# Competition Law and Dispute Resolution

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COMPETITION LAW AND DISPUTE RESOLUTION ALERT

# Finding a balance between civil litigation and competition law

**In the early 2000s, two businessmen joined forces to sell stainless-steel door hardware under the Quicksilver (QS) brand. They agreed – informally – that Mercury Fittings (the respondent) would operate in the Western, Eastern and Northern Cape, and Doorware (the appellant) would cover the rest of the country.**

In respect of one large retailer, the parties further agreed to supply QS goods under the name of the respondent. This was because the respondent already had a vendor number with the retailer. The parties agreed that the appellant would submit its invoices to the respondent, who would do a reconciliation and pay the amounts due to the appellant based on the agreed geographic allocation.

When the respondent's founding member passed away in 2021, the appellant's CEO made changes to the account it had with the retailer and opened an office in Cape Town – an area previously designated to the respondent.

This led to an urgent application in the High Court by the respondent to stop what it regarded as a breach of their agreement. The appellant denied that any binding agreement existed and submitted that there were disputes of fact which could not be resolved on the papers.

## Court *a quo*

The High Court found that there were indeed factual disputes regarding the existence of the agreement. The matter was referred to oral evidence, and the court *a quo* also granted an interim interdict against the appellant.

The appellant was subsequently unsuccessful with an application for leave to appeal as well as an application for special leave to appeal to the Supreme Court of Appeal (SCA). The appellant therefore brought an application for reconsideration in terms of section 17(2) of the Superior Courts Act 10 of 2013.

## The SCA

Section 17(2)(f) of the Superior Courts Act states:

> *"The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation."*

The SCA held that the first inquiry is whether exceptional circumstances exist that justify the reconsideration of the decision refusing the appellant leave to appeal. Exceptional circumstances must exist for reconsideration to succeed.

The appellant's reasons for the reconsideration were that:

- The application raised legal argument that was not canvassed in the High Court, being that the interim interdict was wrongly granted because it was contrary to Chapter 2 of the Competition Act 89 of 1998 (Competition Act), which is a function exclusively within the jurisdiction of the Competition Tribunal (Tribunal).

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- The oral agreement entered into between the parties constituted a prohibited restrictive horizontal practice as contemplated in section 4(1)(b) of the Competition Act as the parties:
  - are in a horizontal relationship with one another (as competitors);
  - divided their markets in terms of geographical areas of South Africa to avoid competition; and
  - agreed that each party would have exclusive rights to sell and market QS products within their allocated geographical areas.

**Competition arguments**

Section 65(2) of the Competition Act governs situations where, in an action in a civil court, a party raises an issue concerning conduct prohibited in terms of the Competition Act.

According to the SCA, section 65(2) of the Competition Act requires the party alleging conduct that is prohibited in terms of the Competition Act, to raise that issue, yet the appellant, without any explanation, failed to do so in the court *a quo*. Therefore, the court *a quo* was unable to apply the provisions of section 65(2).

Additionally, the SCA found that the appellant's section 4(1)(b) competition point did not constitute an "*exceptional circumstance*", as the respondent was not given notice of it. The SCA reiterated that litigation by ambush is not permissible.

That said, the SCA commented that the appellant's section 4(1)(b) point had no merit, as in its view, the parties were not in a horizontal relationship (as competitors) and rather, agreed to offer the same goods at the same prices in different geographical areas for convenience and efficiency. The SCA emphasised that the respondent must be put in a position to put facts before a court to contradict allegations of a section 4(1)(b) point, and the SCA ultimately concluded that it could not decide the point.

The SCA noted that the appellant could still raise the competition point in ongoing High Court proceedings as an alternative to its defence that no agreement was concluded between the parties.

**Appealability of interim interdicts**

The SCA quoted *Government of the Republic of South Africa and Others v Von Abo* [2011] (5) SA 262 (SCA), which stated that:

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

The SCA went on to state that it was not in the interests of justice that leave to appeal should be granted against the interim interdict, as it was not final in effect, nor definitive of the rights of the parties. On the contrary, the main

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dispute between the parties (whether there was a validly concluded agreement that remains binding on their heirs) was pending before the High Court and the Tribunal.

The SCA therefore struck the application off the roll with costs.

## Takeaways from a competition law perspective

Section 65(2) of the Competition Act provides a critical mechanism for the interface between civil litigation and competition law enforcement in South Africa. It precludes a civil court from considering the merits of conduct prohibited in terms of the Competition Act; instead, the court must (a) apply the determination of the Tribunal or Competition Appeal Court if one has been made or (b) refer the issue to the Tribunal for determination of the merits, provided that the issue has not been raised in a frivolous or vexatious manner and the resolution of that issue is required to determine the final outcome of the action.

In *Astral Operations Ltd v Nambitha Distributors Pty Ltd Astral Operations Ltd v O'Farrell NO and Others* 689/2013, 13794/2011 the court has emphasised that the jurisdiction to determine whether conduct amounts to a prohibited practice under the Competition Act lies exclusively with the specialist competition authorities. The civil court's role is limited to a threshold assessment: it must be satisfied that the competition issue is neither frivolous nor vexatious and that its resolution is necessary for the determination of the main dispute. If these criteria are met, the court is obliged to refer the issue to the Tribunal.

In *Leonard and others v Nedbank Ltd and Others*, Case Number 841/CR/Aug07 the Tribunal characterised a referral under section 65(2) as a "*drastic step*", which significantly impacts litigants who, while attempting to recover their debt in one forum, are now compelled to engage in another at great expense and inconvenience. Additionally, the Tribunal underscored the civil court's role in "*identifying opportunistic litigants who may seek to stay civil proceedings by finding some inkling of competitive harm lurking in the civil dispute to which they are a party*".

The mere raising of a competition law issue does not automatically trigger a referral. In *Doorware CC v Mercury Fittings CC* [2025] ZASCA 25, the SCA underscored that the party alleging prohibited conduct in terms of the Competition Act must raise the issue in the civil court and must give notice of the point to its opponent. Otherwise, the civil court may be hamstrung from applying section 65(2).

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The evolving jurisprudence on section 65(2) referrals highlights the delicate balance between the jurisdiction of the civil courts and the exclusive competence of the competition authorities. While competition law defences are not to be used opportunistically to delay or frustrate civil litigation, the substantive determination of prohibited practices ought to be reserved for the specialist competition authorities.

Is the Doorware case, as the SCA opined, the tale of an innocent agreement to sell the same goods at the same prices in different areas for reasons of convenience and efficiency, or is it a classic story of a 20-year profit-maximising collusive arrangement? If the latter, it appears that it was set to go undetected, until the appellant thought disclosure was a potential exceptional ground to appeal the court *a quo's* decision. Had the appellant realised, if the competition point was successful, it was itself admitting to being party to a prohibited practice? While the SCA found it could not, in this chapter, decide the competition point, it doesn't seem we've reached the end of the competition story.

## Takeaways from a litigation perspective

This judgment reaffirms the exacting bar for what constitutes "*exceptional circumstances*" in appeal proceedings. Second, it demonstrates that it is important for a litigant to place all arguments it intends to make at the first time of asking. The court will not lightly entertain issues of law that are raised after the court *a quo* has already adjudicated the matter.

Third, not all orders can or should be appealed. Interim interdicts that preserve the status quo will rarely meet the threshold for appealability, especially when their outcome is not final in nature.

Lastly, the judgment reiterates the principles of procedural fairness in matters. Courts want clean litigation, not trial by surprise.

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