COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number: 15/IR/Feb01

In the matter between

YORK TIMBERS LIMITED Applicant

and

SOUTH AFRICAN FORESTRY COMPANY LIMITED Respondent

REASONS

THE PARTIES

1. The applicant is York Timber Timbers Limited, a public company incorporated in South Africa. The business of the applicant is sawmilling. It converts softwood into a range of sawn products, including wood chips for the pulp and paper industry. It also markets sawn wood to timber merchants, especially in the construction and furniture industries on the domestic and export markets.

2. The respondent is the South African Forestry Company Limited ("SAFCOL), a public company incorporated in terms of section 2 of the Management of State Forests Act 128 of 1992. SAFCOL is entrusted with the management and development of certain State forests. It sells softwood saw logs from these forests in South Africa and abroad. SAFCOL is vertically integrated and owns sawmills that it supplies saw logs to from the plantations under its management. The five sawmills under SAFCOL's control are Wemmershoek, George, Weza, Blyde and Timbadola. Through these sawmills SAFCOL sells sawn products in competition with some of its customers in the sawmilling industry.

BACKGROUND[1]

1

3. From around 1952 the State, through the Department of Water Affairs and Forestry ("DWAF"), entered into contracts for the sale of softwood saw logs from its plantations to private sawmills. The purpose of these contracts, which were for an initial period of ten (10) years extendable for another five (5) years, was to encourage investment into the sawmilling industry. Log prices for each year were determined through an agreed formula and negotiated between DWAF and the sawmills collectively, and as a result, prices were generally uniform. On the expiry of the first contracts DWAF decided to revise the terms of these contracts, and between 1968 and 1971 entered into 52 new agreements with existing and new sawmills.

4. The revised agreements were for an unspecified period of time but ran for an initial period of five years. They would then continue to run for further successive five year periods provided the parties agree on the terms of the contract for each five-year period. The contract provided that if the parties failed to agree on applicable terms then the matter must be referred to the Minister of Water Affairs and Forestry who would determine the terms of the contract. If the terms determined by the Minister were not acceptable to the sawmill the contract would run on existing terms for a further period of five years and then expire. An important feature of these agreements was that each sawmill was guaranteed a certain volume of logs per annum from a specified plantation. In other words, each log supply contract stipulated the source and the volume of the log supply based on the sawmill's requirements and the sustainable yield of the specified plantation.

5. As mentioned above DWAF conducted price negotiations with the long-term customers collectively and they would all agree on the same price for all, with small regional variations. Later a clause was added to the contracts to provide a mechanism for the resolution of price disputes between the parties – if the parties were unable to reach agreement on price revisions they would refer this matter to the Minister of Water Affairs and Forestry ("the Minister"). If the Minister expressed the opinion that the parties were unable to reach agreement on the prices the matter would then go to arbitration. The effect of the wording of this clause was that if there is a price dispute the sawmill would continue to pay the prices last agreed between itself and DWAF until the dispute is resolved.

6. In 1993 SAFCOL succeeded DWAF as the seller of some of the State's saw logs in South Africa, thus taking over a number of the long-term contracts between DWAF and various sawmills. It inherited 27 contracts allocated to 27 sawmills. SAFCOL had been incorporated in 1992 in terms of Management of State Forests Act 128 of 1992 and entrusted with the management of a large proportion of the State's commercial forests. One of SAFCOL's mandates in terms of the Act is to manage State forests under its control on a commercial basis.

7. The applicant was party to two long-term contracts that SAFCOL took over from DWAF. The contracts entitled the applicant's sawmill, Nicholson and Mullin situated in Mpumalanga, to a supply of saw logs from the Witklip and Swartfontein plantations to the volume of 2, 000 000 (two million) cubic feet over five years.

8. SAFCOL decided to revise the inherited agreements in 1995. SAFCOL claimed that the changes were sought in order to enable it to meet its statutory requirement to manage the forests under its control on a commercially viable basis. Essentially the revisions limited the

tenure period of the contracts to a period of 3 years with subsequent periods of three years provided the parties reached agreement on the terms to apply during each successive 3-year period. The revised agreements also did away with the requirement that the Minister's opinion be sought on whether the parties are unable to reach agreement before price disputes can be referred to arbitration.

9. With the exception of the applicant, CJ Rance (Pty) Limited ("Rance") and Lentz Properties (Pty) Limited ("Lentz"), SAFCOL succeeded in convincing all the sawmills to accept the new contracts. Under pressure from SAFCOL to agree to the revisions the applicant instituted a High Court action arguing that it was not obliged to negotiate about the tenure of its contract. This matter was settled. SAFCOL agreed with the applicant's assertion regarding the unlimited tenure of the applicants' 1968 contract. Rance and Lentz eventually entered into revised contracts with SAFCOL but it is common cause that their contracts are effectively the same as before and are not affected by the changes introduced by SAFCOL in 1995.

10. In 1998 SAFCOL again proposed revision to the log supply contracts. This time it persuaded the sawmills to accept contracts with even more limited tenure: the new contracts would run for an initial period of 3 years with an option to renew for a further 3 years subject to a right of cancellation by SAFCOL with 3 years notice at any time. Furthermore the price revision procedure of the 1995 contracts was amended to provide for an expert arbitration instead of the legal arbitration in the contracts then.

11. The applicant, Rance and Lentz again rejected these new contracts; all subsequent negotiations regarding the proposed new contracts failed. The relationship between the applicant and SAFCOL continued to be governed by the 1968 contract as the applicant had not accepted either of the revisions proposed by SAFCOL in 1995 or 1998. As a result, the price revision procedure requiring the intervention of the Minister in the case of the parties failing to reach agreement on price and the long-term tenure of the contracts remained part of the applicant's contract with SAFCOL.

