



**IN THE SUPREME COURT OF SWAZILAND**  
**JUDGMENT**

Civil Appeal Case No. 1/2014

In the matter between:

<b>EAGLES NEST (PTY) LIMITED</b>	<b>1<sup>st</sup> Appellant</b>
<b>USUTHU POULTRY FARM (PTY) LIMITED</b>	<b>2<sup>nd</sup> Appellant</b>
<b>EAGLES MILLING (PTY) LIMITED</b>	<b>3<sup>rd</sup> Appellant</b>
<b>CRANE FEEDS (PTY) LIMITED</b>	<b>4<sup>th</sup> Appellant</b>
<b>FARM SERVICES (PTY) LIMITED</b>	<b>5<sup>th</sup> Appellant</b>
<b>CRANE PROPERTIES (PTY) LIMITED</b>	<b>6<sup>th</sup> Appellant</b>

**And**

<b>SWAZILAND COMPETITION COMMISSION</b>	<b>1<sup>st</sup> Respondent</b>
<b>NKONZO HLATSHWAYO N.O.</b>	<b>2<sup>nd</sup> Respondent</b>

**Neutral citation:** *Eagles Nest (Pty) and 5 others v Swaziland Competition Commission & Another (1/2014) [2014] SZSC 39 (30 May 2014)*

**Coram:** **RAMODIBEDI CJ, MOORE JA and DR. TWUM JA.**

**Heard:** 26 May 2014

**Delivered:** 30 May 2014

*Summary : Swaziland Competition Commission. Duties and function clearly spelt out in section 13 of Act 8 of 2007. Commission charged appellants with unlawful anti-competition practices and mergers, after investigations. Appellants resisted efforts to discuss procedure for hearing the unlawful practices. Appellants applied to High Court for judicial review. Act prescribed Appeal to High Court as the correct procedure for relief of persons aggrieved by decisions of Commission. High Court dismissed application for judicial review. On appeal this Court dismissed appeal on two grounds (1) That appeal to the High Court was the only mode of seeking relief stated in the Act. (2) That the appellants' application to the High Court was premature and that the appellants suffered no real prejudice.*

## JUDGMENT

### DR S. TWUM J.A.

[1] This is an appeal against the judgment of Stanley B. Maphalala, Principal Judge, sitting at the High Court Mbabane delivered on 12<sup>th</sup> December, 2013. He dismissed the Appellants' application for relief, as hereinafter particularised, with costs. It is from this judgment that they have appealed to this Court.

[2] **Background Facts:**

On 15<sup>th</sup> November, 2007, His Majesty the King assented to an Act of Parliament, Act 8 of 2007, cited as the Competition Act, 2007. It came into force on Friday, December 7<sup>th</sup>, 2007. The Act was “*to provide for the encouragement of competition in the economy by controlling anti-competitive trade practices, mergers and acquisitions, protecting consumer welfare and providing for an institutional mechanism for implementing the objectives of the Act and other matters incidental thereto.*” The Act was to apply to all economic activity within the country or having an effect in the

country except a few trade practices which are not relevant for resolving this dispute between the parties herein.

[3] **Competition Commission**

(1) The Act established the Swaziland Competition Commission, as a body corporate with perpetual succession and capable of suing and being sued in its corporate name.

(2) The Commission was to be independent of control of any person, any statutory body, Government or any other entity, in the discharge of its functions.

[4] The Commission was charged by the Act to perform the following functions:- (section 11)

(1) To monitor, regulate, control and prevent acts or behaviour which are likely to adversely affect competition in the country.

(2) Without prejudice to the generality of the immediately preceding functions, the Commission was to perform the following functions:-

- (a) carry out, on its own initiative or at the request of any person, investigations in relation to the conduct of business, including the abuse of a dominant position, so as to determine whether any enterprise is carrying on anti-competitive trade practices and the extent of such practices and issue such orders or directives it deems necessary to ensure compliance with this Act;
- (b) carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger and issue such orders or directives it deems necessary to ensure compliance with this Act;
- (c) Take such actions as it considers necessary or expedient to regulate the creation of a merger or to prevent or redress the abuse of a dominant position by any enterprise;
- (d) provide persons, engaged in business, with information regarding their rights and duties under this Act;
- (e) provide information for the guidance of consumers regarding their rights under this Act;

- (f) undertake studies and make available to the public reports regarding the operation of the Act;
- (g) co-operate with and assist any association or body of persons to develop and promote the observance of the standards of conduct for the purpose of ensuring compliance with the provisions of the Act;
- (h) advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister, including the determination of penalties to be imposed for the infringement of this Act;
- (i) review this Act and any other legislation which inhibit fair competition and make proposals to the Minister for the amendment of such legislation;
- (j) co-operate with regional and international bodies engaged in the enforcement of competition law and the promotion of a competition culture;
- (k) enter into discussions on contentious issues with any regulatory authority in order to harmonise and ensure consistent application of the competition principles;

- (1) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.
  
- (3) The Commission had power to require any person engaged in business or trade or such other person as the Commission might consider appropriate, to state such facts concerning goods manufactured, produced or supplied by the person as the Commission might think necessary, to determine whether the conduct of the business in relation to the goods or services constituted an anti-competitive practice.
  
- (4) Subject to the other provisions of the Act, the Commission was empowered to regulate its own procedure. (section 14 (1) ).

[5] **Organization of the Commission**

- (i) For its proper function, a Secretariat was constituted for the Commission.

- (ii) The Secretariat was made up of an Executive Director and other employees of the Commission. The Secretariat is the investigative and administrative arm of the Commission. The Board of Commissioners are the adjudicative and policy making body.
  
- (iii) There was an Executive Director who was the chief executive officer of the Commission. He/she was responsible for the day to day administration of the Commission.

Under s.38 (1) of the Act, the Commission could authorise any of its employees to be investigating officers for the purposes of the Act.

