COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 103/CR/Dec06

In re points in limine:

Woodlands Dairy (Pty) Ltd	First Applicant
Milkwood Dairy (Pty) Ltd	Second Applicant

And

Competition Commission	Respondent

In the matter between:

Competition Commission	Applicant

And

Clover Industries Limited	First Respondent
Clover SA (Pty) Ltd	Second Respondent
Parmalat (Pty) Ltd	Third Respondent
Ladismith Cheese (Pty) Ltd	Fourth Respondent
Woodlands Dairy (Pty) Ltd	Fifth Respondent
Lancewood (Pty) Ltd	Sixth Respondent

Nestle SA (Pty) Ltd Seventh Respondent

Milkwood Dairy (Pty) Ltd Eighth Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member), and M Madlanga (Tribunal Member)

Heard on : 19-20 January 2009

Order Issued : 17 March 2009

Reasons Issued : 17 March 2009

REASONS FOR DECISION

Introduction

[1] This application raises several preliminary objections arising from complaint proceedings that have been instituted against, *inter alia*, the applicants in this matter. The objections concern alleged procedural irregularities in the Competition Commission's investigation of the applicants.

[2] On 7 December 2006, the Competition Commission ("the Commission") filed a complaint referral with the Competition Tribunal against eight respondents, including the two applicants. The first applicant in this matter is Woodlands Dairy (Pty) Ltd ("Woodlands"), and the second applicant, Milkwood Dairy (Pty) Ltd ("Milkwood").

[3] The hearing into this matter has not yet commenced, due to, *inter alia*, challenges certain of the other respondents have raised about the Commission's entitlement to proceed with the matter, which at the time of writing these reasons, are still before the courts.[1] We will

[1] Issues of procedural fairness were also raised by one of the respondents in those proceedings. The nature of these objections appears fully in the following decisions of the Tribunal and the Competition

refer to this as the 'Malherbe' challenge, as its centrepiece is a letter written by a Mrs Malherbe to the Commission on or about 10 June 2004 and whose juristic nature lies at the heart of that litigation. The essential question in that case was whether Mrs Malherbe's letter constituted a complaint to the Commission by a person in terms of section 49B(2)(b) of the Competition Act (the 'Act') or constituted the mere submission of information to the Commission as contemplated in section 49B(2)(a).[2] If the letter was indeed a complaint, as some of the respondents had argued, then the Commission had not filed the complaint referral within the requisite time period and hence the proceeding was void. The Commission argued that the letter did not constitute a complaint, but a submission of information and that it (the Commission) had initiated the complaint, in terms of section 49B(1), and since the Commission is not subject to any time limit on referring complaints it has initiated, the objection was without foundation.[3] The Tribunal and the Competition Appeal Court upheld this argument of the Commission.

[4] Milkwood and Woodlands were not applicants in respect of the Malherbe challenge, but they have in this application brought their own set of challenges, which were not raised in the other applications, and which we consider now. As we shall see the issue of the proper initiation of a complaint preceding the complaint referral remains at issue *in casu* although it takes a different form. The present application was argued before us on 19 - 20 January 2009.

[5] The Commission's complaint referral of 7 December 2006, which underpins this and the Malherbe applications, has been brought against eight firms in the milk industry who are processors of milk. The Complaint referral comprises six counts with different firms being charged with different counts. A summary of the counts faced by the applicants as appears in the Complaint referral, is set out below:

Appeal Court: *Competition Commission v Clover Industries Limited and 7 Others* Case Number 103/CR/Dec06 (a decision dated 23 June 2008) and *Clover Industries Limited and Another v The Competition Commission and Others* Case Number 78/CAC/Jul08. A petition to the Supreme Court of Appeal in respect of the Competition Appeal Court (CAC) decision to refuse leave to appeal is still pending at the time of writing this decision.

[2] Section 49B(2) states, *"Any person may (a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form, or (b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form."*

[3] Section 49(B)(1) of the Act, which states that *"The Commissioner may initiate a complaint against an alleged prohibited practice."*

COUNT 1:

PARTIES: ***Clover, Parmalat, Lancewood, Woodlands, Ladismith Cheese and Nestle***

Breach of section 4(1)(b)(i) – direct or indirect fixing of the procurement prices of milk from producers through information exchange, price movement requests, or field officers regularly exchanging pricing information.

COUNT 2

PARTIES: ***Parmalat, Clover, Woodlands and Nestle***

Breach of section 4(1)(b)(i) or alternatively 4(1)(a) – indirect fixing of purchase price of milk and/or a trading condition through long term milk supply agreements between them.

COUNT 3

PARTIES: ***Parmalat and Clover***

Breach of section 8(d)(i), alternatively section 8(c), alternatively section 5(1) – exclusive supply agreement with the producers

COUNT 4

PARTIES: ***Woodlands and Milkwood***

Breach of section 4(1)(b)(i) – direct or indirect fixing of the retail price of UHT milk between them. It's also alleged that Woodlands and Milkwood agreed not to compete in certain areas.

COUNT 5

PARTIES: ***Clover and Woodlands***

Breach of section 4(1)(b)(i) – fixing of the prices of processed milk ("UHT-Long Life") to the retail market. It is also alleged that Woodlands and Clover agreed on trading conditions by artificially manipulating the market through arrangements regarding price signals and volumes in the market for raw milk.

COUNT 6

PARTIES: ***Parmalat and Woodlands*** *(Clover granted leniency)*

Breach of section 4(1)(b)(i) – indirectly fixing the selling price and/or trading conditions of milk and processed products at an artificially high level by agreeing on a coordinated control of volumes in the market

[6] The core of the applicants' case against the Commission is the allegation that the Commission is obliged by law to have a validly initiated complaint before it, or prior to it utilising its powers to investigate in terms of section 49A of the Act, the section that empowers the Commissioner to summons persons to produce documents and submit to interrogation. The applicants rely for this on section 49(3) which states:

> *"Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate a complaint as quickly as practicable."*

Since section 49A, the section which confers the summons power, commences with the phrase, *"At anytime during an investigation…"* it follows, argue the applicants, that reading the sections together an initiation must precede an investigation and an investigation is a pre-condition for the issue of a summons.

