

SOUTH AFRICA / JUDGMENT

Gas2Liquids (Pty) Ltd v Competition Commission and Others (13607) [2013] ZACT 3; [2013] 1 CPLR 330 (CT) (23 January 2013)

[2013] ZACT 3

COURT
Competition Tribunal

BEFORE
N Manoim, Y Carrim, L Reyburn

CASE / FILE NUMBER
013607

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 013607

In the matter between:

Gas2Liquids (Pty) Ltd Applicant

and

The Competition CommissionFirst respondent

The South African Petroleum Industry

AssociationSecond respondent

BP Southern Africa (Pty) LtdThird Respondent

Chevron South Africa (Pty) LtdFourth Respondent

Engen Petroleum LtdFifth Respondent

Sasol Group Services (Pty) LtdSixth Respondent

Shell South Africa Marketing (Pty) LtdSeventh Respondent

Shell South Africa Refining (Pty) LtdEighth Respondent

Total South Africa (Pty) LtdNinth Respondent

The Petroleum and Gas Corporation of

SA (Pty) Ltd t/a PetrosaTenth Respondent

Easigas (Pty) Ltd	Eleventh Respondent
Shell & BP South African Petroleum Refineries (Pty) Ltd	Twelfth Respondent
Sasol Synfuels	Thirteenth Respondent
The National Petroleum Refineries of SA (Pty) Ltd	Fourteenth Respondent
Natcos, a joint venture between Sasol Ltd and Total SA (Pty) Ltd	Fifteenth Respondent
The Minister of Trade and Industry	Sixteenth Respondent
Panel: N Manoim (Presiding Member)	
Y Carrim (Tribunal Member)	
L Reyburn (Tribunal Member)	
Heard on: 26 November 2012	
Reasons and Order issued on: 23 January 2013	
Reasons for Decision and Order	

Introduction

This is an appeal by Gas2Liquids (Pty) Ltd (“Gas2Liquids”) in terms of sec 10(3) of the Competition Act against an exemption granted by the Competition Commission (‘Commission’) to the South African Petroleum Association (‘SAPIA’) and its members in terms of sec 10(8) of the Competition Act, Act no. 89 of 1998 (‘the Act’).

The Competition Commission and The South African Petroleum Association (‘SAPIA’) and its members are opposing the appeal, arguing that it be dismissed with costs. 1

The exemption in this case relates to a set of agreements in the liquid fuel industry that it is said require exemption to stabilise the supply of liquid fuels. The appellant, Gas2Liquids, seeks to have the exemption set aside. The appeal has been unsuccessful for the reasons we explain in this decision.

As we later go on to explain, Gas2Liquids has struggled to articulate the basis for its appeal. In its notice of appeal Gas2Liquids raised numerous and sometimes inconsistent grounds of appeal. These grounds narrowed dramatically in its written heads of argument and reduced even further in its oral argument on the day of hearing.

In a previous interlocutory decision in this matter we had to rule on two issues: whether Gas2Liquids had locus standi to appeal – we decided it did; secondly whether the appeal was a narrow one confined to the record before the Commission or a wider one allowing new evidence

to be introduced. We decided it was a narrow appeal. Gas2Liquids had contended that the appeal was a wider one.² That approach is itself instructive of its current difficulties. It pointed to the fact that the appellant sought a basis for an appeal in a possible widened proceeding, lacking confidence that it could find it in the present record. In the result we have not been persuaded that the appeal has merit.

Background

In December 2005 the country experienced a series of disruptions to fuel supplies. The disruptions affected motorists, airports and certain sectors of the economy, specifically agriculture. The disruptions ranged in severity from the inconvenient to serious losses for some businesses. The Minister of Minerals and Energy, concerned about the crisis, appointed a task team to investigate its causes and to make appropriate recommendations.³ The task team, headed by an erstwhile member of this tribunal, Marumo Moerane, concluded that another crisis could occur in the second half of 2006.