By Legal Notice published in the Gazette on Thursday, June 10<sup>th</sup>, 2010, the Competition Commission Regulations came into force.



[6] **The Dispute. Investigation into First and Second Applicants**

(1) By Notice of Motion filed in the High Court on 15<sup>th</sup> July 2013, the Applicants (all 6 of them cited in the Motion Paper) applied to the High Court for an order in the following terms:

“1. Dispensing with the requirements of the ordinary Rules of High Court and treating Part A of this application as urgent in terms of Rule 6(25);

(2) Staying any proceedings before the First Respondent relating in any way to making a final decision regarding the matters under case number EC/02/2012 and MA/07/2012 by the Board of the First Respondent, including but not limited to the holding of a hearing in terms of Section 13 of the Competition Act 8 of 2007 or Regulation 28 of Notice 92 of 2010, pending the final resolution and determination of PART B of this application;

(3) The First Respondent be liable for the costs of this stay application, which includes costs of two Counsel certified in terms of High Court Rule 68, in the event that it is opposed; and

- (4) Granting the Applicants further and/or alternative relief;

**PART B**

- (5) That the Respondents be called upon to show cause on 14 August 2013 at 10 am why orders should not be made in the following terms:

5.1. Reviewing and setting aside:

5.1.1. The decision by the First Respondent not to produce to the First and Second Applicants the full and complete record of the investigation by the Secretariat under case number EC/02/2012;

5.1.2. The decision by the First Respondent not to produce to the Third to Sixth Applicants the full and complete record of the investigation by the Secretariat under case number MA/07/2012;

5.1.3. The decision by the Chairperson of the Commission, the Second Respondent, regarding the conduct of the hearing under case number EC/02/2012, including but not limited to the decision that it shall be scheduled for three (3)

hours total and that no person that participated in the investigation by the Secretariat in any way, including by interview or providing information in any form, will be called to testify under oath and subject to cross-examination;

5.1.4 The decision by the Chairperson of the Commission, the Second Respondent, regarding the conduct of the hearing under case number MA/07/9012, including but not limited to the decision that it shall be scheduled for three (3) hours total and that no person that participated in the investigation by the Secretariat in any way, including by interview or providing information in any form, will be called to testify under oath and subject to cross-examination.

(6) Ordering that:

6.1. The First Respondent is compelled to provide to the First and Second Applicants the full and complete record of the investigation by the Secretariat under case number

EC/02/2012 within four (4) business days of the date of this Order;

6.2. The First Respondent is compelled to provide to the Third to Sixth Applicants the full and complete record of the merger investigation by the Secretariat under case number MA/07/2012 within four (4) business days of the date of this Order;

6.3. The Board of the First Respondent and the Second Respondent, within four (4) business days of the date of the Order, is to schedule a hearing under case number EC/02/2012:

6.3.1. That is set down and allocated at least three (3) days of hearing time; and

6.3.2. At which either the First or Second Applicants or the First Respondent may call any person that participated in the investigation by the Secretariat in any way, including by interview or providing information in any form, to testify under oath and subject to cross-examination;

6.4. The Board of the First Respondent and the Second Respondent, within four (4) business days of the date of the Order, is to schedule a hearing under case number MA/07/2012;

6.4.1 That is set down and allocated at least two (2) days of hearing time; and

6.4.2 At which any or all of the Third or Sixth Applicants or the First Respondent may call any person that participated in the merger investigation by the Secretariat in any way, including by interview or providing information in any form, to testify under oath and subject to cross-examination;

(7) Declaring that the investigation undertaken by the Secretariat of the First Respondent under case number EC/02/2012 be extended beyond the statutory time period for the conduct of such an investigation;

(8) Declaring that the investigation undertaken by the Secretariat of the First Respondent under case number MA/07/2012 be

extended beyond the statutory time period for the conduct of such an investigation;

- (9) The First Respondent be liable for the costs of Part B of this application, which includes costs of two Counsel certified in terms of High Court Rule 68, in the event that it is opposed; and
- (10) Granting the Applicants further and/or alternative relief.”

[7] (1) The Respondents were the Swaziland Competition Commission and the Commission’s Chairman.

(2) In their Founding Affidavit sworn to by John Frederick Chester Jnr who described himself as an adult male and General Manager of Eagles Nest (Pty) Ltd, the first Applicant and the other five applicants brought the application for relief against the First Respondent and against the Second Respondent, in his official capacity.

(3) The affidavit described in general terms two matters pending before the Commission which have generated the dispute. It stated that the

first matter was an investigation into the market conduct of the First and Second Applicants.

- (4) It was stated by these Applicants that the Secretariat of the Commission had undertaken an investigation which included interviews and provision of information by several participants. In a nutshell, it was the Applicants' case that the Secretariat of the Commission had relied on such information and came to conclusions which were adverse to the two companies. It said those companies denied any wrongdoing, particularly anti-competitive practices or conduct and wished to challenge those conclusions.

- (5) It was alleged by those applicants that the Respondents had denied them access to the full record of the Secretariat's investigations.

Additionally, the First and Second Applicants complained that the manner of hearings as *contemplated* by the Commission suffers from such procedural fairness problems as to be unjust.

(6) Finally, for the First and Second Applicants, it was urged that the Secretariat's investigation was concluded outside the statutory time period and they sought a declaration in that regard.

[8] **Proposed Merger:**

(1) The second matter pending before the Commission was the validity of a proposed merger to which the Third to the Six Applicants (inclusive) were parties. This was notified to the Commission. The Secretariat investigated it and approved the transaction subject to two conditions. These applicants contested the imposition of those conditions in this application, since in their view, there was no basis for their imposition.

(2) These Applicants claimed that the Commission had denied them access to the full record of the Secretariat's investigations. Further, they complained that the merger hearings *would be* of an unreasonably short duration and also without the opportunity to challenge the evidence of third parties by calling them as witnesses and cross-examining them.