[7] In this case Woodlands received its summons in March 2005 and Milkwood in August 2005.[4] Mrs Malherbe's letter was submitted to the Commission prior to these dates. However, since the Commission's stated disavowal in the Malherbe challenge that she was the initiator, it meant that the Commission was; in which case the question is, when did it do so – before or after the dates on which the summonses were issued? Here whilst the facts are common cause the legal conclusions diverge.

[8] The Commission argues that there was a generalised complaint initiation, foundational to these proceedings, issued on 9 February 2005 and thus prior to the date of the summonses. The applicants argued that the February initiating document relied on by the Commission did not extend to them because, *inter alia*, they are not mentioned at all, and that despite this, it has other technical deficiencies. Moreover, they argue that a later series of initiation documents, in which the applicants are mentioned by name, are the

[4] This is certain in the case of Woodlands but less clear in relation to Milkwood as discussed more fully below.

foundation for the case against them and that these were all issued after the date of the summons and interrogation.[5] As the applicants put it, the cart had come before the horse.

[9] The Commission's response to this was twofold. First that it was not necessary for the applicants to be expressly named in the February 2005 document for it to serve as a valid initiation against them, and that the subsequent express referrals were done *ex abundante cautela*.[6] However, as a proposition of law the Commission disputes whether the Commissioner in fact needs to have an initiated complaint before him, prior to using his section 49A powers. The Commission argued that the Commissioner needs to be able to investigate before deciding whether to initiate a complaint. Without being able to investigate and thus, *inter alia,* utilise the section 49A summons procedure how does the Commissioner know whether there exists a complaint to be initiated? Thus we had a debate that went to the root of the purpose of the Commission's investigative powers. Are the investigative powers dependant, for their exercise, on a prior complaint initiation for their validity; or do they exist independently of initiation, as in many cases prior investigation may be needed to inform a decision to initiate. (Interestingly, the applicants during argument conceded that the search and seizure powers under section 46 of the Act were capable of being exercised prior to initiation, as the warrants required third party authorisation and could not be exercised by the Commission acting alone.)

[10] But the applicants also contended that even the subsequent, post summons initiations, which made express mention of the applicants, were invalid as the Commissioner had applied the incorrect test in exercising the powers to refer. The applicants allege that from the language on these initiating documents it appears that in initiating, the Commissioner had applied the incorrect discretion, and instead used the discretion applicable to section 46 of the Act, the search and seizure provision, and not section 49B(1).[7] This argument although made in the papers was not pursued in oral argument.[8]

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[5] See Annexures H, I, J and L to the founding affidavit of Alexander Gutsche. Gutsche is the chairman and chief executive officer of Woodlands.

[6] This initiating document is annexure G to the founding affidavit of Gutsche, record page 83.

[7] See founding affidavit of Gutsche, paragraph 39 record pages 20-21.

[8] Section 49B does not set out what the threshold discretion is for deciding on an initiation. If that threshold is interpreted as a more demanding one, it would follow that the Commission's argument that investigative powers may precede initiation has a compelling logic- how else could the high threshold be reached unless underpinned by some investigative powers having been exercised beforehand. Supporting such a reading is the fact that the investigative powers sections each contain their own bespoke discretions (see 49A and 46).On the other hand if the threshold is set low, then it would suggest that the more probable interpretation is that the investigative powers provisions, are triggered post

[11] On this basis the applicants argue that the summonses, and all they yielded by way of documents and interrogation, were unlawful and must be set aside. As an ancillary argument it also argued that the summonses were, on their own terms, invalid for want of being overbroad and vague. Finally they argued that those who exercised the investigative powers were not properly designated. The Commission staff who conducted the interrogations had not been properly appointed as inspectors in terms of section 24(4) of the Act, and thus were not entitled to perform the interrogation functions.[9] This argument received further refinement in the applicants' heads of argument when it was suggested that none of the inspectors had been designated in terms of section 49(3) of the Act.[10] This point was not persisted with in oral argument, after the Commission had filed supplementary affidavits in this respect, but a new point was taken as a result of the documents this yielded. The applicants argued that certain powers purportedly exercised by the then Deputy Commissioner, had not been validly exercised, as the Deputy Commissioner had not been validly designated the powers of the Commissioner in terms of section 23 of the Act. The Commission rejected both arguments as wrong both in fact and law.

[12] Further the applicants argued that the interrogations that followed in pursuance of the summonses were unlawful as if the summonses were void *ab initio* so were all their unlawfully induced consequences. Ancillary to this argument was that the interrogations even if pursuant to a valid summons were conducted in a deceptive manner, as the applicants were never warned that they were the subject of an investigation and hence this constituted unfair administrative action.

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initiation, and that initiation serves as first step in the lifecycle of a complaint. Furthermore initiation is not the only discretion exercised by the Commission in relation to a complaint. At the referral stage the Commission is again exercising a discretion to refer the case to the Tribunal. (Section 50) Presumably here, the Commission, now fully informed on the outcome of the investigation into the alleged prohibited practice, would face a more demanding discretion than at the time of initiation. Any decision interpreting section 49B's order of priority in relation to section 49A would need to examine the 'initiation's' function in relation to the workings of the Act as a whole, and not be confined to the language of the section.

[9] See founding affidavit of Gutsche paragraph 28 record page 18.

[10] Applicants' heads of argument paragraph 58.

[13] Finally, Woodlands argues that count 5, referred to above, was never initiated against it by the Commission or anyone else, but was nevertheless referred. On this basis alone count 5 against Woodlands is vitiated.[11]

[14] The applicants' conclusion is that the complaint proceedings brought against them are vitiated by these alleged irregularities and that the evidence procured from them is consequently inadmissible against them.[12]

Approach to the decision

[15] Because we find that the summonses are void on the grounds of their being vague and overbroad, we do not need to decide a number of the points that have been argued in this case. Thus we have not decided whether as a matter of law a summons can only be issued after there has been an initiation of a complaint nor whether the initiation of February 2005 was a valid initiation in general or if it was, whether it was valid in respect of the applicants. Nor even if it was not a valid initiation against the applicants, whether the summons powers could nevertheless not be used to compel information from them since section 49A refers to "*any person who is believed to be able to furnish information on the subject of the investigation…"*, and thus does not seem to be confined to respondents or potential respondents. Nor have we needed to decide on the appointments and designations of the inspector nor the designation of powers to the then Deputy Commissioner.