12. When SAFCOL took over the contracts in 1993 the applicant was involved in a price dispute with DWAF because it was resisting the price increases introduced by DWAF for the years 1991/1992, 1992/1993 and 1993/1994. Consequently, while all the other customers of DWAF were paying the 1993/1994 prices, the applicant was still paying the 1990/1991 prices. In 1994 the parties reached a settlement regarding the outstanding price increases and the applicant began paying the same price as the other long-term customers of SAFCOL.

13. The parties have since found it difficult to agree on price revision, and York has, as a rule, insisted that no arbitration can take place before the Minister expresses the opinion that the parties are unable to reach agreement. The Minister has refused to intervene in these disputes and SAFCOL has therefore been unable to enforce the arbitration clause. On 10 November 1998, after several attempts to get the applicant to agree to arbitration on the 1995, 1997 and 1998 price revisions, SAFCOL purported to cancel the long-term contracts between the parties and instituted an action for a declarator confirming the validity of the purported cancellation. Pending the outcome of this action the parties agreed to implement the contracts as if they were still in operation. The applicant contends that the purported cancellation is unlawful.

14. SAFCOL continued to negotiate the price revisions with the applicant. The applicant declined SAFCOL's requests that they undertake arbitration on the three outstanding price revisions without the Minister's involvement. It was not until 1999 that the applicant agreed to arbitration, and even then only on the 1995 price revisions.

15. When SAFCOL tried to implement new prices in 2000 that the other sawmills had agreed to, the applicant again resisted. By this time the applicant was still paying the 1995 prices as per the arbitration award as it had refused to subject itself to arbitration on the 1997 and 1998 price revisions. On 25 August 2000 SAFCOL sent an ultimatum to the applicant requiring it to declare whether it was willing to pay the 1997, 1998 and 2000 price increases or go to arbitration on the issue. The applicant committed to neither and SAFCOL purported to cancel the agreement governing the implementation of the long-term contracts. SAFCOL has applied to the High Court for a declarator on the validity of this purported cancellation as well. Both the application for a declarator regarding the purported cancellation of the long-term contracts and the agreement governing their implementation are still pending.

16. On 14 September 2000 the parties entered into an *ad hoc* supply agreement terminable on 30 days notice. In terms of this agreement the applicant would pay for the saw logs supplied the same price paid by other long-term customers of SAFCOL for the year 2000. The source and volume of saw logs, i.e. 6 675m^3 per month from the Witklip plantation, remained unchanged from the disputed long-term contracts. On 14 February 2001 SAFCOL notified the applicant that it was no longer feasible to continue supplying the guaranteed volume (6 675m^3 per month) from the Witklip plantation and this would be reduced to 2 222,2 m^3 as from 01 May 2001. SAFCOL claimed that the reduction in volume supplies was necessary for the long-term sustainability of the plantation.

17. An understanding of the history of sawlog volumes between the parties is necessary to contextualise SAFCOL's notice. The original sawlog volumes to be supplied by SAFCOL to the applicant from the Witklip and Swartfontein plantations was 2, 000 000 (two million) cubic feet over five years. By 1988 the applicant's guaranteed volumes was 55 000m^3 per annum; 30 000m^3 from the Witklip plantation and 25 000m^3 from the Swartfontein plantation. During this year substantially more volumes became available and DWAF offered the applicant an extra 30 000^3 per annum for the next five years. When SAFCOL took over the plantation in 1993 the applicant therefore had a guaranteed volume of 85 000m^3 per annum from these plantations. In 1994 as part of a settlement in one of a number of price disputes between the parties it was agreed to keep the guaranteed sawlog volumes at 85 000m^3 per annum until 31 March 1997; thereafter the volumes would revert back to 55 000m^3 per annum. In yet another settlement between the parties in 1996 they agreed on volumes of 75 100m^3 per annum from Witklip which by that time also included Swartfontein. The volumes of 75 100m^3 were to be supplied to the applicant from 1 April 1997 until 31 March 2002.

18. The need to reduce the sawlog volumes, SAFCOL claimed in its notice to the applicant, was a consequence of the applicant's insistence on the supply of volumes in excess of the sustainable yield of the plantation. This had resulted in severe overfelling. It is this reduction of the volumes of logs supplied to the applicant that is the subject of this application.

19. The applicant claims that its business is dependent on SAFCOL for well over 90% of its saw log supply volumes. It claims that transport costs make it infeasible to obtain saw logs from other suppliers who are situated long distances away. A reduction of almost two-thirds in its current log supply volume as per SAFCOL's notice will, therefore, eventually lead to the demise of its business - its standing overheads and other fixed costs cannot be covered at a production rate of a third of its capacity. In addition, the applicant claims that its break-even point is volume sensitive with profit only made on the top of its current log supply volume of 6675m^3; as a result scaling down the operations of the business will not save it.

20. The applicant also claims to have made an investment of R10 million in 1995 upgrading its processing facilities based on volumes then guaranteed to them by SAFCOL. It would not be possible to recover this investment as planned if the purported reduction in its log supply materializes and the loan re-payments will hasten the demise of the business.

THE NATURE OF THE RELIEF CLAIMED

21. We now consider the relief claimed. Ordinarily we would not consider this issue until the end of our decision once we had decided whether the requirements of section 49C had been met. In this case however a wide range of prayers were sought and the respondent has argued convincingly at the outset that only three are competent at the interim relief stage.

22. The three which it says are competent at this stage are prayers 8, 9 and 11.Prayer 8 provides for interim relief from the alleged refusal to deal and contains two different formulations of order to remedy the alleged problem. Prayer 9 provides that they serve as an interim order and prayer 11 is for costs.

23. At the hearing the applicant abandoned prayer 10 which related to the imposition of an administrative fine and no more need be said about that.

24. Prayer one relates to condonation of time periods which was not put in issue and prayer twelve was the usual further and alternative relief formulation customary in all such applications so no more need be said of either.

25. This then leaves us with prayers 2 – 7. What the applicant asks us to do is to make declaratory orders declaring conduct of the respondent to be a prohibited practice in terms of various provisions of section 8 and 9 of the Act. These are to be found in prayers 2 –6 . Prayer 7 requests us to issue a notice in terms of section 65(6)(b) certifying the above as prohibited practices.