The task team identified a number of problems that led to the crisis. Amongst those relevant to the present case were the tight supply demand situation, scheduling of refinery shutdowns (specifically the possibility that refineries might shut down at the same time thus exacerbating supply shortages) poor communication amongst stakeholders and inadequate logistical infrastructure.⁴

The Moerane Report concluded that stability could come about only through a co-ordinated approach involving industry discussions over issues such as supply lines and production shutdowns. But the Report recognised that such co-ordination might infringe the Act. ⁵ It recommended that exemptions be sought.

On 5 June 2009 the Minister of Trade and Industry granted the petroleum industry a designation in terms of section 10(3)(b)(iv) for a period ending on 31 December 2015. SAPIA and its members applied to the Commission, and were granted, on 17 March 2010, a short-term exemption from certain restrictive practices. The objective of this exemption was to enable SAPIA and its members to collectively develop, plan and monitor the supply of liquid fuels during the period of the 2010 FIFA World Cup. The exemption ended on 31 August 2010.

Five months prior to the expiry of the World Cup exemption, SAPIA applied for a further exemption until 31 December 2015. The application covered a wide range of cooperation agreements and practices which, according to SAPIA, were required to ensure the continuity and stability of liquid fuels supply to various sectors and geographic locations in South Africa. It concerned cooperation agreements and/or practices between SAPIA and its members at the following stages of the liquid fuels supply chain: inbound logistics; primary distribution; terminal and depot operation, and shared services such as airport fuelling services and port joint bunkering services. The exemption in essence covered the same agreements as the World Cup exemption, but did not extend to the wholesale, commercial and retail trade supply chain.

Upon receiving SAPIA's application the Commission, as required by the Act, published a notice in the Government Gazette inviting interested parties to make written representations as to why the exemption should be refused.⁶

The Commission received three submissions. One was from the National Association of Automobile Manufacturers of South Africa ("NAAMSA"),

which represented the interest of vehicle manufacturers, importers and distributors. NAAMSA supported the application, indicating that in order to ensure that there was a stable supply of liquid fuels in the country it was necessary to coordinate activities in the petroleum industry to optimise the usage of existing facilities. The second submission was that of the South African Petroleum and Energy Guild and Others ("SAPEG"), a non-profit organisation established to represent emerging

companies in the energy sector. Gas2Liquids is a member of SAPEG. SAPEG objected to the exemption, arguing that emerging players in the wholesale market who are historically disadvantaged South Africans ("HDSAs"), cannot get access to the national infrastructure used by the oil companies at different stages of the liquid fuel supply chain. It wanted fair and transparent access for all its members to the infrastructure. The third submission was made by NERSA, the National Energy Regulator of South Africa. NERSA wanted to confirm that the exemption application included the sharing of information which related to the general operation of facilities in the petroleum sector because, in order for it to approve licenses to operate the facilities, licensees had to share certain information with competitors. The

Commission confirmed that the exemption did indeed cover the sharing of such information.

Upon investigating the exemption the Commission found that the agreements and practices contravened sections 4(1)(a) and 4(1)(b)(i) of the Act, but concluded that the cooperation agreements and practices met the criterion set out in section 10(3)(b)(iv) of the Act as they would contribute towards maintaining the economic stability of the petroleum and refinery industry by reducing the risks of fuel supply interruption. It also found that SAPEG's submissions fell outside the ambit of the Act and that there were government regulations and policies in place which ensured access for HDSAs and other third parties to the national infrastructure used in the industry. Moreover, it was the Department of Energy's and/or NERSA's responsibility to ensure that all stakeholders, including SAPIA, comply with industry regulations. The Commission thus granted SAPIA the second exemption on 3 October 2011 in terms of section 10(3)(b)(iv).

Although the Commission did not accept the argument advanced by SAPEG it was not unresponsive to its contentions. We set out below the terms of the exemption. We underline those terms the Commission inserted to accommodate the SAPEG concerns:

SAPIA and its members and any other approved participants in exempt agreements and practices may not share competitively sensitive information, except for the purposes described in the exemption application.