- (3) In paragraph 7 of the Founding Affidavit the six applicants declared that the merits and further substantive details of the two matters were not relevant for purposes of the Honourable Court's determination of the application.
- (4) Indeed, the Applicants' claimed that any *consideration of the merits would predictably involve voluminous set of technical and complex submissions* regarding competition law and economics. They were seeking selective justice. They respectively submitted that the details and contents of those submissions would be irrelevant to the Honourable Court's determination of the procedural fairness, natural justice and lawfulness issues raised for determination in the application.

[9] **RESPONDENTS' ANSWERING AFFIDAVIT**

- (1) At the very beginning of their Answering Affidavit the Respondents submitted that the proceedings were a diversionary tactic by the Applicants to avoid answering to the charge of engaging in anti-

competitive trade practices prohibited by the Swaziland Competition Commission Act; (hereinafter “the Act”).

- (2) The Respondents confirmed that the Secretariat of the Commission investigates all contraventions of the Act, and reviews all mergers filed with the Commission for authorization. Once the investigations are completed, the Secretariat submits a report of such investigations to the Board of Commissioners whose function it was, inter alia, to adjudicate on the investigations referred to it by the Secretariat.
- (3) The Respondents stated that those were the two matters pending before the Commission as the Applicants had indicated. However, the Respondents added that the investigation involving only the First and Second Applicants, who are egg producers, was engendered by a complaint raised in Parliament in which the Minister for Commerce, Industry and Trade was requested to investigate *suspected* collusion between the First and Second Applicants in the egg market. They added that the second investigation involving the Third to the Sixth

Applicants, was a proposed merger for the acquisition by the Third Applicant, of the Fourth, Fifth and Sixth Applicants.

(4) The Secretariat made a number of recommendations to the Board. With respect to the anti-competitive conduct of the First and Second Applicants the recommendation was that the supply agreement between them should be proscribed. Further, they should cease and desist in any way from colluding with each other in the conduct of their business.

(5) The Respondents also alleged the presence of a number of disputes between the parties.

These are:

(i) The cause of the delay in finalising the review of the mergers and the investigation of the anti-competitive conduct by the First and Second Applicants.

(ii) The Applicants insisted on the disclosure of certain information given to the Commission by third parties on a confidential basis.

(6) The Respondents claimed that in respect of the first dispute, the Applicants had a case to answer since their agreement, which they termed a supply agreement, was in violation of Section 30 of the Act. Comprehensive details which the Respondents claimed supported their case then followed. It was the Respondents' further claim that the Applicants had not disclosed the grounds upon which they challenged the findings made by the Respondents, nor had they justified their insistence that oral evidence should be taken, particularly as the Respondents' case in that regard was based on the Applicants having entered into a prohibited agreement which established an egg cartel. The Respondents submitted that the relationship between the First and Second Applicants was regulated by the agreement whose terms were clear and not in doubt. It was a case of "res ipsa loquitur."

(7) With regard to the merger, the Respondents' case was that in 2009, the Third Applicant acquired the assets of the Fourth, Fifth and Sixth Applicants. The acquisition of these assets was not notified to the Commission. Their failure contravened section 35 of the Act. The

effect of that contravention was that the transaction was of no force and effect unless, for good reason, the Commission condoned it.

- (8) The Respondents also raised an issue of *prematurity* in the application before the Court. Another issue was the fact that the Applicants, (ie the Appellants) did not have valid grounds to urge in support of their relief for a review of the Commission's decision regarding the proposed hearing and that in any event the order for a declaratory relief was not competent.
- (9) With regard to the charge of prematurity, the Respondents pointed out that the Board of the Commission had not yet *decided* on any of the substantive matters in dispute. They only decided on the procedure which they considered could be sufficient for the merits to be gone into. In any event, under the Act the Commission could regulate its own procedure i.e. to allow or disallow oral hearings. The Applicants can only claim to be prejudiced after the hearings before the Board of the substantive matters. Under Regulation 31 (1), the Commission

shall publish its decision in its website, if any, a summary of its decisions on the 1<sup>st</sup> day of every quarter.

(10) In paragraph 64 of the Respondents' Answering Affidavit, they submitted that a proper interpretation of the Act shows that the Legislature intended to confer exclusive jurisdiction in competition matters on the Commission.

(11) Section 40 of the Act states:

“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 the Act or under any regulations 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.”

Under Section 2 of the Act, “Court” means the High Court of Swaziland.

[10] **Judgment**

- (1) In paragraph 27 of the judgment appears the following:

“Before proceeding with preliminary points and the merits I think it is imperative to deal with the issue of jurisdiction of this court in this matter as the thrust of Respondents’ argument is on this point. I will then deal with the merits of the case if I find that this court has jurisdiction to hear and decide the matter.”

- (2) In the context of the application filed in the court praying for review of the Commission’s decisions under the common law, the court posed this rhetorical question – are the Applicants entitled to proceed by way of the application or are they bound by the provisions of s.40 of the Act?

- (3) The Applicants, in effect answered the question in the affirmative. They referred to sections 151 and 152 of the Constitution of the Kingdom of Swaziland and concluded that the High Court has original jurisdiction to determine the application, including through its powers of review and supervision. The Applicants cited and relied on a

dictum in the High Court case of *Takhona Dlamini v President of the Industrial Court and Another*, Case No. 23 of 1997.

- (4) The Applicants submitted further that it is decided case law in the Kingdom of Swaziland that the original jurisdiction of a superior court can only be ousted by clear and unambiguous language of a statute and section 40 of the Act does not trump a party's rights held under section 151 of the Constitution and that a party could approach the High Court for relief of its dispute. It is fair to point out that this quintessential proposition is a rebuttable presumption of law.
  
- (5) The Respondents, however, contended that the Application was proscribed by section 40 of the Act, or putting it differently, that no review is competent where an appeal is provided for by the Act. The Respondent's case was that the plain language of the section was clear, that matters arising from the Competition Act, are brought to the High Court by way of appeal, not review or declaration of rights. Consequently, this was a jurisdictional matter. Actually as will be



shown below, section 40 of the Act puts the proposition more robustly than this statement in the paragraph.

