COMPETITION TRIBUNAL

(REPUBLIC OF SOUTH AFRICA)

Case No. 18/IR/December '99

In the matter between

Cancum Trading No. 24 CC	First Applicant
Henlin Trust	Second Applicant
H & M Lindeque Trust	Third Applicant
Maltea Trading CC	Fourth Applicant
Rietvlei Trading CC	Fifth Applicant
Rosa Trading CC	Sixth Applicant
Prism Merchandise Enterprises CC	Seventh Applicant
Ritima CC	Eighth Applicant
Cancum Trading No. 26 CC	Ninth Applicant
Rogai Trading CC	Tenth Applicant
Wahda CC	Eleventh Applicant
Eloff Anderson Pederson	Twelfth Applicant
Ruiker Trading CC	Thirteenth Applicant

and

Seven Eleven Corporation SA (Pty) Ltd	Respondent

DISSENTING DECISION ON APPLICATION FOR INTERIM RELIEF IN TERMS OF SECTION 59 OF THE COMPETITION ACT, 89/1998

INTRODUCTION

1. I agree with the majority decision of the Panel insofar as it relates to:

   1.1 The application for non-joinder by Respondent

1.2 The Applicants' claim under Section 8(d)(i) and/or 8(c)

2. I disagree with the majority decision that:

   2.1 evidence has been placed before the Tribunal to make a finding that the Respondent has engaged in the practice of minimum resale price

maintenance in violation of section 5(2).

2.2 the requirements of section 59(1)(b)(i)or (ii) have been met.

3. My reasons are set out below:

Interim Relief

4. The Act makes provision for the granting of interim relief in terms of section 59(1).

5. The type of the interim orders that the Tribunal may grant where it is satisfied that the requirements of section 59(1) have been met, are enumerated in section 60(1) of the Act.

6. Requirements for obtaining an interim order under Section 59(1) are similar to those at common law for obtaining an interdict with two exceptions:

6.1 whereas the standard of proof in the High Court is *prima facie,* in the case of s 59(1) it is *on a balance of probabilities. S*ection 68 of the Act requires that the standard of proof in any proceedings in terms of Chapter 3 of the Act (Merger Control) and Chapter 6 (Remedies and Enforcement) be on a balance of probabilities.

6.2 the alternative in Section 59(1)(b)(ii) is not found at common law.

7. The requirements of Section 59(1) are therefore considerably more difficult to meet. An applicant has to overcome all four hurdles and satisfy the Tribunal of all four requirements before the Tribunal can exercise its discretion to award an interim order.

8. At common law, urgent interdicts are very sparingly granted by the High

Court.

9. A survey of European, American and Australian competition case law shows that courts and competition authorities are equally frugal with such orders.

Minimum Resale Price Maintenance

10. The only prohibited practice that this decision relates to is that of minimum resale price maintenance. In order to succeed under 59(i), the Applicants have to overcome the first hurdle and place before the Tribunal evidence to show on a balance of probabilities that the Respondent has engaged in minimum resale price maintenance.

11. The Applicants placed before the Tribunal the provisions of clause 9.1 of the Franchise Agreement which reads as follows:

> 9.1 *In order to ensure uniform profitability and uniformity in specification compliance and control, the **LICENSEE** agrees to handle, promote and/or sell only those items approved by the **LICENSOR** purchased only from the **LICENSOR** and/or such wholesalers and/or suppliers as are approved by the **LICENSOR**. The **LICENSEE** shall sell all its products only at prices approved by the **LICENSOR** from time to time.*

12. In paragraph 13 of the Founding Affidavit of the First Applicant under the heading Fixed Selling Price, the First Applicant makes the following allegation:

> 13. From time to time Respondent supplies the First Applicant with a retail price list, and compels the First Applicant to sell its merchandise at the prices specified by the Respondent. I annex hereto an example of the latest predetermined price list as received from the

Respondent ("**PG 3"**). I do not include the total price list, this would entail a very voluminous document which would unnecessarily burden these papers. Respondent can and does oblige First Applicant to sell products at a price which results in a loss to the Respondent [sic] as turnover, rather than profitability, of a Franchisee is the basis on which Respondents return is calculated.