If:

2.1 a party to an agreement or practice at any stage of the liquid fuels supply chain acts as an operator of the infrastructure or coordinates the joint use of a facility to which that agreement or practice relates; and

2.2 it is necessary for that operating party to be provided with disaggregated volume information of other participants, or any other information which may lead to a substantial lessening or prevention of competition;

Then the operating party must not share that information with the other participants, unless sharing the information is necessary to ensure security, stability and continuity of liquid fuels supply, or is necessary for strictly operational purposes.

The employees of any operating party who receive such information shall ensure that the information is held, maintained and used separately, confidentially and on a need to know basis only.

SAPIA and its members may not share information relating to setting margins, imposition of levies and / or approval of tariffs, unless required to do so by the Department of Energy or NERSA.

SAPIA and its members and any other approved participants are required to comply in all material respects with all statutes, regulations and policies which have the force of law, and which directly relate to competition in the petroleum refining and marketing industry in South Africa. These industry regulations include but are not limited to: the Petroleum Products Amendment Act (58 of 2005), the Petroleum Pipelines Act (60 of 2003), the National Ports Act (12 of 2005), and Regulations in terms of the Petroleum Pipelines Act and National Ports Regulations.

SAPIA must open up its membership to accommodate both existing and potential marketers in the petroleum and refinery market on fair, reasonable and transparent grounds. (Our underlining)

SAPIA will provide the Commission with regular updates regarding the implementation of the Department of Energy's 'Energy Security Master Plan'.

The exemption period runs from 3 October 2011 to 31 December 2015.

On 10 November 2011, Gas2Liquids appealed the Commission's decision in terms of section 10(8) of the Act. 7 SAPIA and the Commission both opposed the appeal.⁸

Legal framework of the exemption

Applications for exemption are made in terms of section 10(1) of the Act which states:

A firm may apply to the Competition Commission to exempt from the application of this Chapter-

an agreement or practice, if that agreement or practice meets the requirements of subsection (3);
or

or category of agreements or practices, if that category of agreements or practices meets the requirements of subsection (3).

This section has to be read in conjunction with section 10(3) which sets out the requirements for exemption. It states that the Commission may only grant an exemption if:

(a) Any restriction imposed on the firms concerned by the agreement or practice concerned, or category of either agreements or practices concerned,

is required to attain an objective mentioned in paragraph (b); and

(b) The agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

(i) maintenance of promotion of export;

(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry. (Our underlining)

Section 10(3) therefore sets out two requirements that need to be established; the Commission must first ascertain whether the restrictive practice is 'required' in order to achieve one of the objectives listed in part (b) and secondly, that the agreement or practice within the context of 10(a) 'contributes' to achieving one of the objectives listed in that sub-section. In this case the specific objective relied upon is subsection (iv), the economic stability of an industry designated by the Minister, after consulting the Minister responsible for that industry.

It is perhaps more helpful to reverse the order of the sub-paragraphs to appreciate this, as this moves the analysis to a more logical one, involving first the general consideration and then the specific one. Taking subparagraph (b) first, the Commission asks whether, apart from the formal steps of the designation having been complied with, the agreement meets the object on which its application for exemption is premised; that is does it contribute to the economic stability of an industry. In this case the Commission has done just that and concluded that the agreements contribute to the economic stability of the liquid fuels industry by ensuring stability of supply.

It then moves to the specific, viz. sub-paragraph (a). Here it asks whether any restriction imposed on the firms concerned by the agreement is necessary to achieve the objective. There was a debate during the hearing as to whether restriction meant restriction on competition or more generally a restriction in its unqualified sense.

Whilst the section does not insert any qualifying language it is hard to see why the concept restriction can have any other meaning than restriction on competition. The Act is not concerned with any restrictions parties may impose on one another that are competition-neutral. In considering an exemption one is concerned with whether restrictions on competition by way of an arrangement are required to achieve the objective for which the exemption has been sought. Thus by way of example, if the parties to the present exemption had sought to regulate wholesale and retail prices as well, that would not have been a justified restriction on competition as the object of stability could be achieved without this. Indeed this is exactly what the Commission decided.