[16] We do deal with the issues of whether the Commission may rely on the evidence yielded by the interrogations. We have also decided on the objection in respect of count 5.

Summons too broad and unduly vague.

[17] A section 49A summons can require three things of the person summonsed; to produce documents, to submit for interrogation or to do both. In this case Woodlands was summonsed to do both whilst Milkwood was summonsed only to appear for interrogation.

[11] See founding affidavit Gutsche paragraph 37, record page 20.
[12] Applicants' heads of argument paragraph 1.

For this reason we will deal with Woodland's summons first, and then, to the extent necessary, we will deal with Milkwood's separately.

The Woodlands summons

[18] The summons in respect of Woodlands was issued on the 22 March 2005.[13] Woodlands executives were required to present themselves for interrogation and produce its documents, on 19 April 2005. However, the time table set out in the summonses was not adhered to; it appears with the consent of both parties, these were extended. The interrogation of both Woodlands executives, Dr H.J. Kleynhans (the then managing director) and Mr Owen Gush (the general manager support services), took place on 22 September 2005 at a hotel in Port Elizabeth. According to Woodlands, substantial documentation was made available to the Commission, both prior to and subsequent to the interrogation.[14]

[19] The evidence thus procured as a result of the summonses is, in respect of Woodlands, documents supplied, and the testimony of Kleynhans and Gush at their respective interrogations.

[20] The covering page of the Woodlands' summons is the standard pre-printed Commission document that it uses for this purpose.[15] Notable on this page is the pre-printed block headed "*Concerning*" which has a blank space below it, presumably intended to be completed by the Commissioner to indicate what the summons concerns in each particular instance. In the Woodlands summons the words, *"Investigation into the milk industry"* are inserted into the *"Concerning"* block. The summons is addressed to Dr H.J. Kleynhans in his capacity as chief executive of Woodlands. Annexed to this form is an annexure A, which comprises three parts and constitutes the body of the summons. The first three paragraphs of Part I of Annexure A of the summons explain the purpose of the summons. They appear under the heading *"Introductory note".* As they occupied most of the parties attention in this hearing they are worth quoting in full:

[13] Annexure B to the supporting affidavit of, page 31 of the record.
[14] Supporting affidavit of Gutsche page 14 of the record, paragraph 25.
[15] Form CC20, issued in terms of section 49A of the Act and to be found in the annexure to its rules.

"This summons has been issued in connection with a full investigation into the milk industry by the Competition Commission of an alleged contravention of Chapter 2 of the Competition Act, …"

The gist of the complaint initiated by the Commissioner relates to the reasonable believe (sic) that there exists anti-competitive behaviour in the milk industry. The alleged prohibited practices include possible collusion and/or price fixing, possible abusive behaviour as well as restrictive vertical practices.

You are summonsed in terms of section 49 A of the Competition Act, … as part of the above- described investigation by the Competition Commission. It is believed that you are able to furnish information on the subject of the investigation, or have in your possession or control a book, document or other object that may have a bearing on this investigation."[16]

[21] The applicants suggest that the narration on the summons does not fulfil the requirements of section 49A which requires, if not by express language then by necessary implication, that a summons be issued in respect of an investigation whose subject matter must be a prohibited practice which is stipulated in the summons. This prohibited practice, whose essential particulars must find expression in the summons, must in turn be one that was the subject matter of a prior complaint initiated in terms of section 49B.

[22] Rather than doing this, what the Commissioner has done, as appears from the first paragraph of the summons quoted above, is to broadly investigate anticompetitive practices in the milk industry. This approach, they argue, contemplates an investigation whose parameters are far wider than that which is permitted by the empowering section. Although in the second paragraph of the summons the Commissioner purports to set out the 'gist' of the complaint, this description does not serve to narrow the ambit of the summons, but to retain its breadth and arguably extend it beyond that contained in the first paragraph. They also complain that the applicants were not told which firms were the subject matter of the investigation nor, as was to emerge later, that they were also the subject of the investigation.

[23] Woodlands argued that it made an attempt to ascertain the scope of the summons more fully when its attorney on behalf of Woodlands wrote to the Commission on 1 April 2005,

[16] Record page 32.

asking that it, *"… be advised of the subject of the investigation with sufficient particularity to determine which of the information in its possession is relevant to the investigation."*[17]

[24] The attorney complained that the description of the complaint referred in the broadest terms to the kind of activities that are prohibited under the Act and did not provide any particularity regarding the current complaint. Thereafter followed a series of questions asked of the Commission, which in brief, asked who the parties were to the various alleged practices and what the subject matter of the particular practice was.

[25] However, the Commission in its reply not only refused all particularity, but seemed in one phrase, to widen the investigation beyond even the broad language of the summons.

> *"The Commissioner initiated the complaint to establish whether there is any anti-competitive behaviour at "any level" of the industry. Through this we allowed ourselves the opportunity to evaluate the entire industry. Therefore it would be premature for the Commission to comment on any industry relationships and to conclude on the applicable sections of the Act at such an early stage of the investigation."*[18]

The courts approach to the validity of warrants

[26] It is trite law as argued by the applicants that an organ of state such as the Commission can only exercise functions that are conferred to it by law. The relevant section of the Act, which the Commissioner uses to issue a summons to compel documents from persons and to require people to submit to interrogation in pursuance of a summons, is section 49A. The material terms of this section state:

> "*49A(1) At any time during an investigation in terms of this Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or*

[17] Record page 48, letter from Rushmere Noach Incorporated to the Competition Commission.
[18] Letter from the Commission to Rushmere Noach, dated 6 April 2005, record page 50.

control of any book, document or other object that has a bearing on <u>that subject</u> –