14. In the same paragraph the Applicant then gives an example of how the fixing of prices by the Respondent disadvantages it. It states that in November 1999 it was obliged to purchase a 1.5 litre bottle of Coca-Cola from the nominated supplier for an amount of R3,79 and was obliged to resell it for R3,99 after having to pay the Respondent 2,5% royalty on turnover plus a further 5% in respect of rent for the premises. The First Applicant suffered a loss of R0,10 on each 1.5 litre bottle of Coke it sold.

15. First Applicant makes a number of examples in paragraph 14 of the Founding Affidavit of instances where it was forced by the Respondent to purchase goods from suppliers at higher prices than they could get at alternative suppliers. At paragraph 14.3 the First Applicant indicates that a general increase in cigarette prices by suppliers and wholesalers could not be passed on by it to customers as the Respondent insisted that the cigarettes be sold at the old (lower) retail prices thereby lowering his gross profits.

16. In response to the allegation relating to the Coca-Cola, the Respondent in its Answering Affidavit at paragraph 16.3 indicated that the Coke was at a special price which was supplied by the supplier at a 10% discount and was sold at a very special price. It also stated that this was not an ordinary price and it cannot be seen to characterise the whole of the Respondent's pricing policies and in any case the First Applicant made a profit of 1% per bottle sold at the special price and in fact bought 180 cases at the discounted price while selling it at the normal price resulting in quite a big profit. In its

Replying Affidavit the First Applicant did not specifically deny this but indicated in paragraph 21 that the Respondent does not pass on discounts and rebates except to promise to pay Applicant at the end of this financial year modest rebates in respect of cigarettes, bread flour, Coca-Cola etc.

17. In its Replying Affidavit the First Applicant refers to what it considers an example of the Respondent's behaviour with regard to setting prices at paragraph 55:

> Moreover, the Respondent not infrequently allows stores owned by the Respondent itself to charge lower prices for standard merchandise. One example is the Respondent's own store in Sandbaai near Hermanus which, since the Franchisee went out of business approximately a year ago, has been charging prices significantly below that dictated by the Respondent to other Franchisees. At a meeting with Mr Hadjidakis on 25 August 1999, at which I was present, the attorney for the Association of Seven Eleven Franchisees challenged him about this. Mr Hadjidakis' response was that the Sandbaai store needed to generate turnover and for that reason prices had been dropped. The Applicants ask no more than the freedom to set their own prices in the interest of generating turnover and providing customers with a competitive price.

18. In paragraph 56 the Applicants mention a further incident in the case of the Seven Eleven franchise in Monte Vista where the Respondent also permitted a Franchise owned by a "close associate" Andrew Tucker to charge prices on certain staples well below that of another Franchise in the same road which is referred to as Mrs Solberg. No supporting affidavit by Mrs Solberg is annexed to support this allegation though an affidavit by her is attached regarding a separate High Court action by the Respondent against her but no specific reference is made to lower prices. It is not certain why this affidavit was annexed.

19. The facts set out in paragraphs 13 - 19 constitute the sum total of evidence placed before the Tribunal to show that the Respondent engaged in minimum resale price maintenance.

Clause 9.1 of the Franchise Agreement

20. The last sentence in this clause contain the important words, *"the Licensee shall sell all its products only at prices approved by the Licensor from time to time".* As was pointed out in the majority decision, unlike in the European Union where vertical price fixing is per se illegal, in the context of franchising, in South Africa and very recently the US,[1] resale price maintenance is not prohibited per se, only *minimum* resale price maintenance. Maximum resale price maintenance would be judged by the rule of reason i.e. it could be justified provided any technological, efficiency or other procompetitive results from the agreement could be shown to outweigh the anti-competitive effects.

21. All clause 9.1 provides for is that the Franchisor shall determine the prices at which the Franchisees can sell products to the consumers. The prices that the Respondent therefore set could amount to either minimum or maximum resale price maintenance. Evidence was led by the First Applicant of maximum resale price maintenance when he alleged that he was forced to sell a 1.5 litre bottle of Coke and toothpaste at a lower price than he wanted to. While the First Applicant alleged that this reduced his profit margin and in the first instance in fact caused a loss of 10 cents per bottle of Coke, the consumers gained by getting lower prices for those particular items.