Expressed differently, sub-paragraph (a) ensures that parties to agreements that purport to contribute to the objectives set out in subparagraph (b) do not get a blank cheque to restrict competition more than is necessary.

The appeal

As we noted earlier, Gas2Liquids' notice of appeal was lengthy and wide-ranging. There would be little point in replicating the entire document as in its heads of argument Gas2Liquids restricted the basis of its appeal to the grounds set out below.

It alleged that the Commission erred on the following grounds in granting the exemption:

“The agreements and/or practices covered by the exemption fall outside the ambit of information exchanges that were intended by the Minister of Minerals and Energy and the Minister of Trade and Industry to be covered when the industry was designated for purposes of an application in terms of s 10;

The agreements and/or practices covered by the exemption, which, taken individually and together, result in extensive exchanges of detailed competitively sensitive information, have significant anti-competitive effect;

The agreements and/or practices covered by the exemption, whether taken individually or together, are not “required” to ensure economic stability of the industry;

The agreements and/or practices covered by the exemption, can, at best for SAPIA, be said to “contribute” to the economic stability of the industry, but the economic stability of the industry can also be secured by less anti-competitive means, such as interaction under the auspices of the Department of Minerals and Energy that includes not only members of SAPIA, but all players in the industry;

The conditions attached to the exemption implicitly recognize that the exemption improperly benefits only certain industry players and that its operation must be extended to truly contribute to the stability of the industry; and

The conditions attached to the exemption fail to address the significant concerns associated with the grant thereof, and fails (sic) to incentivize the SAPIA members to address matters truly required to ensure stability of supply in the industry.”

During oral argument there was a shift in emphasis. Gas2Liquids indicated at the hearing that it did not take issue with the fact that the agreements contributed to the security of supply, the second requirement, but that it was limiting its argument to the first requirement, namely whether the restriction, i.e. the restrictive practice imposed on competition, was required to meet the objectives of sec 10(3)(b)(iv). According to it, the Commission had erred by basing its decision to exempt only on the second requirement and had neglected to consider the first. As an example it pointed out that documents demonstrating the fact that a comprehensive investigation had been made by the Commission were “patently absent from the record”. Nor, it argued, was there any indication that the Commission had engaged with the Minister of Trade and Industry or the Minister of Minerals and Energy to establish whether the agreements were within the ambit of practices considered by the Ministers to be ‘required’ for the stability of the industry.

Analysis of the grounds of appeal

As we noted earlier, most of the grounds raised in the notice of appeal have not been persisted with in argument by Gas2Liquids. Indeed the respondents contend that notwithstanding the breadth of the original notice, some points in the heads of argument are novel, whilst the rest appear to have been abandoned.

For purposes of analysis the grounds of appeal can usefully be grouped into four categories:

Those that criticise the method the Commission adopted in determining the exemption;

Those that allege the exemption has anticompetitive outcomes because it is exclusionary of smaller firms in the industry ;

Those that allege that the purpose of the exemption could have been achieved by less restrictive means that do not exclude other firms (although these are not articulated); and

Those that advance industrial policy arguments that it alleges the Commission should have taken into consideration when deciding the exemption application.

(There is some overlap between the second and third categories but for present purposes that is not of consequence.)

The first category – Procedural

Sapia rightly points out that several of the issues advanced as grounds of appeal were in fact grounds of review. But Gas2Liquids elected to appeal and not review the exemption decision and cannot use the one to advance the cause of the other. Indeed the approach that Gas2Liquids urged the Tribunal to adopt in deciding the appeal was more the methodology of review proceedings than of an appeal.

Gas2Liquids argued that in order to decide whether the requirement set by section 10(3)(a) had been met the Tribunal must consider the following set of three questions; firstly, whether the Commission had appreciated that it needed to investigate this requirement, secondly whether the Commission had in fact investigated it, and finally, had the Commission made the correct decision based on the information before it?