26. The applicant wants these orders so that it can institute civil proceedings for damages and also, we understand, for the purpose of the civil proceedings in which the parties are currently engaged before the High Court. The respondent contends that an interim

declaratory order is a contradiction in terms.

27. A party cannot institute a claim for civil damages without filing with the relevant civil court a certificate from the Chairperson of the Tribunal, or the Judge President of the Competition Appeal Court stating that the conduct which forms the basis for the civil action has been found to be a prohibited practice.

28. The question to be determined is whether this certificate can be issued pursuant to a finding in an interim relief case or only after the granting of final relief pursuant to a complaint referral.

29. Although the language of section 65(6) does not expressly limit it to complaint referral proceedings it seems clear to us that the certificate can only be issued at the end of final proceedings and not interim proceedings.

30. The reason for this is obvious. An applicant may be granted interim relief because the burden of proof in this proceeding is less exacting but may not be granted final relief. If the applicant could get a certificate after an award of interim relief and commenced action for damages in a civil court and was successful what would happen if it did not succeed in gaining final relief. The legislature could not have intended such an untenable result.

31. In any event the language of section 49C says that the Tribunal may grant an interim order. An order finding conduct to be a prohibited practice for the purpose of section 65 is certainly not of an interim nature.

32. Our interpretation is also strengthened by section 65(8) which states:

> "***An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter."***

33. The clear implication of this provision is that the civil action should not commence until the matter has been exhaustively heard by the Competition authorities. It follows that if an appeal suspends the right to institute a civil action the right contemplated must be pursuant to a final not an interim order.

34. In section 65(9) the right to claim commences on the date the Tribunal has made a "*determination...*" This language too suggests a final not an interim order is contemplated.

35. We find accordingly that prayers 2 – 7 are not competent for us to consider at interim relief stage. Accordingly we confine ourselves in this decision to considering prayers 8, 9 11 and 12.

Standard of proof required for an interim relief application.

36. Prior to the amendment, on the 1st February 2001, of the Competition Act by the Competition Second Amendment Act, the standard of proof for an interim interdict was no different to the standard for complaint referral proceedings and was the balance of probabilities.[2]

37. Various amendments were made to the section providing for interim relief (section 59) so that the present section 49C differs from it in important respects. One of the changes relates to the standard of proof required in interim relief applications which now receives specific mention in the section.

Section 49C(3) of the Act states:

> '*In any proceedings in terms of this section, the standard of proof is the same as the standard of proof in a High Court on a common law application for an interim interdict."*

38. It is important to note that the section mandates the application of the common law "standard of proof", for an interim interdict ,but not the common law requirements for an interim interdict.

39. The common law requirements for an interim interdict are well known and are usually stated as follows:

1. A *prima facie* right on the part of the applicant;
2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
3. A balance of convenience in favour of granting the interim interdict; and
4. The absence of any other satisfactory remedy.

40. The requirements for interim interdict in terms of section 49C are set out in section 49C(2)(b)

i. "*The Competition Tribunal -*

ii. may grant an interim order if it is reasonable and just to do so, having regard to the following factors:

1. The evidence relating to the alleged prohibited practice;

2. the need to prevent serious or irreparable damage to the applicant; and

---

2

3. the balance of convenience."

41. It will be observed that these requirements, although similar to, are not identical to, the requirements for an interim interdict at common law.

42. However as the applicant points out we are required to follow the Act in so far as the requirements are concerned, although we are expressly required to look to the common law on interim interdicts to determine the standard of proof.

43. It is common cause that this means a standard of proof less exacting than the civil burden of a balance of probabilities but how exacting is that burden.

44. Erasmus has observed that:

> "*In the majority of cases an applicant for an interlocutory interdict cannot establish his right clearly upon affidavits, his allegations more often than not met by counter allegations or denials. Therefore since the application is merely interlocutory and the effect of the granting thereof is only temporary and not finally decisive of either party's rights, the court will grant an interdict upon a degree of proof less exacting than that required for the grant of a final interdict. It is in attempting to define this degree of proof – an almost impossible task, it has been held – that the court have used such varied expressions as 'a clear right', 'a prima facie right', 'prima facie proof of a clear right', 'a prima facie case for an interdict' and prima facie grounds for an interdict." (Erasmus E8 – 9 – 10)*

45. These questions were resolved in the well-known case of Webster v Mitchell[3]. Here Claydon J in a frequently cited paragraph observed:

> "*The use of the phrase "prima facie established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining interim relief, for his right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."*

46. In Gool v Minister of Justice and Another[4] Ogilvie Thompson J commented that the criteria

3
4

on the first branch of the enquiry leaned too heavily in favour of the applicant and he proposed the following addition to the test:.

> "*With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in Webster v Mitchell... is the correct approach for ordinary interdict applications."*

47. The Webster test with the Gool rider has now become the accepted common law test for the standard of proof in an interim interdict and many courts have followed it.[5]Most recently it has been confirmed by the Supreme Court of Appeal in Simon NO v Air Operations of Europe AB and Others [6]. For the purpose of this decision we will refer to this approach as the 'orthodox approach'.

48. The applicant argues that the Gool qualification is not part of our test because of the requirement in section 49C(2)(b) for an interim order to be granted if it is "*reasonable and just to do so "*. The applicant thus appears to accept Webster but not Gool.[7] No basis for following the common law in the first instance and abandoning it in the second is given. As we point out below there is nothing inherent in the meaning of the words *reasonable and just* that suggests that the balance should be tilted in favour of either the applicant or respondent.