- (6) The learned Judge quoted long excerpts from the South African Supreme Court of Appeal case of *American Natural Soda Corporation v Competition Commission* 2003 (5) SA 633 where the Court opined that whatever kind of approach one adopts in interpreting a statute one must bear in mind that the actual language of the statute cannot be ignored.
- (7) In conclusion, the learned Judge held that for the full reasons given in the judgment, but primarily on the ground that competition was regulated only in terms of the Act, and any adjudicating process of competition matters arising from performance of functions under the Act can only be dealt with as provided in the Act, it was necessary to follow the plain language of section 40. He added that section 151 of the Constitution recognises that the High Court may be conferred with appellate jurisdiction by any law. In sum, all decisions of the Commission are only appealable to the High Court.

**[11] The Appeal**

(1) On 12<sup>th</sup> December 2013 the appellants appealed against the whole of the judgment and order handed down by His Lordship Mr Justice Maphalala P.J. The following grounds of appeal were noted:-

“1. In relation to the jurisdictional question:

1.1 The learned Judge erred in failing to find that sections 151 and 152 of the Constitution of the Kingdom of Swaziland (2005) create original jurisdiction of the High Court to determine this application, including through an exercise of its powers of review and supervision;

1.2 The learned Judge erred in failing to find that the original jurisdiction of a superior court can only be ousted by clear and unambiguous language of statute, that section 40 of the Competition Act does not trump a party’s rights held under section 151 of the Constitution and that a party may approach the High Court for relief if its dispute may be settled by process of the court;

1.3 The learned Judge erred in failing to follow binding precedent in the Kingdom of Swaziland that the original jurisdiction of a superior court can only be ousted by clear and unambiguous language of statute, that section 40 of the Competition Act does not trump a party's rights held under section 151 of the Constitution and that a party may approach the High Court for relief if its dispute may be settled by process of the court;

1.4 The learned Judge erred in finding that the application is precluded by section 40 of the Competition Act;

1.5 The learned Judge erred in finding that no review is competent where an appeal is provided for by section 40 of the Competition Act;

1.6 The learned Judge erred in failing to find that, absent express and unambiguous ouster in a statute, the High Court's inherent jurisdiction (here, expressed in sections

151 and 152 of the Constitution as well) is available to an aggrieved party, such as the appellants;

1.7 The learned Judge erred in failing to find that section 40 of the Competition Act affords a party an appeal right, but has not effect on that party's right to bring a review to court;

1.8 The learned Judge erred in failing to find that the appeal right provided by section 40 of the Competition Act is in addition to the appellants' entitlement to bring this review application; it neither replaces nor precludes it;

1.9 The learned Judge erred in failing to find that the section 40 appeal rights does not derogate from the other, independent rights of review held by the appellants, but rather provides an additional avenue for judicial scrutiny and redress arising from decisions of the Commission;

1.10 The learned Judge erred in finding that the “plain language of section 40” of the Competition Act requires the dismissal of the application on jurisdictional grounds (para [40]);

1.11 The learned Judge erred in finding that the ambit of the Competition Act requires the dismissal of the application on jurisdictional grounds;

1.12 The learned Judge erred in finding that no review is competent of decisions by the Commission, as are at issue in the application here;

1.13 The learned Judge erred in finding that section 40 of the Competition Act excludes the High Court’s review jurisdiction over the application;

1.14 The learned Judge erred in finding that “a matter arising from the decision of the Commission made under the Act or

regulations can only be brought to the High Court by way of appeal” (para [41]);

1.15 The learned Judge erred by misapplying the decision of the South African Supreme Court of Appeal in *American Natural Soda Ash Corporation v Competition Commission* 2003 (5) SA 633 to the application;

1.16 The learned Judge erred in finding that section 151(6) of the Constitution (and not the Competition Act as stated in the judgement) requires the appellants to pursue an appeal only;

1.17 The learned Judge erred in finding that “an appeal to the High Court [would] have provided an adequate and better address to the [appellants]”;

1.18 The learned Judge erred in finding that the Competition Act extinguishes the appellants' review rights and the review jurisdiction of the High Court;

1.19 The learned Judge erred in finding that the Competition Act requires only an appeal to the High Court (para [44]);

1.20 The learned Judge erred in finding that the exercise of the High Court's review jurisdiction "will cause chaos in business" (para [44]);

1.21 The learned Judge erred in finding that "the word 'appeal' in section 40 read with section 151 (6) of Act does not have the same meaning as 'appeal' in the ordinary sense" (para [45]);

1.22 The learned Judge erred in finding that the inherent limitation of a review to issues of procedure requires a

finding here that the Competition Act ousts the High Court's review jurisdiction;

1.23 The learned Judge erred in finding that the Competition Commission's exclusive jurisdiction to administer the Competition Act and regulate competition in the Kingdom of Swaziland ousts the High Court's review jurisdiction;

1.24 The learned Judge erred in finding that the appellant's decision to pursue a review, rather than an appeal, was improper and is "proof of abuse of process" (paras [50]-[51]);

1.25 The learned Judge erred in finding that the appellants' review "proceedings are used as a dilatory and diversionary tactic to prevent the Commission from exercising its statutory functions" (para [51]);



1.26 The learned Judge erred in finding that “to proceed outside that *fora* would put business into disarray” (para [53]);

1.27 The learned Judge erred in finding that the application should be dismissed on jurisdictional grounds “therefore the other questions raised as preliminary objections and merits of the case to be heard by the proper *fora* under the Act” when the High Court properly has review jurisdiction over the application (para [56]).

2. The learned Judge erred in dismissing the application on jurisdictional grounds and by failing to determine the merits of the application, despite it being argued in full at the hearing before the High Court.
3. The learned Judge erred in failing to determine the declaratory relief sought in the application, despite it being argued in full at the hearing before the High Court.