(a) to appear before the Commissioner or a person duly authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) *at a time and place specified in the summons, to deliver or produce to the Commissioner, any book, document or other object specified in the summons."* (Our emphasis)

[27] Our jurisprudence on the validity of warrants has had a difficult history. Small wonder that inspectors of the Commission or police investigators struggle with it if it is a matter on which the highest courts have not agreed. In *Powell*, a case on which the applicants were heavily reliant as being the leading case on the principles of search warrants, the SCA after the reviewing the common law cases on search warrants summarised their relevant principles.[19] Two of the principles relevant to us are:

> *" (d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.*
>
> *(e) if a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid and it will be set aside."*[20]

[28] In the later case of *Zuma*, this approach appears to have been criticised when the majority in the Supreme Court of Appeal held:

> *"the proper starting point in my view, is not with preconceived ideas of what a warrant must contain, whether drawn from other cases or otherwise, but rather with construing the particular authorising statute to see what its criteria are."* [21]

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[19] *Powell NO and others v Van der Merwe NO and others* 2005 (5) SA 62 (SCA).
[20] *Powell* above paragraph 59
[21] *Thint (Pty) Ltd v National Director of Public Prosecutions* [2008] 1 All SA 229 (SCA) and *National Director of Public Prosecutions v Zuma and Another* [2008] 1 All SA 197 (SCA) (the SCA Zuma judgment) at par 75.

[29] This approach found favour with the Constitutional Court in *Zuma* (*'Zuma(CC)'*) when that case went to it on appeal, except the Constitutional Court emphasised that any interpretation must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution.[22]

[30] Following this approach we must not have preconceived ideas of what a summons issued in terms of the Competition Act must contain, we must first look at the section that authorises the issue of the summons, in this case section 49(A) of the Act.

What does section 49(A) mean by "the subject of an investigation?

[31] The first point to note about this section is that it is the Commissioner, not any external functionary, who issues the summons. By way of contrast if there is a warrant to be issued for a search in terms of the Act, the warrant must be issued by a High Court judge or a magistrate. [23]

[32] The second is that the information sought has to relate to the *"subject matter of an investigation."* For the purpose of this case we need to understand what this can refer to. Certainly the subject matter of an investigation could be a prohibited practice which is being investigated in terms of a complaint either initiated by the Commissioner acting in terms of section 49(1) or a complaint from a member of the public , in terms of section 49B(2)(b) .[24]

[33] The question in this case is whether the empowering statute authorises an investigation that is wider than the terms of a particular prohibited practice and whether an industry wide investigation – is competent in terms of this section. If it is, then an investigation predicated on anti-competitive practices in the milk industry may competently be the subject matter of an investigation. If it is not, and the section is construed to have

[22] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v NDPP and Others* Case CCT 91/07 at footnote 112.
[23] Section 46(1).
[24] Section 49B(1) states "The Commissioner may initiate a complaint against a prohibited practice." Section 49B(2)(b) states, "Any person may – (a)….(b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form."

application to prohibited practices only, then such a description would be *ultra vires* the empowering statute.

[34] The legislature could easily have added the words *"into a prohibited practice"* after the word "*investigation"*, if it had intended that limitation to apply in section 49A. Instead it chose not to do so. It clearly uses the phrase *prohibited practice* when it intends to, as it does in the sub-sections of 49(B) we cited above and section 46(1)(a), the latter section being the one that empowers searches and seizures.

[35] Does the legislature therefore intend the summons section to include proceedings other than prohibited practices? In our view it does, but it does not follow that this authorises industry wide investigations. The reason that section 49A refers to investigations generally, and not to investigations into prohibited practices, is that the term investigation is also used in respect of investigations into mergers. Section 13B(1) of the Act provides for this.[25]

[36] It is quite clear from the Act and the way in which it functions that the concept of investigations refers to investigations into prohibited practices or mergers and no greater universe than this. Accordingly, since it is common cause that the Commission *in casu* was not dealing with a merger, it had to be concerned with an investigation into a prohibited practice, and the Commissioner had to confine his powers of summons to a prohibited practice.

[37] However, in crucial parts of the summons there is reference to the generic term anti-competitive practices and this term gets repeated in the later letter from the Commission. The term 'anti-competitive practices' is ambiguous. It can be interpreted strictly to embrace only prohibited practices as defined in the Act or it could mean to apply to these acts as well as others that have an anti-competitive effect, but are not prohibited by the Act. For instance, certain forms of behaviour are considered prohibited only if committed

[25] The sub-section states: *"The Competition Commission may direct an investigator to investigate any merger, and may designate one or more persons to assist the inspector."* This is the merger proceeding analogue of section 49B(3) which applies to prohibited practices, and which states, *"Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as possible."*

by a dominant firm. Price discrimination which is a prohibited practice under United States law irrespective of whether the firm is dominant is in our law restricted to dominant firms.[26] The ambiguity is regrettably compounded by the reference to the milk industry as a whole suggesting that the term anticompetitive practices is not confined to Chapter 2 contraventions only and that the Commissioner has a more ambitious end in mind.[27]

[38] A search warrant of similar breadth, issued in terms of section 29 of the National Prosecuting Authority Act No. 32 of 1998 (the NPA Act), was considered in the *Powell* case. Here the description of the conduct being investigated was termed *"alleged irregularities"* and was found by the court to be sufficiently wide language to embrace non-criminal but unethical conduct as well – conduct for which a warrant is not authorised by the empowering legislation.[28]

[39] If the summons is read as one into anticompetitive practices in the milk industry as part of an industry wide investigation, irrespective of whether those are practices proscribed in terms of the Act, then it is void for falling outside of the permissive powers of investigation conferred by the statute in section 49A.

[40] However, this is not the end of the matter, as the summons is ambiguous – it could be read as only applying to anti-competitive practices that are prohibited by Chapter 2 of the Act. The first paragraph of the summons does indeed refer to Chapter 2, and the second, proceeds to list certain of the prohibited practices, albeit that this is done after the preceding word "*including*".

[41] Thus a possible *intra vires* reading of this summons, is that the Commission is investigating several prohibited practices in the milk industry which include, but are not confined to those practices expressly mentioned in the summons, but whatever they may be, are prohibited practices in terms of the Act.