49. What the applicant appears to be advancing is that we distinguish between a prima facie "case" and a prima facie "right".[8] The distinction in classification appears to be based on the use of these terms in the Webster judgment where Claydon J identifies the prima facie case approach as one where one looks at the applicant's case and sees if he has furnished proof which if uncontradicted and believed at the trial would establish his right. Claydon J goes on to say that the use of the phrase

> "'… prima facie established though open to some doubt" indicates I think that more is required than merely to look at the allegations of the applicant, but something short of weighing up the probabilities of conflicting versions is required."[9]

50. Hence he arrives at the test we have discussed above.

51. It must be conceded that the case has been made for departing from the orthodox approach in two recent decisions although this is not an argument that has been made by the applicant. Let us first consider these decisions and then examine the consequences of them.

5
6
7
8
9

52. The first case involved an application for interim relief in relation to an alleged constitutional right. Here Heher J[10] decided the Court was not bound by the same standard that applies in an ordinary application for an interim interdict. The justification for this departure was because:

> "We are at large to arrive at our own decision as no rule has been laid down for such interdicts involving constitutional issues."[11]

53. Heher J considered what is held to be a rival approach to these issues, that favoured by the House of Lords in American Cyanamid Co v Ethicon Ltd[12]. In that case, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather he held it would suffice if he or she could satisfy the court that the claim is not:

> " *frivolous or vexatious ; in other words that there is a serious matter to be tried."*

54. Heher J went on to state that he could see no reason why the 'serious question to be tried approach' (i.e. that favoured in American Cyanamid)

> " should not be accorded equal status with the traditional approach"[13]

55. The Land Claims Court in Chief Nchabeleng v Chief Pasha followed this approach, preferring American Cyanamid.[14]Here the court after considering Heher J's decision held:

> "*For similar reasons I am of the view that this Court should adopt the approaches in the two decisions of Holmes JA and the American Cyanamid case, which for all practical purposes, are the same."*

56. The Court held that it was not bound by the common law approach (i.e. the orthodox approach) for several reasons. Firstly, because the Land Claims Court was not bound by precedents of provincial divisions of the Supreme Court and High Court and could find no Appellate Division or Supreme Court of Appeal decision on the issue[15]. Secondly, because its powers to confer an interim interdict were based on a statute that had not previously been interpreted by any court. Thirdly because its statute requires that Court to have regard to the requirements of equity and justice. Finally, because the right sought to be enforced in the case before them was a right to restitution which had its origins in the interim Constitution.

57. Yet these decisions, carefully argued as they are, relate to instances where the courts felt able to depart from the orthodox approach. Here we are mandated to follow it. Given that in

10
11
12
13
14
15

Simon, which was decided after these two decisions, the Supreme Court of Appeal reiterates the orthodox approach we can see no basis to depart from it. It is not for us to determine whether the common law approach is correct – it is for us to ascertain what it is and having done so to apply it.

58. At best for the applicant it can be said that the language of "*reasonable and just to do so"* in section 49C(2)(b) suggests that we are at large to follow the American Cyanamid [16]approach because we have been given through this language some form of equitable jurisdiction. The terms "reasonable and just" do not suggest this. Their ordinary meaning is neutral in relation to the contending approaches. Against this, we have in 49C(3) an express requirement to apply the common law. If anything there are indications in section 49C that some weighing of the conflicting evidence is required. In section 49C(2) it is stated that:

> *(2) "The Competition Tribunal –*
>
> *(a) must give the respondent a reasonable opportunity to be heard, having regard to the urgency of the proceedings…"*

59. This provision is more consistent with the orthodox common law approach than the one commended to us by the applicant.

60. This debate is only relevant if the different approaches lead to different results. It has been suggested by Franklin J[17] that the test in American Cyanamid is less stringent than the test of a prima facie right which is open to some doubt (i.e. the orthodox approach). One leading academic writer has suggested that this may not be so and that there is no obstacle to equating the two notions.[18]

61. This however is not a problem that we can resolve and until our courts have more authoritatively came out in favour of the American Cyanamid approach or decided that the two approaches are to be equated we must stay on the orthodox road.

62. We conclude that the approach taken in Webster's case as supplemented by Gool's case correctly reflects the standard of proof in a common law application for an interim interdict in the High Court which we must apply for the purposes of section 49C.

63. Although the Webster test is often stated as a single requirement Selikowitz J[19] has pointed out that it involves two stages.

> "*Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see*

16
17
18
19

whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."

64. Applying this analysis to our Act means that we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a *prima facie* right .We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.

65. If the applicant has succeeded in doing so we then consider the "doubt' leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raises serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.

66. As far as the remaining factors in 49C(3) are concerned viz. irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion.[20]

THE APPLICATION

67. As indicated earlier the only prayers left for us to consider are prayers 8, 9 and 11. In effect we have been asked to interdict SAFCOL from reducing the extent of its guaranteed log supply to York Timber. The applicant avers that this constitutes an abuse of dominance on SAFCOL's part. More particularly the applicant invokes Section 8(d)(ii) of the Act, alternatively Section 8(c) in support of its case.

68. Section 8(d)(ii) reads:

"*It is prohibited for a dominant firm to:*

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act –

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible."

69. Section 8(c) reads:

20

"*It is prohibited for a dominant firm to-*

engage in an exclusionary act other than an act listed in paragraph (d) if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain."

70. Section 7 of the Act provides:

"*A firm is dominant in a market if –*

1. *it has at least 45% of that market;*
2. *it has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or*
3. *it has less than 35% of that market, but has market power."*

Is SAFCOL a 'dominant firm'?

71. In order to consider a claim in terms of Section 8 the Tribunal must be satisfied that the respondent is either dominant in the market in which the alleged abuse is perpetrated or that the effect of the abuse is experienced in a related market, one either upstream or downstream of the market in which the alleged perpetrator of the abuse is dominant. However where that is the case, it still remains to be established that the perpetrator of the alleged abuse is, by drawing on its power in the market in which it is dominant, attempting to create or to exercise market power in this related market. In the matter before us it is alleged that a supplier – SAFCOL - has refused to provide a key input, saw logs, to the applicant, York Timber, a participant in a downstream market. It is further alleged that SAFCOL is dominant in the market for the supply of saw logs and that it participates in the downstream market. In other words, this matter falls into the second of our two categories of dominance – it is alleged that the firm dominant in the upstream market is attempting to leverage its power downstream.