4. The learned Judge erred in failing to declare that the time period for the investigation and determination of the two matters pending before the Commission has elapsed.
  5. The learned Judge erred in failing to determine the application for striking out, despite it being argued in full at the hearing before the High Court (para [24]).
  6. The learned Judge erred in rejecting the finding that section 40 of the Competition Act and sections 151 and 152 of the Constitution provided a review remedy to the aggrieved party, as the Court did in *Pick 'n Pay Retailers (Pty) Ltd* (Case No 1639/2012) (para [34]).
- [7] The learned Judge erred in failing to find that the Commission's impugned decisions regarding access to the record, duration and conduct of the hearing are not decisions that a reasonable decision-maker could make in light of the legislative and regulatory framework governing the Commission, the

complexity and specialist technical nature of the subject-matter of the hearing, the perilous consequences of an adverse finding by the Commission and the negation of the appellants' rights caused by the impugned decisions.

8. The learned Judge erred in dismissing the application with costs, and in failing to grant the relief sought in the application, including the Appellants' costs.”

(2) Even though the grounds of appeal are legion, a careful reading of them persuades me that the quintessential complaints are:-

(A) The finding by the trial Judge that the application was precluded by section 40 of the Competition Act; or that no review was competent where appeal is provided for by section 40 of the Competition Act.

**[12]** (B) (1) Alleged acts of procedural unfairness. This is expressed in ground 7 as follows:-

“[7] The learned Judge erred in failing to find that the Commission’s impugned decisions regarding access to the record, duration and conduct of the hearing are not decisions that a reasonable decision-maker could make in light of the legislative and regulatory framework governing the Commission, the complexity and specialist technical nature of the subject-matter of the hearing, the perilous consequences of an adverse finding by the Commission and the negation of the appellants’ rights caused by the impugned decisions.”

And that the appeal may be disposed of by dealing with these complaints.

I will deal now with all that is contained under rubric ground one (1) as one complaint.

- (2) It is trite law that appeal and review constitute different litigation challenges to the impugned decisions. They are different ways of considering decisions but with the same ultimate aim of changing the said decisions.

- (3) It is common cause that section 40 of the Swaziland Competition Commission Act, (hereinafter “the Act”) provides a right of appeal from a decision of the Competition Commission (“The Commission”) to the High Court. This section has been reproduced in paragraph 9 above.

Under section 2 of the Act, “Court” means the High Court.

- (4) The appellants’ position on this is that the review application is available to it as a constitutional right. They also contend that section 40 of the Act contains no express ouster of any review right.
- (5) Section 151 (1) (a) of the Constitution states that the High Court has unlimited original jurisdiction in civil and criminal matters as the High Court possess at the commencement of this Constitution. Section 151 (1) (b) provides that the High Court has “such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland.” (underlining supplied). Section 151 (7) provides that any reference to revisional jurisdiction

shall be construed as including a reference to jurisdiction to determine reserved questions of law and cases stated.

- (6) Now under section 152 of the Constitution, the High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority. There is considerable doubt about the classification of the Commission. Is it a subordinate court, a lower adjudicating authority or simply a tribunal. Applying the *ejusdem generis* rule I will conclude that it is neither because it stands on its own. Subordinate courts or lower adjudicating authorities may include Magistrates' courts, traditional or customary courts or even coroners' inquests. At the periphery, one may include *ad hoc* committees disciplinary bodies which may be set up to investigate cases of insubordination in employment relations. From the point of view of their functions and the fact that they are independent, it may be valid to say that there is such a large number of tribunals in the governance of a nation that it is very nigh impossible to categorise them. Now, into what category may the Competition Commission be placed? It is obviously not a court. It is also not a lower adjudicating authority. The functions stated in the

Act clearly reinforce that stance. Is it then a tribunal? An answer is necessary because unless the Commission is a tribunal, the High Court may not have review jurisdiction over it. It has been stated on high judicial authority that the word “tribunal” is ambiguous because it has not like, “court”, any ascertainable meaning in English law.

- (7) It is also accepted that a tribunal is not necessarily a court merely because:-
- (i) It may give final decisions, or
  - (ii) It may hear witnesses on oath; or
  - (iii) Two or more contending parties may appear before it between whom it has to decide.
  - (iv) It may give decisions which may affect rights of subjects.
  - (v) There may be an appeal from it to a court.
  - (vi) It is a body to which a matter may be referred by another body.

See *Shell Co of Australia v Federal Commissioner of Taxation* 1931 AC 275.

- (7) One thing is certain. Tribunals are mostly independent. They are in no way subject to administrative interference as to how they decide any particular case. In *R v Deputy Industrial Injuries Commissioner ex p. Jones* (1962) 2QB 677 at 685, Lord Parker C.J. called the Commissioner a “quasi-judicial tribunal” and so did Lord Diplock in *R v Deputy Industrial Injuries Commissioner ex p. Moore* (1965) 1QB 456 at 486. But Wade and Forsyth, *Administrative Law*, 9<sup>th</sup> Edition page 910 explain that a quasi-judicial tribunal is concerned with questions of policy whereas the Commissioner is concerned only with questions of law and fact.
- (8) It is now the generally accepted principle that there should be a right of appeal from a tribunal to the High Court, on a point of law, in order that the law may be correctly and uniformly applied. See Wade and Forsyth, *op cit* p.917. Of course, a right of appeal is not ordained by common law. It is conferred by statute.
- (9) Furthermore, section 4 of the High Court Act (No 20/1954) provides that the High Court shall have full power, jurisdiction and authority to



review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same. This shows that the review jurisdiction of the High Court is not inherent as the English Kings Bench Division had, over inferior courts. This jurisdiction, like all the others stated in sections 151 and 152 of the Constitution, are statutory powers.