22. On its own the clause *allows* the Respondent to engage in the practice of

1 State Oil Company v Khan (1997) 139 L Ed 2d 199

either minimum or maximum resale price maintenance. To my mind it does no more than this. On its own it cannot constitute evidence of minimum resale price maintenance.

23. It would be an entirely different matter if the clause had provided that the Franchisee shall sell all its products at a price not lower than that determined by the Franchisor and the Franchisee was trading on the basis of such an agreement. Such a clause would be capable of only one interpretation namely minimum resale price maintenance.

24. In section 5(2), it is the *practice* of minimum resale price maintenance which is prohibited. A clause such as clause 9.1 cannot on its own constitute evidence of a practice. An agreement regulates the relationship between to parties. The terms of that agreement merely enable each party to do certain things. The terms of the agreement do not constitute acts which could amount to a *practice* as required by s5(ii). Evidence will have to be produced by the Applicants to show that such a practice has occurred. It is not sufficient to show that it could occur. That would be tantamount to arguing: I can therefore I have!

25. Nowhere in the Affidavits of the Applicants have they shown that minimum resale price maintenance has occurred. The paragraphs I have quoted from only refer to the setting of prices and in the other instances they refer to vague allegations which amount to not much more than hearsay. It is not sufficient to say that in Hermanus one Franchisee was allowed to lower its prices and the other was not. An affidavit from the Franchisee who was refused permission to charge lower prices should have been filed. Mrs Solberg who appears to be an ex-Franchisee could also have attached an Affidavit to the effect that she wanted to charge x price for certain items and the Franchisor refused to allow her to do so. Such evidence would have been more useful than the numerous references by Applicants to Mr Hadjidarkis' tone and volume of voice at meetings. If such evidence was

contained on the papers, I would have had no difficulty (with or without clause 9.1) to find that the requirement of Section 59(1)(a) had been met.

26. Counsel for the Respondent in a response to a question asked by the presiding member of the Panel, conceded that the Franchisees could not charge lower prices if they wanted. This however was his submission not evidence.

27. The Applicants have therefore failed to satisfy the first requirement in section 59(1)(a) and are not entitled to the relief sought in paragraph 2(b) and 2(c) of the Notice of Motion insofar as it relates s 5(2).

28. Even if I had found that the Applicants had satisfied the first requirement in s 59(1)(a), I do not believe that they are entitled to an interim order.

Serious Irreparable Damage

29. The Applicants have argued that the order is necessary to prevent serious irreparable damage and further to prevent the purposes of the Act being frustrated. The majority decision implicitly rejects the Applicants' reliance on S 59(1)(b)(i) and instead find that the Applicants have shown that an order is necessary to prevent frustration of the purposes of the Act.

30. The 13 Applicants lodged a complaint with the Competition Commission on 13 December 1999. The Respondent submitted that there are altogether 124 Seven-Eleven Franchisees in the Western Cape. What is apparent from the Affidavits and Supporting Documents filed is that almost all of the Applicants are involved in disputes with the Respondent. Several of them stated that they fear that the Respondent may take legal action against them. All of them are experiencing financial difficulties and face claims by the Respondent, some of which they deny. The Respondent has launched an application in the High Court in Cape Town for the liquidation of the 9th

Applicant. The matter was to have been heard in March 2000.

31. The Applicants all allege that their financial difficulties arise from the alleged restrictive practices of the Respondent. In view of the finding that the Applicants have not established a contravention of section 8(d)(i) and/or section 8 (c) or section 5(1), the Applicants would have to establish that it is the practice of minimum resale price maintenance by the Respondent that caused the financial difficulties that they now face. The Applicants have attempted to use their financial difficulties and possible imminent legal action to be taken by the Respondent to meet the requirement of s 59(b)(i). The First Applicant in paragraph 24 of his Founding Affidavit alleges that he is suffering irreparable damage on an *ongoing basis* by being obliged to purchase stock from only those suppliers approved by the Respondent and at fixed costs prices and by selling the product at fixed prices. He alleges that with every sale from the First Applicants store which could have been purchased by First Applicant at a lower cost price, it is sustaining a loss.