72. There are thus two products markets at issue in this matter. The first is the market for saw logs. We shall refer to this as the upstream market. The second is the market in which these saw logs are converted into various sawn timber products. This is the downstream market. York and SAFCOL do not compete in the upstream market. They are, however, both active in the downstream market.

73. York avers that SAFCOL is dominant in the upstream market. SAFCOL contests this. At least it insists that its market share is below that threshold – 45% - at which, in terms of Section 7 of the Act, it is deemed to enjoy market power. At market shares below 45% the absence (Section 7(b)) or existence (Section 7(c)) of market power has to be established in order to prove dominance.

74. SAFCOL also argues that it does not possess market power, defined in the Act as 'the power of a firm to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers'. It cites the long-term contracts that it has entered into with its customers as evidence of its lack of market power. It avers that because these contracts, which govern the sale of approximately 60 (sixty) percent of the volumes produced by SAFCOL in Mpumalanga, specify price and quantity over varying periods (usually three years), it is restrained from exercising market power. SAFCOL, in fact, appears to argue that market power is absent because the price is determined through a process of negotiation, or, if that fails, compulsory arbitration.

75. It is common cause that the market for saw logs is geographically bounded. That is, it does not make commercial sense to transport saw logs over a significant distance and, accordingly, the downstream converters, the saw mills, are obliged to purchase saw logs from plantations within a confined geographical reach of their mills. While the applicant in this matter has not provided us with much hard evidence regarding the extent of the geographical market it seems again to be common cause that the province of Mpumalanga constitutes the geographic market for saw logs. That is, in the face of a significant rise in the price of saw logs emanating from the Mpumalanga plantations, sawmills in the province would not be able to substitute logs grown in other parts of the country.

76. The respondent, SAFCOL, has provided us with data that suggests that its share of the output of the Mpumalanga plantations falls below 45%, the level at which dominance is deemed to exist. First SAFCOL referred us to a report by the Department of Water and Forestry (DWAF) dealing, *inter alia*, with the amount of land under pine plantation in the country.[21] According to this report, in the Mpumalanga region, in those areas surrounding York's sawmill, the total area under pine plantation is 220, 733.82 ha. The respondent claims that only 73,215.5 ha of this area belongs to it, an equivalent of 33.2%. Second, relying on two other reports[22], presumably also compiled by DWAF, SAFCOL estimates that it is responsible for approximately 42% of the volume of logs produced in Mpumalanga. It then argues that it does not possess market power drawing, as noted above, on the fact that its behaviour is regulated and confined by the long-term nature of the contracts entered into with its customers and that price is determined through negotiation with its customers or by arbitration.

77. The applicant has, again, not provided us with much by way of concrete evidence in support of its claim that SAFCOL possesses and exercises market power in the Mpumalanga saw log market. It has provided us with a range of assertions to this effect drawing strongly on a submission made several years ago to the erstwhile Competition Board by Mondi, a large producer of saw logs as well as a large sawmiller and significant customer of SAFCOL. In this submission Mondi argued that SAFCOL possessed market power by dint of its share of the market and that it manifested its power in a 'take it or leave it' approach towards price setting.

78. On balance for interim relief purposes we find that SAFCOL is indeed dominant in the Mpumalanga market for saw logs. The arguments relied upon by SAFCOL, both in respect of market share and market power, do not hold water. SAFCOL, in its construction of the saw log market, has included that share of the output of vertically integrated producers – that

21
22

is producers active in both upstream and downstream markets – that is dedicated for use in the vertically integrated structures. This includes the vast bulk of Mondi's output of saw logs as well as a significant share of the output of SAFCOL itself. This output does not enter the market, it is, in other words, not available to the sawmill who, like the applicant, does not possess its own supply of saw logs[23]. SAFCOL has argued that this depends upon price – that is, if Mondi was offered the 'right' price for its log output it would divert its supply from its own mills to those of the independents. This argument is not persuasive, certainly not over the short to medium term. That is, a long-term hike in the price of saw logs may encourage an integrated producer to exit saw milling in favour of a focus on its plantations, but this scenario is implausible over anything but the very long run.

79. Hence the market is properly defined as the quantum of saw logs available to the non-integrated sawmills and, on this definition, SAFCOL's share clearly exceeds the 45% threshold. It is then deemed to be a dominant firm. Accordingly the applicant is not required to prove the existence of market power and the respondent gains nothing from an attempt to prove that it does not have market power. We should however add that the fact that a share of this output is governed by long-term contracts does not constrain its exercise of market power. That a supplier is contractually bound to honour, over the length of the contract, the price established when the contract is entered into says nothing about its ability to exercise market power. Market power is exercised at the time of the conclusion of the contract – at that time SAFCOL's customer are unable to substitute the SAFCOL supply with alternative sources in the geographical market and, accordingly, SAFCOL is possessed of the power to behave independently of its customers. Similarly, the fact that the price is the outcome of negotiation or arbitration does not determine whether or not market power exists. This is a particularly crude interpretation of the market power concept. No monopolist has absolute freedom to determine its price. There is a level of price at which even a monopolist will not be able to dispose of its product. SAFCOL's argument suggests that simply because it is unable to lay down any price that it chooses, it does not possess market power.

80. As to the downstream market – the market in which saw logs are converted into sawn timber – while it is common cause that SAFCOL is a competitor in this market, that is that it owns and operates saw mills, it does not appear to be in a position to exercise or even to aspire to exercise market power. Despite the voluminous record in this matter, we have in fact been told remarkably little about this market. We do not know the geographical boundaries of the market – is it regional or national or, indeed, international? Nor do we know the products that comprise this market. We do not know what varieties of sawn timber are produced by the applicant's mills or the respondent's mills, whether their products are in competition with each other or not. From the little information made available – and that largely by the respondent – it appears that the output of sawn timber produced by the York Mills somewhat exceeds the output of the SAFCOL mills, at least that of SAFCOL's Mpumalanga mills. At paragraph 80.1 of its answering affidavit SAFCOL estimates, and York does not dispute, that its share of the saw milling market is 8%, although neither the geographical boundaries of this market nor the products of which it is comprised have been clearly specified by the parties.