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[26] Robinson- Patman Act section 2.

[27] Note that in Part 1 before the enumeration of prohibited practices the word 'including' precedes the list, suggesting that that which follows is not all. Given the comprehensive list what is meant by the cautionary including might suggest non-proscribed forms of anti-competitive conduct are in the Commissioner's sights.

[28] See *Powell*, id paragraph 9.

[42] If this is the case then the question is whether a general stipulation that the practices involve any possible prohibited practice in a named industry is sufficient for a valid summons in terms of section 49A.

[43] We suggest not and give several reasons for this. In the first place it seems highly unlikely that even the most egregious industry in the country could be suspected of every crime in the Competition Act's armoury. Secondly, competition law is about anti-competitive effects and these in competition law take place in markets not industries. Industries typically have several layers of firm involvement – in milk it would seem from the complaint referral there are producers or farmers, processors such as the applicants, and downstream from them various other intermediaries until the product finds the ultimate consumer. The summons therefore read at its most benign for the Commission is an investigation into any kind of prohibited practice known to Chapter 2 at any level of the milk industry.

[44] In *Zuma (CC)* the Constitutional Court was faced with a warrant that set out the offences being investigated, but lacked any further detail. Thus the warrant referred to an investigation into fraud and corruption but did not contain any further particulars concerning who the accused was, the nature of the fraud etc.

[45] Despite this the Court upheld the warrant:

> "*I can see no reason why the prosecution should have been obliged to provide further details as to exactly who was suspected of having committed the offences, as well as where and when they were suspected of having been committed."* [29]

[46] The Court went on to explain why – this might undermine success of the investigation or might compromise an innocent party named or might not be known yet at the time.[30]

[29] *Zuma* (CC) id, at paragraph 170.
[30] Id paragraph 170.

[47] Although the Court is indicating a more permissive approach towards the extent of information contained in warrants than did the SCA in *Powell*, this does not mean that minimum requirements have been jettisoned. The Court stressed that:

> *"One needs to know the boundaries of the investigation in order to determine the boundaries of the authorised search and seizure operation."* [31]

[48] The Court made the point that a section 29 NPA Act [32] warrant, should state at minimum the following without recourse to external sources of information; the statutory provision in terms of which it was issued; the suspected offence under investigation; the premises to be searched and the classes of information that are reasonably suspected to be on those premises.[33]

[49] Although we are mindful of what we stated above that warrants must be interpreted not generally, but in the context of their own statutory framework, the requirement that the Court set in relation to a section 29 NPA Act warrant – that it must stipulate the offence under investigation – ought in our view to apply in respect of a summons in terms of section 49A of the Competition Act. Thus we hold that a section 49A summons must at a minimum stipulate the prohibited practice that is the subject of the investigation. Without this a summons is unbounded.

[50] We must now consider whether the present summons can be construed as disclosing a prohibited practice with sufficient particularity to pass the *'boundedness'* test.

[51] The applicants had argued that the prohibited practice should be alleged with some degree of particularity, and that at minimum the name of the accused, or in our case the prospective respondent or respondents be disclosed. For the particularity on the identity of the respondent they relied on certain decisions of the Competition Appeal Court which dealt with the particularity required of a third party complainant in respect of a complaint in terms of section 49(2)(b) of the Act, the section that empowers a third party to lodge a

[31] Id paragraph 167.
[32] National Prosecuting Authority Act 32 of 1998.
[33] Id paragraph 159.

complaint. The CAC held that in respect of this category of complaint the identity of the third party was a prerequisite.[34]

[52] These decisions cannot be regarded as authority for what minimum content the Commission is required to stipulate in respect of a summons in terms of section 49A, where as we have seen, the Constitutional Court in *Zuma*, has explained, for reasons that apply equally to the considerations that inform a section 49A summons, that the identity of an accused need not be stipulated. It seems perfectly reasonable that in a cartel case the identity of potential respondents may not be an issue which the Commission wishes to disclose during its investigation phase.

[53] Thus we do not regard the failure of the Commission to specify the applicants or any other firms as respondents in the summons as being the reason for rendering it void.

[54] We thus return to the question of whether the present summons, read as restrictively as possible in favour of the Commission, contains the minimum required specificity in regard to the alleging of a prohibited practice that is the subject of an investigation.

[55] It might be possible for a summons that lacks the minimum specificity to be resurrected by reference to an external document that compensates for its deficiencies. The *Zuma* (CC) decision, suggested that a warrant in terms of section 29 of the NPA might in limited circumstances be rectified in this way. We do not need to decide this point now, because even if the summons could be rescued by reference to a later document, the Commission, as we have seen, failed to clarify the issue when it had an opportunity to do so; Senekal's letter, which we considered above, widened not narrowed the scope.

[56] Therefore we can only have regard to the content of the summons to resolve this issue of validity. The summons is organised into three parts. Part I appears to be devoted to the scope of the investigation and its relevant portions are the ones quoted earlier. Part II appears purely procedural, advising the addressee of its rights and obligations and

[34] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* 15/CAC/Feb 02 at par 15-16.

appears to be composed of standard terms for all summonses. Part III specifies the documents that are sought from the addressees.

[57] Part I as we noted above purports to describe the subject matter of the investigation. A reading of it suggests that the Commission is investigating a prohibited practice (unspecified) in the milk industry (at no specified level of the industry).[35] It would be the equivalent in criminal law of suggesting that a crime had been committed, but leaving it to the imagination of the reader to ascertain what that crime might be. Part I is thus unbounded in its nature and fails to meet the test we laid down earlier for the specification of a particular prohibited practice or practices.

[58] Part II is purely procedural and takes the matter no further. Part III identifies the documents sought. For the most part it must be conceded in the Commission's favour that the identity of the documents sought in this Part, is sufficiently specific. A person reasonably familiar with competition law and economics could discern from reading this Part that the Commission is investigating some form of contravention of section 4 of the Act in relation to milk processors, with a particular focus on the manner in which they purchase milk from producers in particular areas . It could then be said that Part III is sufficiently specific that it cures any confusion created by the generality of Part I.