32. The Second Applicant cites as his reason for urgency that the prime business season of the stores situated in Saldanha, Vredenburg and Langabaan is over Christmas and New Year and summer holidays and it was crucial for these stores to maximise turnover and profitability over this period to ensure the viability of the stores. They argued that if they were allowed to purchase their merchandise freely in the market whilst adhering to the terms of the Franchise Agreement they would be able to render a more competitive product to their customers by being in a more efficiently run business. They argue that the opportunity for rendering an efficient and competitive service over the prime holiday season would be lost if the interim order was not granted on an urgent basis. The Sixth Applicant also cited the Christmas holiday season as the reason for urgency.

33. No satisfactory link has been established between the financial difficulties experienced by the Applicants and the commercial disputes that are

currently raging between the Respondent and the Applicant on the one hand and the alleged practice of minimum resale price maintenance. It is possible that if the Franchisees could choose their own suppliers and charge their own prices as well as compete with each other, their profit margins may improve or they may avoid the difficulties they are in now. It is also entirely possible that the financial difficulties may be due to reasons other than the terms of the Franchise Agreement.

34. What we have before the Tribunal are allegations that businesses are failing. How such failures or the application for liquidation relates to the alleged minimum resale price maintenance is not detailed. Counsel for the Respondent rightly points out that proper evidence in such an instance would be financial records to provide proof of such a link. It may well be that the Competition Commission finds the necessary link due to a more detailed investigation. On the papers before us it is impossible to do this.

35. All the Applicants seem to a lesser or greater extent to be involved in contractual disputes with the Respondent involving amounts of money claimed and disputed. In these disputes both parties are legally represented. These appear to be in the nature of contractual disputes which do not fall within the ambit of the Tribunal and should be settled in the civil courts or by negotiation between the parties.

36. To avail oneself of section 59(1)(b)(i) it has to be shown there is the likelihood of not only damage but damage which is substantial and is of such a nature that it cannot be remedied by damages at a later stage.[2] On the evidence placed before the Tribunal, I'm not at all convinced that the facts of the present case was that which was in the contemplation of the drafters of section 59(1)(b)(i).

Frustration of the Purposes of the Act

2 La Cinq SA v E C Commission [1992] ECR 11-1 and TYTEL (Pty) Ltd and others v Telecommunication Commission (67 ALR 433)

37. This alternative to s 59(1)(b)(i) is substantially more difficult to define as the legislators left it rather vague.

38. A survey of other competition jurisdictions show that there is no identical provision in competition legislation. In the United States and in Britain there is a public interest requirement which is broader but analogous to the requirement in section 59(1)(b)(ii). In the U.S the Clayton Act contains a formulation of the requirements for the granting of preliminary injunctions and though it varies across different circuits there are common factors that the courts have regard to in granting a Plaintiff an interim injunction. One such requirement is that the granting of such an injunction is in the public interest.

39. In the United Kingdom the Competition Act 1998 came into effect on 1 March 2000. Section 35 of that Act provides that where the Director General of Fair Trade has a reasonable suspicion that a prohibited practice has occurred while an investigation into the matter is ongoing, he/she can make certain directions. Section 35(b) reads as follows:

> 35(b). If the Director considers that it is necessary for him to act under this section as a matter urgency for the purposes -
>
> i. of preventing serious, irreparable damage to a particular person or category of person, or
>
> ii. of protecting the public interest,
>
> he may give such direction as he considers appropriate for that purpose.

40. One of the most important rules of statutory interpretation is that every word

or expression must be given its ordinary meaning.[3] The word *frustrate* generally refers to action that makes something ineffective or prevent achievement of a particular purpose. In the context of the Act it would then mean that prevention of the achievement of any or all of the purposes of the Act. This is fairly clear. What does present a problem is that this requirement is placed as an alternative in a section that essentially deals with interim orders which by their very nature, are urgent and cannot wait for the normal processes of litigation or in this instance for a investigation taking place at the Competition Commission

41. There is a clear separation in s 35(b) of the prevention of serious, irreparable damage to a particular person and protecting the public interest. If an Applicant is not able to show that it is likely to suffer serious harm it can in the alternative show that it is in the public interest that an interim direction be made.