- (10) It is obvious that but for section 40 of the Act, no decision of the Commission would have been appealable to the High Court. Section 40 was enacted pursuant to authority in that behalf given to the legislature under section 151(1) (b) of the Constitution. To that extent, the power contained in section 40 of the Act is also a constitutional right. There is no express provision in the Act recognising a right of review of any decision of the Commission in the Act. It all becomes a matter of purposeful interpretation. Interpretations in these matters are aided generally by rebuttable presumptions. Now in casu, how is the obvious incongruence between section 40 and section 152 to be resolved?

(11) It is common cause that the Commission is a specialised body created by the Act. The question is whether the legislation (ie section 40) was meant to restrict applications to the High Court for review of the Commission's alleged impugned decisions? In practice, it may be noted that many statutory schemes contain their own remedies, example, by way of an appeal, say to a Minister. There may then be a choice of alternative remedies either under the Act or according to the ordinary law. On the other hand it may be held that the statutory scheme impliedly excludes the ordinary remedies. If its language is clear enough, it may exclude them expressly.

(12) In the view of Lord Scarman speaking in *R v Inland Revenue Commissioners ex p. Preston* (1985) AC 835 at 852, he added that "it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision." Again Lord Templeman said that "judicial review should not be granted where an alternative remedy is available" in the same case. In another tax case, Sir John Donaldson, Mr said that it is a cardinal principle that, save in the most exceptional circumstances, (the judicial review) jurisdiction will not be exercised where other remedies were available

and have not been used. *R v Epping and Harlow General Commissioners ex p. Goldstraw* (1983) 2 All ER 257 at 262.

- (13) Further, there are numerous judgments of impeccable authority to the effect that judicial review is not to be accepted by the courts where an alternative remedy exists.
- (14) This is particularly so when the statutory remedy is the only remedy under the Act; for example, when a taxing statute gives a right of appeal to the Commissioners of Inland Revenue (England) on a disputed assessment, the court will not grant a declaration to the taxpayer that he is entitled to certain allowances. (See *Argosam Finance Ltd v Oxby* (1966) Ch 390 or that he is not the owner of the property assessed. *Re Vandervelt* (1971) AC 912. Similarly, where a river authority is given a statutory right to recover certain expenses in a magistrate's court, it cannot obtain a declaration from the High Court that the claim is good, *Barraclough v Brown* (1897) AC 615 at 622. Again, where Trinity House were empowered to grant pilotage certificates, with a provision for complaint to the Board of Trade if

they failed to do so without reasonable cause, the disappointed applicants could not complain to the court; *Jensen v Trinity House* (1982) 2 LIR 14.

(15) In his book *Judicial Review of Administrative Action* (3<sup>rd</sup> ed.) at page 316, the learned author S.A. de Smith, wrote:

“It is the general rule that where Parliament has created new rights and duties and by the same enactment has appointed a specific tribunal or other body for their enforcement, the recourse must be had to that body alone.”

Again, Wade and Forsyth – *Administrative Law*, 9<sup>th</sup> Edition at page 711 explain the attitude of the courts thus:-

“These are cases where the right given by the statute does not exist at common law and can be enforced only in the way provided by the statute. The right and remedy are given *uno flatu*, meaning with the same breath and the same intent and the one cannot be dissociated from the other.”

See *Barraclough v Brown* (supra).

The learned authors continue:

“The same logic is applied to the important class of cases where the Act prescribes a procedure for the making and consideration of objections to some proposed order and then provides that a person aggrieved may question its validity, after it has taken effect, within a short period of time but not otherwise. This statutory procedure is exhaustive, and rule out any challenge except as expressly permitted by the Act.” *R v Cornwall ex p. Huttington* (1994) 1 All ER 694.

Professor J.F. Garner in his book *Administrative Law* (3<sup>rd</sup> ed.) at pages 159-160 gives the reason behind the principle:

“This is based not so much on the express terms of the statute, as on the situation which Parliament intended to result as a consequence of an express remedy being provided by the statute.”

(16) Finally for this purpose, in the Ghana case of *Commissioner of Income Tax v Fynhout* (1974) 1GLR 283 CA (full bench), the company applied for an order of certiorari to quash an assessment of tax on it, arguing that it was not assessable to tax. The High Court rejected the application but on appeal to the Court of Appeal, that decision was

reversed. The Commissioner of Income Tax then applied to the full bench of the Court of Appeal to review the decision of the ordinary bench. Allowing the application, the full bench held that the ordinary bench fell into grave error when it quashed the determination of the commissioner. It pointed out that once the assessment had been made, the proper procedure for the company to challenge it was by raising an objection under paragraph 49 of the Income Tax Decree, 1966 (NLCD 78). Since the company had not availed itself of that paragraph, the Commissioner was not expected to make any further express finding. The court said it was only when that stage had been reached that the Court of Appeal would have jurisdiction in the matter.

- (17) It is quite clear from the examples cited above that the law reports and textbooks are full of examples where the Legislature had created new rights not previously known to the common law and had provided special *fora* and procedures for their enforcement. In such cases, the intention of the legislature has been that only those *fora* and procedures should be used. In casu, the Commission did not exist at all. By Act 8 of 2007 the Swaziland Competition Commission was

established with the powers stated in section 11 of the Act. The Act provided its composition, organs, methods of obtaining information, conduct of investigations, anti-competitive conduct, etc. Section 40 of the Act provided unequivocally that any person aggrieved by a decision of the Commission made under this Act or under any regulations made hereunder may, within 30 days after the date on which a notice of that decision is served on that person, appeal to the High Court.

(18) The decided cases discussed above show that the only remedy given for any complaint about any decision of the Commission made under the Act is an appeal to the High Court. As the decision in *Barraclough v Barrow* supra decided, the right and remedy are given *in ano flatu* .....the one cannot be disassociated from the other. The remedy here is appeal to the High Court within 30 days.