[59] Arguably one could say that this overall reading of Part III would allow the reasonable reader of item 2 which states that:

> *"Please submit all internal communication (circulars, letters, memoranda, e-mail, etc) within the company for the period 1 January 2002 till 18 March 2005, dealing with milk procurement",*

[35] We say unspecified because the summons refers to an alleged contravention of Chapter 2. Chapter 2 lists all the prohibited practices known to the Act so this reference is not self-limiting. The second paragraph of the summons does enumerate some prohibited practices but refers virtually to all of them in the Act and less this was not wide enough uses the word '*including*' prior to the list, to signal that the enumerated list is not to be considered a closed list. Whilst we make no finding that the level of industry is a necessary requirement of validity it does demonstrate how the degree of vagueness as to the practice is compounded by vagueness of the location of the market where the practice/s may be taking place.

to appreciate that it does not apply to an email requesting the kitchen staff to buy a litre of milk from the nearest café; nor that item 4 which reads:

> *"Copies of all correspondences (letters, e-mail, etc,) sent to or received from any other milk buyer/ processor in the milk industry during the period 1 January 2002 till March 2005",*

could be read to include a Christmas card sent to a milk farmer who supplies the applicant.[36]

[60] However, it is not fair to expect the addressee of this summons to perform this exercise in inference. If the Commission could show some circumspection in Part III it is hard to see why they could not have done so in Part I, which sets out the context for the specificity mentioned in Part III. Recall it is the job of Part I to define the subject of the investigation, not Part III. And Part II is redolent with warnings about the need for compliance. For instance;

> *"You must produce each document (as specified in Part III below) in its entirety by including all the attachments and all pages regardless of whether they directly relate to the specified subject matter."*[37] (Our emphasis)

And further:

> *"The specification of documents in Part III below means that every document falling within the specifications must be found and produced."*[38]

[61] It is unfair to require the applicants to read back into Part I what could be inferred from Part III in the face of the warnings contained in Part 2. Without a limitation in Part I as to the ambit of the investigation, the reader of Part III does not know whether items such as the ones referred to above should be given their literal, context-free reading or a contextual one, but the warning language of Part II suggests that too much reading in

[36] The Christmas card possibility is not an original idea. It is mooted by the Court in *Powell.*
[37] Part 3 item 6(a) record page 36.
[38] Part 3 item 6(d) record page 37.

would be imprudent. It is the Commission's obligation, as the author of the summons to provide the context, not the applicants as its readers.

[62] The Court in *Zuma* (CC) devoted much attention to the debate around the intelligibility of a warrant and whether it required an objective or subjective approach. Concluding that the approach was objective the Court held that it was not necessary that searcher and searched understand the summons in the same way, provided that objectively the terms of the summons are clear. This is because the searcher is able to carry out the warrant without the consent of the searched person. The searcher is empowered to act unilaterally [39]

[63] In the case of the present summons, however, the searcher is the person to whom the summons is addressed, who from now on we will refer to as the addressee. If the summons so lacks precision that the addressee cannot appreciate what must be submitted, then the addressee risks criminal prosecution. The summons makes this perfectly clear when it states in item 4 of Part II that obstruction is an offence in terms of section 70 of the Act, and in item 5 that failure to produce as ordered is an offence in terms of section 71 of the Act.[40]

[64] The addressee is placed in an unfair position. If he takes too cautious a view of the ambit, and submits more than the Commissioner indeed wants, he waives privacy more than

[39] Id paragraph 156.

[40] See record pages 35-6 where it states:

"*You are furthermore alerted to section 71 of the Competition Act No. 89 of 1998 (as amended). In terms whereof:*

> *"A person commits an offence who, having been summonsed in terms of section 49A, or directed or summoned to attend a hearing:*
>
> *a) falls without sufficient cause to appear at the time and place specified or to remain in attendance until excused; or*
>
> *b) attends as required, but-*
>
> *(i) refuses to be sworn in or to make an affirmation; or*
>
> *(ii) fails to produce a book, document or other item as ordered, if it is in the possession of, or under the control of, that person."*

would be necessary to be compliant. If his interpretation is too narrow, he risks prosecution in terms of section 70 or 71 of the Competition Act.

[65] Thus in either scenario the addressee suffers a violation of his constitutional rights. Too narrow a construction risks an uninformed exposure to prosecution which is an unfair administrative action, in terms of section 33 of the Constitution; too wide a construction to avoid these consequences compels an addressee into an unnecessary invasion of its privacy right, protected by section 14 of the Constitution. Thus the addressee might provide the Commission with all its Christmas cards, because it cannot appreciate the boundaries of item 4 of Part III.

[66] In our view even if we have applied the *Zuma* principles too strictly to this document, the fact that it is a summons and not a warrant, as it was in *Zuma*, makes the requirements of precision more not less demanding, as the searcher is not the inspector, with some knowledge of the prohibited practice in his head, but an addressee who lacks this background.

[67] Part III we conclude does not rescue the incurable vagueness created by the language of Part I.

[68] In our view the stipulation of a prohibited practice accompanied by some particularity as to its nature, is a necessary prerequisite of legality, for a summons in terms of section 49A. The particularity may be succinct – it is not intended to be a pleading – but it must be sufficient to guide the addressee to appreciate the boundaries to the request for documentation. The Woodlands' summons contains neither and is thus void for vagueness and overbreadth.

The Milkwood summons

[69] The summons in respect of Milkwood was issued on 30 August 2005.[41] Stephen Fick, the managing director, who deposes to the affidavit on behalf of Milkwood, makes no allegation that he produced any documents in pursuance of the summons and his

[41] Annexure A to the supporting affidavit of Stephen Fick page 107 of the record

complaint, at least from his affidavit, appears to be restricted to the interrogation. His interrogation took place on the same day as that of Kleynhans and Gush. Whilst Kleynhans and Gush were represented at the hearing by an attorney and senior counsel, Fick elected not to be represented.[42]

[70] The evidence thus procured as a result of the summons in respect of Milkwood is the testimony of Fick during his interrogation. He does not allege that he supplied any documents to the Commission nor does the summons require documents from him or Woodlands.[43]

[71] Part I of the Milkwood summons resembles that of the Woodlands summons in every material respect except for that of its concluding paragraph which provides:

> *"The matters in respect of which you may be required to answer questions when you appear on this occasion are specified in Part III of this annexure, below."*[44]

[72] Part II of the summons is like its counterpart in the Woodlands summons, procedural, except that in Milkwood, the explanation is limited to the persons' rights and duties in respect of an interrogation. There is no reference to documentation.

