as follows:-

“The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decision taken by the administrative agencies fall within the bounds of reasonableness as required by the Constitution-----

----- a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself as well as on the identity of the decision – maker ----- A decision that requires an equilibrium to be struck between a range of competing interest or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the court. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieved that goal. In

such circumstances a court should pay due respect to the route selected by the decision - maker”

[49] The above general attitude of the courts to the powers of a statutory or administrative body was further espoused in the case of **Wycliffe Simiyu Kayabe and others v Minister For Home Affairs and others CCT 53/08 [2009] 2ACC 23, paragraph 36**, in the following words:-

“First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanism undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhance procedural fairness as enshrined in our Constitution. Courts have often emphasized that what constitutes a “fair” procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedure is crucial in administrative action”

[50] I am highly persuaded by the exposition of the foregoing authorities. I respectfully submit myself with them.

[51] In casu, the issues with respect to the exclusivity clause *vis a vis* the Act are highly specialized and technical in nature . These include the investigation

of anti-competitive and prohibited agreements and trade practices implicated by the exclusivity clause. It will entail an inquiry into section 5 (1) of the Act which permits restraint of trade *vis a vis* the character of the lease provisions, and if adjudged to be restraint of trade, whether or not they violate section 30 and 31 of the Act. Also in the mix is the question of dominance of trade. These are all highly technical and specialized issues tailor made for enquiry by the Commission.

[52] It remains for me to emphasize that the Act and Commission are relatively young, as young as 2007. They must be given the opportunity **to test their wings in flight** in relation to competition issues in the Kingdom, to ensure a realization of the intention of parliament which made them. Courts in the Kingdom are thus enjoined to be extremely vigilant not to encourage an unworkable situation where a litigant who has been notified of a pending investigation launched by the Commission rushes to court thereafter, ultimately scuttling the Commissions powers. If this practice is encouraged it will sound a death knell to the intent of Parliament in bringing the Act to be.

3. Disputes of fact

Quite apart from the better approach of the court to the powers of the Commission, especially where an investigation is already pending before it prior to litigation, I agree with the parties that there are disputes of fact in this case with respect to the exclusivity clause which are irreconcilable on the papers.

[53] I have already indicated in this judgment that the question of the exclusivity clause *vis a vis* the Act raises highly technical and specialized issues. This state of affairs is compounded by the facts urged in aid of a resolution of these issues which are highly ferociously contested by the parties. As rightly indicated by the Applicants in their heads of argument, this contest is glaringly evident when the facts urged by the 1st Respondent in paragraphs 61 to 73 [volume 2: pp 197 to 202] of its answering affidavit are juxtaposed with paragraphs 41 to 51 of the Applicants replying affidavit in the main application [volume 3: pp 591 to 601]. These facts include statistics of competitive trade practices in South Africa.

[54] The fact of these disputes and the propriety of their resolution by the Commission was aptly captured by the 1st Respondent in paragraphs 90 to 91 of its heads of argument. These are apposite at this juncture:-

“90 Finally, several disputes of fact arise in the main application from the contested competition aspects of the dispute and the Commission is the specialized body best – placed to resolve these in the first instance.

90.1 One example suffices; the issue of the appropriate market definition. This is the threshold preliminary determination that the Commission would be required to make in its investigation so as to identify and determine the scope of the relevant product and geographic markets in which the parties operate. After this is done, the Commission can then access and evaluate any possible anti-competitive effect of the exclusivity clause in terms of section 30 and 31 of the Competition Act.

90.2 Applicants contended that they are “not attempting to prevent competitors from operating within the Kingdom of Swaziland and make allegations relating to other shopping centres with anchor supermarket tenants in the 30 kilometre corridor between Manzini and Mbabane.

90.3 This is done apparently to dispute the Commission’s allegation that “[e]xclusivity and letting restrictions clauses in the lease agreements of the shopping centre may prevent, restrict or unduly restrain competition or limit access to markets

90.4 *Yet the legislature has assigned to the Commission the exclusive jurisdiction to determine precisely these complex questions of fact and economics. It is the specialist body qualified to first define the relevant markets, conclude which other shopping centre and which retailers are in competition with the first respondent and its tenants, and what the economic effect of the relevant contractual clauses are on the conditions and dynamic of competition in those markets and between those competitors.*

90.5 *Affording the Commission the first opportunity to decide these complex issues is in accord with the legislative framework for the regulation of competition matters within Swaziland. It merely delays but does not eliminate the exercise of this courts jurisdiction over the matter until after the Commission has rendered its decision*