(19) In the circumstances we uphold the Judge *a quo*'s conclusion in this matter that the proper procedure for the Appellant to complain about his grievance against the Commission is by way of an appeal to the

High Court and not by judicial review under section 152 of the Constitution.

**[13] (B) The complaint against procedural unfairness**

- (1) As I summarised above the substance of the remaining grounds of appeal complain of alleged acts of procedural unfairness. In sum, the appellants complain of the Commission's decisions regarding access to the record, duration and conduct of the hearings. They say that somehow the Commission's rulings on procedure adversely affected them. Hence "they are persons aggrieved."
  
- (2) Even though the dispute that was before the court a quo was said to be not on the merits, there was no doubt that the ultimate merits loomed large in the background. The appellants wrote to the Commission on 3<sup>rd</sup> April 2013 concerning the hearing that would be required and the procedure that they claimed would ensure procedural fairness at those hearings. They set the tone by saying that this was necessary in the light of the reports furnished by the investigation teams of the Commission and so to accurately address the numerous factual, legal



an economic errors and disputes they contained. In the context of that broad statement, the Appellants proceeded to demand an oral hearing in both matters since there were numerous disputes of law, economics and facts that cannot be resolved on paper filed of record.

- (3) On 9<sup>th</sup> April 2013, the Commission advised the Appellants of the procedure to be followed at the hearings. The Commission had allocated 90 minutes to each party. The appellants regarded that time as woefully inadequate, a mere 90 minutes to them to address the Board on those matters they had notified the Commission. The Appellants had also requested a full record of the investigation that would be placed before the Board at those meetings. The appellants also claimed a right to have the Secretariat's witnesses called before the Board for the appellants to cross-examine them. When the Commission stuck to its procedure, the appellants wrote to it saying that they were left with no option other than to bring an application before the High Court for relief so as to preserve, enforce and give effect to their rights to procedural fairness, natural justice and lawful action by the Commission.

(4) At this juncture it is useful to note what exactly was encompassed in the appellant's alleged rights to procedural fairness.

(a) The appellants requested full report of the full transcript of information provided by witnesses to members of the investigation teams. This will be the reports and evidence to be placed before the Board. The appellants claimed they did not know what transgression stood against them as breaches of the Act. The Commission retorted by saying the very supply agreement entered into by the parties was in breach of section 30 of the Act. That finding was central to the investigation of anti-competitive conduct by the first and second Appellants. The appellants claimed they seek the complete record as an adjunct to their right to defend themselves before the Commission. The Commission's response was that there was no express provision that the Commission must supply the entire record of investigation to every potentially affected entity in anti-competitive or merger matters. This demand must be confined to their right to be advised of and meet the case against them. To resolve this impasse, my view is that the court must always consider the statutory framework within which natural justice is to operate. What is essential is substantial fairness to the

person adversely affected. This may sometimes be adequately achieved by telling him the substance of the case he has to meet without disclosing the full plenitude or sources of information. The extent of the disclosure required by natural justice may have to be weighed against the prejudice to the scheme of the Act which disclosure may involve. For example in the case of *R v Gaming Board for Great Britain ex p. Benaim and Khaida* (1970) 2 QB 417, it was the Board's duty to investigate the credentials of applicants and obtain information from the police and other confidential sources. Such sources, it was held need not be divulged if there were objections, properly based on the public interest. The most important point is that the Board must, however, give the applicant an indication of the objections raised against him so that he can answer them as fairness requires. See also *Re Peigamon Press* 1971 Ch 388 where the court held that the inspectors appointed by the Board of Trade to investigate a company owed only a duty to act fairly. It did not require them to disclose the names of witnesses or the transcripts of their evidence, or to show to a director any adverse passages in their proposed report in draft. Indeed, the court held that if the information

obtained by the inspectors was so confidential that they could not reveal it even in general terms, they should not use it. See also *R v Monopolies and Mergers Commission, ex p. Mathew Brown Plc* (1987) 1 WLR 1235.

- (5) This is the pith of the problem. The appellants not only insist on the taking of oral evidence, they insist on the full details of all the evidence during the hearings before the Commission collected by officers of the Commission's Secretariat. The Commission says the appellants had not demanded any specific document and no specific prejudice had been alleged as a result of their not receiving the transcripts. The Commission subsequently promised to give to the appellants the information on which the report by the Secretariat is premised. It further promised them that the report to be considered by the Board, would be one supported by disclosed statements and documents.
  
- (6) My view is that the Appellants' claim to all the material gathered in the investigation and the identity of the sources thereof, would

militate against the work of the Commission. The effective functioning of the Commission would frequently depend on information received and market data which the sources may justifiably regard as confidential. I accept the position of the Commission that their offer to protect confidential sources of information in return for their deleting same from being used in the hearing is a fair compromise in the public interest.

- (7) My conclusion derives from my conviction that the Act confers wide discretion on the Commission and from the tone and context of the exchange of communications between the parties that there is good faith shown by the Board to work out an acceptable procedure even though the Act makes the Board the final arbiter of their procedure. In *Bushell v Secretary of State for the Environment* 1981 AC 75, at 96C-E it was said that fairness required objectors to a draft scheme may be given information and reasons relied upon by the Department, even though a final decision was far off.

(8) The Commission's functions are onerous and enormous. See sections 31 to 36 of the Act. This set out a host of anti-competition practices to be investigated by the Commission. Lord Diplock said this about the duty of fairness in the context of an investigation by the monopolies and mergers Commission in *Hoffan-La Roche & Co AG v The Secretary for Trade and Industry* 1975 AC 295 at 368 D :

“The Commission makes its own investigation into facts. It does not adjudicate upon a lis between contending parties. The adversary procedure followed in a court of law is not appropriate in its investigations. It has a wide discretion as to how they should be conducted. Nevertheless, I would accept it is the duty of the Commissioners to observe the rules of natural justice in the course of their investigation – which means no more than they must act fairly in giving to the person whose activities are being investigated reasonable opportunity to put forward facts and arguments in justification of his conduct of those activities before they reach a conclusion which may affect him adversely.”