There are two problems with this argument. First it advances a test formulated not as a test on appeal but one that more closely resembles a review. But even if this test is an appropriate one for an appeal, something we do not accept, Gas2Liquids still advanced nothing to suggest that the Commission had failed the test.

Allied to this criticism of the Commission were allegations that the Commission had not done a proper investigation before determining to grant the exemption. Again, this ground would have been better found in a review. But even if it may be considered as an appeal ground, no basis for it was advanced.

Although this point need not be taken further it is worth noting, in order to forestall public concerns, that the Commission invited submissions from the public, and save for those from SAPEG, those it received favoured the granting of the exemption. Nor was the Commission passive in this respect. It sought comments from industry players who had not responded to its notice in the Government Gazette and the responses it elicited in this way were also favourable to the exemption. The Commission moreover did not uncritically accept all the submissions that SAPIA advanced but did its own analysis of the competition issues and concluded, unlike SAPIA, that the practices were unlawful. The Commission further imposed conditions on the exemption to limit its ambit, namely to ensure that it did not apply to wholesale or retail operations, and to require SAPIA to widen its membership.

We thus find that the procedural grounds of criticism fail; both because they constitute impermissible use of an appeal to found a review and secondly, that the criticisms themselves are without substance in the record.

Second category

The contention here was that the Commission has not considered the exclusionary effects of the exemption on smaller competitors of the SAPIA firms. The argument is that the exemption will perpetuate their exclusion from the industry further.

That this should ground an appeal to set aside the exemption is fallacious on several grounds.

First, the fact that an agreement which is the subject of an exemption has an anticompetitive effect is not a proper ground of appeal. An anticompetitive effect is the rationale for an exemption.

Secondly there is nothing in the exemption that excludes non-parties from becoming parties to the agreement. What language there is in the exemption on this point is, as we showed in the underlined phrases in paragraph 14 above, expressly inclusive and permissive.

Gas2Liquids then argued that despite this permissive language there is nothing in the exemption to require SAPIA and its members to include other firms such as Gas2Liquids in their arrangements. Whilst this interpretation is correct, it is still insufficient to show that the exemption should not have been granted.

Even if the exemption perpetuates the exclusion of non-SAPIA firms (something its terms as we noted do not suggest) it does not follow, firstly that this would have an anticompetitive effect, as the exclusion of some firms does not necessarily equate to anticompetitive exclusion.

But even if this latter proposition is wrong, if, as the Commission has assessed, orderly access to the infrastructure is the most important consideration, then any loss to competition by possible exclusion of some firms is a legitimate and properly considered consequence of the granting of the exemption for the period of time in which it will apply.

Indeed, the likelihood is that supply will remain at current levels regardless of any increase in the number of firms accessing the infrastructure. The problem for smaller firms is not the exemption, but the current physical constraints on supply as identified by the Moerane task team's report.

Third category

Gas2Liquids argued that the Commission had not considered alternatives to the present form of the exemption. However, it did not put forward what those alternatives were and instead displayed a degree of ambivalence as to whether the exemption should be granted in some modified form or not at all as shown in the following exchange between the presiding member and Gas2Liquids' Counsel:

Chairperson: In other words, no exemption is required and the market will sort itself out. Is that what you are saying?

Adv McNally: It may be and that, as I say, will go back to the Commission. It may be that in order to achieve that on an efficient basis, there is some need for the oil majors to know what the situation of the minors is from time to time. They need to know who is importing what and at what time. It may be. I'm not saying it would be, but it may be that there are certain practices that are necessary to ensure that. We don't know. What we do know is that this practice is not necessary. It's not the only way to achieve it. It's not necessary to achieve stability of supply.

It is thus incorrect to argue that the Commission had not considered any alternatives. There were no viable alternatives before it that it could rely on, only sweeping statements made by SAPEG suggesting that there were alternatives, one of which was that third parties should be given access. Mere assertion that there is an alternative without putting one forward, and moreover in compelling terms, does not make the decision susceptible to appeal.