91 *Accordingly, the first respondent for these reasons, and those advanced by the Commission in its heads of argument, respectfully submits that this court should decline to decide this application before the Commission has concluded its investigation”*

[55] The position of our law is that the presence of irreconcilable material disputes in motion proceedings robs the case of resolution by way of motion. This position of our jurisprudence was encapsulated in the words of the learned authors **Herbstein and Van Winsen**, in the text **The Civil Practice of the Supreme Court of South Africa (4th ed) page 234**, as follows:-

“It is clearly undesirable in cases in which facts relied upon are disputed to endeavour to settle the dispute of fact on an affidavit, for the ascertainment of the true facts is effected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also of credibility of witnesses giving evidence viva voce. In that event, it is more satisfactory that evidence should be led and that the court should have the opportunity of seeing and coming to a conclusion”

See Hlobisile Cynthia Maseko (nee Sukati) and others v Sellinah Maseko (nee Mabuza) and others Civil Case No. 3815/10

[56] The Commission is in my view structured to unravel the disputes in the manner anticipated by jurisprudence This is because section 13 (1) of the Act gives it the power to

“

- (a) *Summon and examine witnesses*
- (b) *Call for and examine documents*
- (c) *Administer oaths*
- (d) *Require that any document submitted to the Commission be verified by affidavit; and*
- (e) *Adjourn any investigation from time to time”*

[57] Therefore, the Commission is well structured for the task at hand.

[58] The only issue left hanging in the balance, which I find a need to briefly comment on, is the proposition advanced by Advocate Kennedy for the 1st Respondent, that the court should refer the question of the exclusivity clause to the Commission, whilst it proceeds with the legal defences raised by the 1st Respondent. Advocate Kennedy advanced unnecessary waste of time and recourses as his grounds.

[59] I find that I cannot accede to this proposition. This is because in the first instance, the question of the exclusivity clause runs like a golden thread through the issues before court *vis a vis* the leases. One does not need a crystal ball to see this. It leaps out from the reliefs which the Applicants seek in the main application. If this question does not crop up at the hearing before this court, it may very well come to bite us on appeal. Therefore, the piece-meal approach to litigation propounded by Advocate Kennedy, taking into consideration the peculiar facts and circumstances of this case is not sustainable. Besides, it is the cardinal practice of courts across national borders to discourage any form of piece-meal approach to litigation with its attendant costs, waste of time, energy and resources, as it does not aid the course of justice.

[60] In any event, by making this proposition, the 1st Respondent is approbating and reprobating. Shifting goal posts. I say this because in its papers, as I have already amply demonstrated herein, the 1st Respondent tenaciously clung to its views that the court should decline to entertain and determine the application as a whole pending the conclusion of the Commission's investigation. The 1st Respondent specifically contended as follows in paragraph 88 of its heads of argument

“In any event, that investigative process currently underway by the Competition Commission is governed by statutory time periods established in Regulation 14 of the Competition Commission's Regulations. The regulation provides for an initial investigative period of 90 days, which may be extended by one further single period of 60 days in certain circumstances. As a result, there is no risk of inordinate or prejudicial delay to the parties here if this court were to permit the conclusion of that investigation and only then to determine the main application if the exclusivity clause at issue is found to be benign (in other words acceptable in terms, of the competition Act) by the Commission”.

[61] The 1st Respondent's contention of unnecessary delay and waste of resources if the whole application were to await the outcome of the Commission's investigation cannot therefore avail it in the circumstances.

[62] It was for the foregoing reasons, and in the face of Advocate Smith's concession that the postponement *sine die* which the Applicant's proposed in paragraph 13 of their heads of argument, has the same effect in law as the striking off the roll contended for by the Commission in paragraph 6 of the intervening proceedings (volume 5. Book of pleadings), that I granted the orders I detailed in paragraph [1] of this judgment.

For the Applicants:

**Advocate Oque Smith SC
Advocate HF Oosthuizen
Instructed by Cloete/ Henwood
Associated**

For the 1st Respondent:

**Advocate Paul Kennedy SC
Advocate Christiaan Bester
Instructed by Robinson Bertram**

For the 3rd Respondent:

**Attorney Mangaliso Magagula
Magagula & Hlophe Attorneys**

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
THE DAY OF2013**

**OTA. J
JUDGE OF THE HIGH COURT**