As Wade & Forsyth (op cit) put it:

“But without quoting chapter and verse, they must give him a fair opportunity to contradict what is said against him as by giving him an outline of the charge, and if their information is so confidential that they cannot reveal it even in general terms, they should not use it.”

Lord Denning MR has said that the rules of natural justice must not be stretched too far (*R v Race Relations Board, ex p. Selvarajan* 1975 IWL 1686). The position is summed up thus by Lord Mustill in *R v Secretary of State for the Home Department, ex Doody*: (1994) 1 AC 531 at 560:-

“From [the oft-cited authorities], I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as

regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

**[14] The Nature and Duration of the Hearing**

- (1) This Commission is charged with policing a very important area of the livelihood of the nation – the economy. At common law, competition was controlled by the crude laws of supply and demand. This was supported by classical economic theory. Somehow it worked until world resources appear to have dwindled and economic competition depended on a number of factors, including even the



control of the nation's currency. Banks manipulated the LIBOR rates and what George Brown, former Labour Deputy Leader of Great Britain and Ireland as "the gnomes of Zurich" manipulated the rates of currency exchanges.

- (2) For fairly small countries any artificial tinkering of the economy could wreak undue hardship on the population. Most nations, including the whole of European Union, have therefore enacted institutions like the Office of Fair Trading or the Monopolies and Merger Commission, to monitor and control anti-competitive acts.
  
- (3) At their request, the appellants were granted an opportunity to make oral submissions on both matters pending before the Board in 90 minutes on the same day. This would supplement such written submissions, including witness statements the appellants wished to provide. The appellants demanded a full trial process as if it was a High Court civil action. As Counsel for the Commission put it, this request plus a request by the appellants to be allowed to cross-examine all persons who gave information to the investigation teams

put the procedure above ordinary civil proceedings. The reason the appellants gave for these demands was to ensure that future hearings would be fair, just and lawful, not that as matters stood then they had suffered any declared damage or other grievance. In short, the appellants were pushing to take over the Commission's discretion to decide procedure at its hearings. This is a discretion expressly given to the Commission by section 14(1) of the Act. What is worse, the appellants have really not set out their case. They have the report and the supporting statement and information. The Commission complains that it is being kept in the dark about any specific factual disputes and their relevance to their case.

- (4) It is on record that the Appellants' legal advisors offered "to assist the Secretariat as it did not know what it was doing." What a turn-up for the books! Again, at page 12 of their Founding Affidavit (para 21.2.1) the Appellants stated that "the opportunity to debate, explain and argue these complex and technical issues in light of the evidence and facts is essential to ensure that the Board which, *with all due respect, does not include any members with obvious expertise in competition law and economics*, is best-placed to take a decision.

Questions regarding the correct market definition, characteristics of the relationships between the Applicants as either vertical or horizontal, the market dynamics, conditions of competition and resultant incentives of the market participants are all issues that must be debated and addressed before the Board of the Commission at the hearings into the two matters. I am not persuaded that that apparent show of scholarship had any real relevance to the issues at stake in the hearings. In my view, it was all part of the appellants' bravado that the Board lacked "qualified" personnel.

- (5) Section 12 of the Act provides detailed procedure for the Commission to obtain information. The Commission's powers are also carefully spelt out in section 13 of the Act. There was therefore no need for any debate, or argument to explain the envisioned complex and technical matters. The Board in my view, was quite right when it rebuffed the Appellants' efforts to belittle them and concentrated on the mission to conclude the investigations into the two matters.

- (6) It is clear to me that the appellants were engaged on a course of filibuster. They had all the information and assistance they were entitled to get from the Respondents to enable them state their defence or objections or even their reasonable expectations. They simply laboured to abort the proposed hearings.
- (7) In consequence, no real decisions had been taken by the Board which adversely affected them. It was not correct as they put it that they were entitled to anticipate that the hearings, if held, would prejudice them. Consequently, they mounted what in English jurisprudence will be a *quia timet* application. They claimed they apprehended some damage or grievance but which could not be articulated until it had happened. See *American Cyanamid v Elthicon Ltd* (1975) AC 396.
- (8) After all, the appeal was not to some administrative agency or authority. It is to the High Court, the very body the appellants were eager to apply to for relief. It was really an unhappy choice. At that time, the Board had not taken any real decisions on the substantive matter of anti-competitive conduct or practices which could have

adversely affected them they have suffered no real prejudice. The hearing never took place.

- (9) It is also common cause that whereas judicial review is about procedure, an appeal is about the merits of the dispute. Of course, there is nothing to stop an appellant from complaining about procedural irregularities as well as the merits in an appeal. An appeal will obviate piece-meal litigation. Indeed, section 40 of the Act prescribes that the appeal be filed within 30 days. That could expedite the matter, particularly as delay could affect the would-be appellant, the consumer and the larger interests of the country as a whole.
- (10) My view of the matter is as Wade and Forsyth put it. “If confusion and complications are to be avoided, judicial review must be accurately focused upon the actual exercise of power and not upon mere preliminaries” *op. cit* at page 61. In *casu*, the application by the appellants to the High Court was really still-born.

(11) In the result for all the reasons stated in this judgment and also for the reasons given in the judgment of the court a quo. I will dismiss the appeal as unmeritorious.

(12) Costs to the Respondents including certified costs of Counsel.

Ordered accordingly.

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**DR. S. TWUM**  
**JUSTICE OF APPEAL**

I agree.

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**M.M. RAMODIBEDI**  
**CHIEF JUSTICE**

I agree.

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**S. A. MOORE**  
**JUSTICE OF APPEAL**

**For Appellants** : **Advocate D.N. Unterhalter S.C.**  
**(Advocate M.M. Le Roux)**

**For Respondent** : **Advocate K. J. Kemp S.C.**