Fourth category

Into the final category are concerns that the Commission has failed to take into account other legislation and policy affecting the industry. These are industrial policy arguments. The Commission is not obliged to consider such arguments when it exercises its discretion in terms of section 10. Nothing in the section requires it to have regard to other legislation or to broader industrial policy issues. Indeed we would suggest that the reason why two ministers of state are required to perform functions as part of the section 10(3)(b)(iv) exemption process, is that it would be for them, not the Commission to have regard to broader issues of industrial policy. The Commission correctly regarded these issues as falling outside of its statutory mandate.

Conclusion

The agreements provide for the regulation of a bottleneck infrastructure. By its very nature this is a scarce resource that has to be rationed amongst its users by way of them reaching agreement on co-ordinating access. The Commission's decision not to make the exemption dependant on it being extended to all players in the industry cannot be faulted. If it had, the very instability that premised the need for the exemption would again eventuate. The Commission's decision to provide instead for a permissive rather than mandatory regime for access by non-Sapia firms is a sensible compromise.

Gas2Liquids has not shown that the terms of the exemption have gone beyond its stated objective and given SAPIA a 'blank cheque' to engage in anticompetitive activity not justified by the requirements of section 10(3)(b)(iv). For this reason the appeal must fail.

Conclusion and Order

The appeal is dismissed. The appellant is liable for the costs of the second to fifteenth respondents, including the costs of two counsel.

23 January 2013

N Manoim Date

Concurring: Y Carrim and L Reyburn

Tribunal Researcher: Rietsie Badenhorst

For the Applicant: Adv J.P.V McNally SC and Adv M.J Engelbrecht, instructed by Darryl Ackerman Attorneys

For 1st Respondent: Adv J.A Motepe, instructed by the Competition Commission with heads of argument prepared by Adv. I.V Maleka S.C and Adv J.A Motepe.

For 2nd – 15th Respondents: Adv A Cockrell SC and Adv D Turner, instructed by Bell Dewar Inc.

1SAPIA's members are: BP Southern Africa, Chevron South Africa, Engen Petroleum, Sasol Group Services, Shell South Africa Marketing, Shell South Africa Refining, Total South Africa, The Petroleum and Gas Corporation of SA T/A Petrosa, Easigas, Shell & BP South African Petroleum Refineries, Sasol Synfuels, The National Petroleum Refineries of South Africa, and Natcos, an

Unincorporated Joint Venture between Sasol and Total South Africa. The Commission, SAPIA and its members, with the Minister of Trade and Industry are the respondents. The Minister of Trade and Industry, however, did not oppose the appeal.

2See *Gas2Liquids (Pty) Ltd v The Competition Commission*, Tribunal Case no: 95/EA/Nov11 of 6 July 2012. SAPIA had argued as a point in limine that Gas2Liquids had not shown that it had a financial interest that was affected by the granting of the exemption and therefore did not have locus standi in terms of section 10(8) of the Act. Gas2 Liquids as we noted also argued a point in limine regarding the nature of an appeal in terms of section 10(8) contending that the appeal was a wide one not confined to the record before the Commission. SAPIA disputed this as well contending that the appeal was a narrow one. The Commission did not dispute

Gas2 Liquids' locus standi but did argue that the appeal was narrower than that contended for by Gas2Liquids. At a pre-hearing the Tribunal directed that it would first decide those issues before hearing the appeal. A hearing on those issues duly took place. On 6 July 2012 the Tribunal found that Gas2Liquids did have locus standi but that the appeal was a narrow one which was confined to the record before the Commission.

3See Record page 249 Report of Moerane Investigating Team paragraph 1.

4See Record page 250 Report of Moerane Investigating Team paragraph 5

5Moerane report op cite paragraph 25.7.4.

6On 30 July 2010 in Government notice No. 33399 published in terms of section 10(6)(a) & (b) of the Act.

7Neither SAPEG nor any of its other members appealed although it was SAPEG that had made the original representations to the Commission during its investigation.

8Section 10(8) states: "The firm concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) and (5), may appeal that decision to the Competition Tribunal in the prescribed manner."

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