[73] In Part III the following is stated:

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[42] Affidavit of Fick, supra, record page 103 paragraph 10.3.

[43] In the founding papers Fick does not allege that he submitted documents to the Commission. His main contention is about the interrogation he was subjected to. In its answer (p165-169 of the record), the Commission simply responds to issues raised by Fick and does not mention any documents submitted by Fick or Milkwood. The same goes for Milkwood's reply.
During Fick's interrogation, on pages 147 and 159 of that transcript, Fick is taken to documents which he had personal knowledge of. There is no evidence of where the Commission got those documents from, but as they are referenced by the prefix HK, the initials of Dr Kleynhans of Woodlands, these appear to be from the documents submitted by Woodlands. The only contrary indication we have that Milkwood submitted documents is to be found on par 14 page 12 of the Commission's Heads of Arguments where it is stated that:

> *"Milkwood did not raise any complaints about the summons at all until receipt of the affidavit of this application. In fact, Milkwood complied with the summons,* ***the documents were furnished*** *and Fick attended the interrogation."*

However this may have been made in error in the drafting of the heads of argument. Because of this confusion we have drafted our order to include any documents that Milkwood might have submitted to the Commission pursuant to the summons.

[44] Record page 108.

" ***Part III: Matters in respect of which you are required to answer questions relating to the following***

- *Possible collusion between competitors through the allocation of markets fixing of trading conditions and/or price fixing relating to the procurement and processing of milk*

- *Possible abusive behaviour by requiring milk producers to not sell milk to third parties*

- *Issues arising from the information submitted in response to the Commission's summons dated 22/03/2005."*

[74] Part I of the Milkwood summons suffers from the same deficiencies of the Woodlands summons discussed earlier. It fails to specify a prohibited practice and suggests an industry wide investigation. However, unlike the Woodlands summons, this is not a request for the production of documents, but is limited to a request to submit for interrogation. Unlike the Woodlands summons, the subject matter of the interrogation is disclosed in Part III. Whilst the first two items are quite specific, Fick is asked to answer in respect of documents produced as a result it appears from the Woodlands summons. From the transcript we have of the interrogation this interpretation appears correct. Given the criticism that we had of the unbounded nature of the Woodlands summons this request to comment on another's documents solicited in this way makes the Milkwood interrogation again an unbounded one given the context set by Part I. This means that Fick is unaware of whether the investigation travels beyond bullet points one and two of Part III cited above, and indeed whether he will be interrogated on matters that form part of an industry wide investigation, an unlawfully wide remit for a section 49A interrogation. Thus the subject matter of the interrogation, not confined to specified prohibited practices and with its suggestions rather of being an industry wide investigation into anti-competitive practices, exposes Fick and Milkwood to an unwarranted invasion of its business activities and hence although an interrogation is not an examination of

documentation it still has privacy consequences for it. In our view, this summons, although less objectionable than the Woodlands summons in that it does not extract documents and gives some guideline as to the ambit of the interrogation, unlike the Woodlands summons, is still void for vagueness and overbreadth

Waiver

[75] The burden of the Commission's case on the papers has been to suggest that whatever rights the applicants may have had they have been waived by their subsequent conduct. Instead of challenging the validity of the summons before they complied with it despite being legally represented (at least in the case of Woodlands), they supplied the information and submitted themselves to interrogation.[45]

[76] This criticism is unfair. The Commission by denying the applicants knowledge of the ambit of the investigation – indeed they didn't know that they were considered suspects but led during the process to believe that there were other firms implicated – cannot now criticise the applicants who laboured under this informational disability for not vindicating their rights earlier. Courts do not readily come to the conclusion that a person has waived his rights. Our law requires that the person be fully apprised of his rights at the time. As Cameron JA in *Powell* cautions:

> *"Waiver of rights is never lightly inferred. This is certainly not less true of constitutional rights."*[46]

[77] In this case the applicants were not, until receipt of the complaint referral, aware of the practices alleged nor that they were possible respondents. It seems perfectly understandable if the applicants had no reason to think that they might be accused, that they were reluctant to engage in High Court litigation around the validity of the summons.

[45] See answering affidavit of Lulama Potwana paragraph 54, record page 136
[46] *Powell*, id paragraph 49.

As Fick explained in his affidavit about the absence of lawyers when he was at the interrogation:

> *"I had no legal representation at the hearing. I decided that this was not necessary, and the costs to Milkwood unjustified, because there was no indication that Milkwood's conduct was in issue. This was confirmed, I shall show, at the interrogation by the express indication that my evidence was required only in relation to Parmalat."*[47]

[78] The applicants were also criticised because even if they did not challenge the summons prior to complying with it they have still delayed in seeking a remedy. On our analysis, the earliest they could have been expected to consider a challenge was December 2007, given that the complaint referral was filed then. Although this application was first mentioned more than 180 days after that date (the maximum time for a review to be brought in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA)[48], this might be a legitimate point of criticism, but given that these are ongoing proceedings and that they were at the same time criticised by the Commission for not waiting till the hearing to raise these issues, they were accused for being both too late and too early, an obviously optimal period to raise these objections did not emerge.[49] Also there is a dispute on the papers as to whether the objection is indeed made in the applicants answer to the referring affidavit. The applicants contend they did, the Commission argue that the objection is so oblique it could be read to mean anything.[50] Given this procedural morass we would be most reluctant to come to a conclusion that they have waived their rights and non-suit the applicants.

[79] We find that the applicants have not waived their rights and that they were entitled to challenge the validity of the summons when they did.

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[47] Record page 103.
[48] See section 7(1) of PAJA.
[49] At the Commission's request, once the objection was signalled by Counsel for the applicants at a pre-hearing, we set this application down for hearing.