81. Our conclusion is then that on these papers we find that SAFCOL is dominant in the market for saw logs in Mpumalanga. Where the market for sawn timber is concerned, the downstream market, SAFCOL has a relatively small market share and no evidence has been

23

presented suggesting that it possesses anything akin to market power in this market.

Has SAFCOL abused its dominance?

82. The question that must be posed and, in order for the applicant to succeed, must be answered in the affirmative is: 'Does SAFCOL's dominance in the market for saw logs mean that its alleged refusal to supply the applicant, even if proved, amounts to an abuse of this dominant position?'

83. There are two questions here. First, is there a refusal to supply? Second, if there is, is this in violation of the Competition Act?

84. We are not persuaded that there is a refusal to supply. This matter has to be viewed against the background of the lengthy and acrimonious contractual battles between these parties. The most recent salvo in this commercial war of attrition was when SAFCOL gave notice that it intended to reduce, with effect from 1st May, the supply of logs that it had guaranteed to provide to York from its Witklip plantation. The contract in force between the parties, which is terminable on thirty days notice, guaranteed York a monthly supply of 6 675m^3 from Witklip. On 14 February 2001 SAFCOL notified York of its intention to reduce the guaranteed amount to 2 222,2m^3 per month. SAFCOL claims that the Witklip plantation cannot physically sustain the present guaranteed output of saw logs. This is disputed by York. Both parties have presented conflicting expert evidence. It was this notice that gave rise to the present litigation.

85. A reduction in supply – as opposed , that is, to a complete withdrawal – may well constitute a refusal to supply. In this case it is alleged that supply has been reduced by two-thirds. We have no doubt that the impact on the business of York of a reduction in the supply of raw material of this magnitude would be significant. However SAFCOL insists that it has not refused to supply York. It has simply reduced the amount guaranteed by it from the Witklip plantation. York, avers SAFCOL, is welcome to compete for the remainder of the amount previously guaranteed, or however much additional it requires, from that portion of the SAFCOL output that is not committed to long-term contracts. SAFCOL undertakes that it will treat York tenders for log supply from this source on the same terms extended to any other sawmill competing for this supply. SAFCOL points out that York has recently won a tender for the supply of a large supply of this uncommitted part of SAFCOL's saw log output.

86. York clearly believes these undertakings to be disingenuous. It points to correspondence that, it claims, is evidence of SAFCOL's decision to deny it access to additional inputs. It argues that the technical factors cited by SAFCOL in order to justify the reduction of the guaranteed supply from Witklip are not the result of sudden, unforeseen events and, if valid, should and could have been predicted well in advance. It believes that it was awarded the recent tender precisely to provide SAFCOL with evidence required to render plausible an undertaking to allow York access to its uncommitted supply.

87. It is not possible, within the limitations of an application for interim relief, to adjudicate

conclusively these conflicting claims, in particular the divergent views expressed by the experts. Suffice to say that each of the contentions of the applicant is denied by the respondents – while a more detailed investigation may come down on the side of the applicant's version, the respondent has put up a defense, that is, on the face of it, plausible. Moreover, as we shall elaborate below, even if we had been satisfied that the reduction in the guaranteed supply is equivalent to a reduction in actual supply, the applicant has still not persuaded us that the alleged refusal constitutes a prohibited practice in terms of the Competition Act.

88. There are three alternate explanations for SAFCOL's decision to reduce York's guaranteed supply. One explanation – for which York contends – is that it is a refusal to supply. The second – for which SAFCOL contends – is that it is driven by technical conditions of supply that govern the log off-take from the Witklip plantation. In fact, a third explanation is, in our view, most plausible. That is, when the current dispute is viewed against the backdrop of the fraught relationship between the parties it appears that the conflict is, in reality, about price.

89. The 'evergreen' nature of the York contract is offensive to SAFCOL largely because it has enabled York to continue receiving a log supply while simultaneously resisting upward adjustment in the price of this supply. Clearly, after years of protracted litigation, SAFCOL believes that the only way that it can ensure York's willingness to accept regular price adjustments is to eliminate its guaranteed supply and have it rely upon the 'spot market' in which its uncommitted stock is sold. Should York be prepared to accept terms similar to those of SAFCOL's other customers, particularly with respect to price, then it is difficult to identify the advantage that would accrue to SAFCOL from withholding supply to a paying customer – as we will demonstrate below, SAFCOL will not extend its market power even if York were to exit the market and this cannot therefore explain its attack on York.

90. This explanation of SAFCOL's conduct is bolstered by the following simple but persuasive observation of anti-trust scholars Professors Phillip Areeda and Herbert Hovenkamp:

> "The danger of 'abuse' through arbitrary refusals to deal seems quite low. Substantial monopolies, run by directors responsible to stockholders, will generally behave rationally and make all profitable sales."[24]

91. We agree. This observation bolsters our view that this dispute centers around an attempt by SAFCOL to improve the terms of its contract with York rather than an attempt to further its own market position by denying York supply on any terms. The former is a contractual issue; the latter is a competition issue.[25] Hence SAFCOL's progressive exit from its contractual relations with York and its undertaking to continue supplying York with logs are not necessarily inconsistent. It is the contractual terms that SAFCOL find burdensome and from which it desires to escape. SAFCOL will be willing to accept York's custom as long as it is satisfied with the contractual terms. York may or may not have a solid basis in contract law for resisting SAFCOL's efforts to escape contractual obligations but this is not the forum for making that determination.