42. This seems to me a clearer formulation than Section 59(1)(b)(ii). The aim of the latter section is the same. Where an Applicant cannot show serious irreparable damage to itself it can show that any or all of the purposes of the Act are being frustrated. A clear statement of which purposes and in what manner they are being frustrated with corroborating evidence is necessary.

43. In the present case neither in the founding papers of the Applicants or in their Heads of Argument did they show precisely in what manner the purposes of the Act would be frustrated if the interim order would not be granted. In the paragraph 28 of the founding affidavit of Peter John Gibbons he says : *"I further submit that the very purpose of the Competition Act of 1998 would be frustrated should the interim relief not be granted, as the Seven Eleven customers would be deprived of the benefits of a competitive convenient store market. These customers would also be unable to recoup their losses from any party".* This is far to general.

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3 Fundtrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) 710 (A) at 727A

44. In his Heads of Argument and during the hearing, Applicants' Counsel seem to suggest that once the restrictive practice is found to have occurred an Applicant would be entitled to interim relief and if such interim relief is not granted the objects of the Act would be frustrated.

45. The majority decision seems to have accepted this line of argument as they find that the continuation of the practice of minimum resale price maintenance frustrates the purposes of the Act. This cannot be the case.

46. The provisions of s 59(1)(b)(ii) must be read in the context of the section itself which deals with relief which is of an extraordinary nature and urgent. On account of this an Applicant has to overcome each of the 4 hurdles presented in the section. It has to prove firstly that a restrictive practice has occurred. Secondly it has to prove one of two things - either that it faces serious and irreparable harm should the order not be given **or** that the purposes of the Act will be frustrated. Thirdly it has to show that a Respondent has been given a reasonable opportunity to be heard and fourthly it has to show that the balance of convenience favours the granting of the order. It is only once all four hurdles have been overcome by the Applicant that it is entitled to the relief.

47. If the argument of the Applicants are accepted, what they have effectively done is to remove one very important hurdle. They argue that once it has been established that a restrictive practice has occurred they need not overcome the second hurdle in section 59(1)(b) as the very occurrence of a restrictive practice constitutes the frustration of the purposes of the Act.

48. Minimum resale price maintenance is always harmful. It always restricts competition. It always leads to artificially high prices being maintained and disadvantages consumers. This is the reason that it is a per se prohibition. Does this mean that on every occasion that it is shown to have been

practiced the affected party is entitled to an order under section 59(1) provided it can meet the requirements of section 59(1(c)and(d). This would lead to an absurd result. Applicants could therefore lodge a complaint with the Commission and simultaneously proceed with an application under s 59(1).

49. Section 59(1)(b)(ii) requires that in addition to proving a restrictive practice, an Applicant should also show that the interim order is necessary to prevent the thwarting of the purposes of the Act. It is an additional requirement. Precisely because of where the section is placed, it has to be shown that the effect on the purposes of the Act is of such a nature that it cannot wait until the investigation is complete. There could be for example instances where a Respondent denies an Applicant an essential facility and as a result the applicant may go out of business with the resultant loss of many jobs. In such a situation the public interest element of employment would enable an applicant to be successful under s 59(i) and to show that the matter is so urgent that it could not wait until six months later when the Commission investigation is completed.

50. The legislature has deemed it necessary make the standard of proof in s59 applications higher than that in the High Court. The provisions of this section is also stricter than in other jurisdictions. This is an indication that the legislature intended that this section should be utilised only in extraordinary circumstances that warrant intervention and not be used by Applicants to circumvent the normal waiting period or to use the section to settle commercial disputes or gain a business advantage.

51. If the arguments of the Applicants are accepted, the Tribunal is likely to be inundated with applications which should not at all be handled under this section. It is necessary that the Tribunal exercise great circumspection in granting interim relief orders under s 59(1). That is the intention of the legislature and it must be given effect to.

52. Because the Applicants have failed to satisfy the requirements of s 59(1)(a) as well as s 59 (1)(b) (i) or (ii), they are not entitled to the relief sought.

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C. Qunta **12 April 2000**

Member