24

25

92. In any event SAFCOL has undertaken in these proceedings to supply York on terms equal to those on which it supplies those of its other customers with whom it does not have a long-term contractual relationship. Should York's suspicions be realized, should SAFCOL not honour this undertaking, then York may well be able to point to a refusal to supply or to discrimination. Currently it is able to do neither.

93. However, even if the applicant had successfully evidenced a refusal to supply it has, in our view, failed to establish the conditions necessary to render the refusal an abuse of dominance. Areeda and Hovenkamp insist that,

> "An 'arbitrary' refusal to deal by a monopolist cannot be unlawful unless it extends, preserves, creates, or threatens to create significant market power in some market, which could be either the primary market in which the monopoly firm sells or a vertically related or even collateral market. Refusals that do not accomplish at least one of these results do not violate Section 2 (of the Sherman Act), no matter how much they might harm the person or class of persons declined service. Nor are such refusals an 'abuse' of monopoly power in the sense of using power in one market as 'leverage' to increase one's advantage in another market."[26]

94. It may then well be that SAFCOL draws on its power in the market for saw logs to set a price above the level at which prices may be set in a competitive market or, in general, to secure improved trading terms for itself. However, the Act does not prevent a monopolist from setting a monopoly price. In other words setting a monopoly price does not constitute an abuse of a dominant position unless it can be shown that this also constitutes an 'excessive price' that may be impugned under Section 8(a) of the Act. Suffice to note that the applicant has not brought suit under Section 8(a).

95. Following Areeda and Hovenkamp, what is rather at issue is whether the dominant firm, SAFCOL, has attempted to use – or 'abuse' – its dominance to extend or preserve its dominant position, what US antitrust jurisprudence refers to as 'monopolisation'. Where the upstream market is concerned – that is the market for saw logs - this is clearly not the case. SAFCOL's dominance of the upstream market is unaffected by its alleged refusal to supply York – it was dominant before the alleged refusal and this position is not strengthened by its alleged refusal to supply the applicant.

96. But what of the downstream market? It is open to the applicant to establish that SAFCOL's conduct in the market in which it is dominant – the upstream market – leverages market power in the downstream market. Because SAFCOL is active in both the upstream and downstream markets, the applicant, a competitor in the downstream market, may, on the face of it, be on strong ground.

97. However, here again we do not believe that the applicant has established an abuse of dominance, that is we do not believe that the respondent has, by its alleged refusal to supply York, extended, preserved, created or threatened to create power in the downstream market. This caveat – that, in order to find an abuse of dominance from a refusal to supply, market power must be shown to have been extended or created – is crucial if we are to give

26

expression to the requirement of the Act to the effect that it is a refusal to supply a 'competitor' that offends. Action against a competitor only offends when it is anti-competitive and this will be measured by its capacity to extend or create market power.[27]

98. As already indicated there is, in this voluminous record, a conspicuous lack of evidence pertaining to the downstream market. However, on the information that has been presented there is none that suggests that an attack by SAFCOL on York would, even if successful, create new sources of market power for SAFCOL. In other words, by refusing to supply saw logs to its competitor, in the downstream market, SAFCOL has not improved its position qua competitor in that market. Again this confirms our impression that what we have here is a raging commercial dispute in which contractual relations are, at best, unsettled, and in which personal relations are highly fraught. SAFCOL's recent actions may well constitute an unlawful attack on its contractual relationship with York and the attack may well be designed to secure commercial advantage for SAFCOL.[28] There is even the possibility that its actions are purely vindictive and personal designed simply to punish York and its leading personnel for their resistance to SAFCOL's attempts to raise the price of its product and impose less favourable contractual terms on its longstanding customers.[29] If this is so York may well have other remedies at its disposal. However, it is wholly possible to act in this way and to remain, nevertheless, within the parameters of the Competition Act just as it is possible to abide faithfully by the terms of a contract and yet transgress the same statute.

99. We conclude then that even if the facts had established a refusal to supply by SAFCOL, it would not have been possible to impugn this practice under the Competition Act. It is not enough to show that a given practice is a product of market power. It must also be shown that the act complained of actually extends that power or creates new sites of power. This has not been established and, accordingly, the application for interim relief in respect of the alleged violation of Section 8(d)(2) is denied.

100. The applicant alleges, in the alternative, that the respondent has violated Section 8(c). This section places a considerably heavier burden on the applicant than does Section 8(d). As already elaborated, we are not persuaded that the practice complained of, the reduction in the guaranteed supply from Witklip, is 'exclusionary' within the meaning of the Act – that is, it does not impede or prevent the applicant from expanding in the market but merely requires that it competes for its supply of raw material on terms similar to those available to its competitors. Moreover, even if the practice complained of were to be established as an impediment to the applicant's expansion in the market, it still remains for the applicant to establish the 'anti-competitive effect' of the practice, to show, in other words, that market power has been created or extended in consequence of the alleged act. This has not been done. And, even if anti-competitive effects had been established, the applicant would have to show that these outweighed any pro-competitive gains – this, too, has not been established. Accordingly, the relief sought in terms of Section 8(c) is denied.

101. Note that Section 49C(2) requires that, when determining whether it would be 'reasonable and just' to grant an order for interim relief, we should have regard to three factors, viz, evidence relating to the alleged restrictive practice, the need to prevent serious or irreparable damage, and the balance of convenience. We have dwelt on the evidence relating to the

27
28
29

alleged restrictive practice and found none. While we are not told how to balance, how to 'have regard' to, the three factors specified in Section 49C of the Act we would, regardless of the prospect of damage or of the balance of convenience, be hard pressed to grant interim relief in the absence of evidence of a restrictive practice. We should also note that if SAFCOL honours its undertaking to supply York's additional requirement (additional, that is, to the reduced guaranteed amount), then the consequential harm, if any, would be small and the balance of convenience undisturbed.

IT IS ORDERED THAT:

1. the application be dismissed; and

2. the applicant pays the respondent's costs in the application on a party to party scale, including the costs of two legal representatives.

_____ 09 May 2001

D.H Lewis DATE

Concurring: N.M. Manoim; P Maponya

The contractual relationship between the two parties to this matter is fraught with disputes of every kind. A number of the legal disputes have been settled, arbitrated upon or decided by the civil courts, while others are still pending before courts. In this decision we shall refer only to those we consider relevant for purposes of the matter currently before us.

Section 68 of the Act prior to amendment, which stated, " In any proceedings in terms of Chapter 3 or this Chapter [6]the standard of proof is on a balance of probabilities." The interim relief remedy was located in Chapter 6 of the Act as it was then.

1948(1) SA 1186 (W) at 1189.

1955 (2) SA 682 (C) at 688

See Herbstein and Van Winsen page 1069. The same observation is made by Erasmus in Superior Court Practice at E8-10A.

1999 (1) SA 217 (SCA), 228 G- H.

This is surmise on our part. Webster is referred to in the applicants heads but it is not suggested that we do not follow it the approach taken with Gool.

The case law here is confusing and sometimes these terms have been used interchangeably. See for instance the discussion in Prest page 55. Prest suggests the correct meaning is the one given in Webster i.e. proof which if uncontradicted and believed at the trial would establish his right .The author goes on to say that the use of '*prima facie* though open to some doubt' means that something more is required than simply to look at the allegations of the applicant but something short of weighing up the probabilities of conflicting versions is required.

Supra at 1186.

Ferreira v Levin NO and others; Vryenhoek and others v Powel NO and others 1995(2) SA 813 (W). Although this case was heard by a full bench on this point Heher J was the only member of the Court to feel the point needed to be decided.

At page 836 .

[1975] UKHL 1; [1975] AC 396

At page 836.

1998(3) (SA) 578 (LCC) at587

This is a hierarchy of the courts issue. The LCC is bound by decisions of the SCA but decisions of provincial or local divisions of the High Court have only persuasive authority,

The applicant has not referred us to any of these cases but we have thought it appropriate to consider the debate raised by them in coming to an understanding of what the common law approach is and whether we are required by the section to favour one approach as opposed to another.

See Beecham Group v B- M Group (Pty) Ltd 1977 (1) SA 50 T at 56.

See Prest " *The Law and Practice of Interdicts*" Juta page 148.

Spur Steak Ranches v Saddles Steak Ranch, Claremont and another 1996(3) SA 706 (C) at 714.

See our decision in Natal Pharmaceuticals (98/IR/Dec00) and that of the High Court in Spur Steak Ranches supra.

"Department of Water Affairs and Forestry, Report on Commercial Timber Resources and Primary Roundwood Processing in South Africa 1996/97"

Entitled "Revised Commercial Timber Resources and Roundwood Processing in South Africa 1997/98" and "Commercial Timber Resources and Roundwood Processing in South Africa 1998/99".

For example, in annexure GSA8 to its supplementary answering affidavit, SAFCOL relied on a report by its Forestry Division demonstrating that out of the total softwood saw log-producing area of 189 004 ha in Mpumalanga, only 85 791 ha belongs to SAFCOL. A closer look at the report however reveals that out of the total figure of 189 004 ha approximately 70 000 ha belonging to Mondi and Sappi whose sawlogs are not made available to independent sawmills. A total of only 119 004 ha is therefore available in the Mpumalanga market and SAFCOL owns 85 791 ha of it; approximately 72%.

Phillip E. Areeda and Herbert Hovenkamp – Antitrust Law – Volume IIIA (Little, Brown and Company) 1996, p.172

While we do not deny the possibility of a nexus between contractual and competition issues, the following observation, with which we concur, cautions against a simple conflaton of the two: 'Complex contractual settings are pervasive in our economy…..In such a world, change in relationships is inevitable. Parties may become disillusioned with each other, and lawsuits may result. These complex contractual settings present complex issues for antitrust. Although anti-competitive actions are possible when relationships change, they are by no means likely, let alone inevitable'. (Timothy Muris – The FTC and the Law of Monopolisation – Antitrust Law Journal, Vol. 67, No. 3, 2000). In other words, the nexus, if any, between a contractual dispute and an antitrust violation must be proven. It cannot simply be assumed.

Areeda and Hovenkamp - (op cit) at Page 167

The applicant cited the judgment of the European Court of Justice in Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v E.C. Commission (Cases 6-7/73). In this case a refusal to supply was indeed found to constitute an abuse of a dominant position however the facts of this case are not on all fours with the present matter. First, the fact of the refusal to supply was clear and uncontested. It is not so in our case. Second, the Court's finding is explicitly based on the position of the dominant supplier of the raw material input in the 'derivative' or downstream market. The Court accordingly held '..that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86' (paragraph 25 at p341, our emphasis). We repeat: in the present matter there is no evidence that SAFCOL is withholding a supply of logs to York 'with the object of reserving such raw material for manufacturing its own derivatives'. Indeed even if SAFCOL did divert York's entire log supply to its own saw mills it would, on the scanty evidence before us, not establish market power downstream.

Robert Pitofsky, the immediate past Chairman of the Federal Trade Commission, writes that 'A monopolist cannot coerce or induce customers or competitors to bend to its will by using its monopoly power, if it is reasonably likely that {the} course of conduct will injure competition and the monopolist does not have a good business reason for its conduct' (*Roundtable Conference with Enforcement Officials*, 67 Antitrust Law Journal 453, 457 – 1999) (our emphasis). Note then that Pitofsky, who is inclined to lessen the burden of proof on a plaintiff in a monopolization suit, still qualifies his view with the rider that the conduct complained of must be shown to injure competition. His successor Timothy Muris puts it as follows: 'It necessarily follows that showing a link between the exclusionary conduct and the monopoly requires a determination of the impact of the conduct on competition. In short, the anticompetitive effect must be assessed if the conduct is to be found to have the necessary connection to the monopoly. (Muris, op cit, p.697)

'Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition'. (Brooke Group Ltd v Brown and Williamson Tobacco Corporation., [1993] USSC 105; 509 U.S. 209 (1993)