[50] A possible reference in the answering affidavit is paragraph 22.2 of the Woodlands affidavit which refers to the investigation not being in compliance with section 33 of the Constitution and section 6 of PAJA. The deponent gives no justification for this allegation however and refers to an objection counsel had made at the time of the interrogation as its basis for the content.

REMEDIES

[80] The applicants have sought an ambitious range of remedies which amount to staying the present proceedings against them, which were framed as follows:

> *"1. setting aside the purported complaints (the "complaints") initiated by the Competition Commission against Woodlands and Milkwood (numbers 1, 2, 4, 5, and 6 as against Woodlands, and 6 as against Milkwood) as being unauthorised by and in contravention of the requirements of section 49B of the Competition Act, 1998 (the "Act");*
>
> *2. setting aside the purported referral by the Competition Commission to the Competition Tribunal in relation to Woodlands and Milkwood of the complaints on the grounds that they were unauthorised by and in contravention of the requirements of section 50 of the Act;*
>
> *3. setting aside in relation to the fifth complaint its purported initiation by the Competition Commission, and declaring that no complaint as required by the Act has been initiated against Woodlands;*
>
> *4. setting aside and declaring invalid the purported summonses issued during March and September 2005 against Woodlands and Milkwood;*
>
> *5. declaring that all evidence, whether oral or documentary, elicited by the Competition Commission (directly or indirectly) pursuant to the investigation of Woodlands and Milkwood has been unlawfully obtained and may not be used in evidence against either of these respondents in any hearing before the Competition Tribunal;"*

[81] Given that we have decided that the summons is void for vagueness and that it was not necessary for that reason to decide whether the Commission had been clothed with investigatory powers at the time of the investigation – it has certainly been now - the remedy must be more confined. Historically, the remedy for a summons that was void would have been to order the return of the material obtained. However recent

jurisprudence of our courts suggests that in these circumstances a preservation order is competent in terms of section 172(1)(b) of the Constitution which states that:

> ***"172.*** *Powers of courts in constitutional matters-*
>
> *(1) When deciding a constitutional matter within its power, a court -*
>
> *(a)...;*
>
> *(b) may make any order that is just and equitable, including*
>
> *(i) an order limiting the retrospective effect of the declaration of invalidity;*
>
> *(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".*

[82] Again this is an issue that arose in the *Zuma* cases. In the SCA the minority who found the warrants void made a preservation order and held, that courts were competent to do so. The majority who upheld the warrant disagreed. At the same time, the SCA in *Mohammed* did make a preservation order after setting aside a warrant. [51]

[83] For this reason the Constitutional Court in *Zuma* felt the need to give guidance on this point even though this was not an issue it had to decide given that it largely upheld the warrants in question.[52]

[84] Section 172(1)(b) of the Constitution states that a court in deciding a constitutional issue may make any order that is *"just and equitable"*. In *Zuma (CC)*, the Court held that this section does permit a preservation order to be made.[53]

> *"It should also be noted that section 172(1(a) is not limited to declarations of invalidity in respect of laws but also includes declarations of invalidity in respect of conduct. From the start, this Court has recognised that at times there will be considerations of justice and equity which outweigh the need to give immediate*

[51] *National Director of Public Prosecutions and Another v Mahomed* [2008] 1 All SA 181 (SCA).
[52] See *Zuma* (CC) id, paragraphs 216 to 224.The court struck out a portion of one of the warrants but it was common cause that nothing had been obtained by the State in terms of the offending portion of the warrant. Id paragraph 211.
[53] Id paragraph 220.

relief for the breach of a constitutional right. A preservation order raises similar questions of balancing the need to protect the right to privacy on the one hand, with other important public considerations on the other." [54]

[85] The Court then went on to state:

"It follows accordingly that the ordinary rule should be that when a court finds a section 29 warrant to be unlawful, it will preserve the evidence so that the trial court can apply its section 35(5) discretion to the question of whether the evidence should be admitted or not. It seems to me that it is only if an applicant can identify specific items the seizure of which constitutes a serious breach of privacy that affects the inner core of the personal or intimate sphere, or where there has been particularly egregious conduct in the execution of the warrant, that a preservation order should not be granted."[55]

[86] There is no reason why the 'ordinary rule' that the Court refers to above should not apply equally to a summons in terms of section 49A in relation to Competition Tribunal proceedings. Thus if we declare a summons void, the default rule is that we should issue a suitable preservation order, unless it is just and equitable not to do so.

Do we have the power to grant preservation orders?

[87] The question arises as to whether the Tribunal can be considered a '*court*' for the purpose of deriving the powers set out in section 172 (1) of the Constitution. We would of course be classified in the language of the Constitution as an 'independent and impartial tribunal'.[56] It is true that in various sections in the Bill of Rights, the Constitution refers to tribunals and courts separately, thus possibly suggesting that tribunals and courts are juristically distinct institutions.[57] However the term '*court'* is not defined in the Constitution.

[54] Id, paragraph 220.
[55] Id, paragraph 223.
[56] See section 34 of the Constitution: see footnote below.
[57] Section 34 of the Constitution states:
"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal."

In Chapter 8 of the Constitution, which deals with courts and administrative justice, it is stated in section 166 that;

> *" The courts are-*
>
> *(a) The Constitutional Court;*
> *(b) The Supreme Court of Appeal;*
> (c) *The High Courts …..;*
> *(d) The Magistrates Courts; and*
> *(e) Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.*

[88] Whilst no mention is made here of tribunals, the use of the word *'including'* prior to the phrase *"of a status similar to a High Court or Magistrates' Court,"* suggests the notion of what a court is, is wider than conventional notions suggest. This means that the concept of what a court is extends beyond High Courts, Magistrates' Courts and courts of a similar status to them. In this widened conception, certain tribunals may by their nature and function qualify to be treated as courts. Case law suggests that when considering whether a particular tribunal may be regarded as a court, the context in which that issue arises is all important.[58] Thus tribunals may for some purposes be regarded as courts, but for others they might not be. We will follow this approach and accordingly, we are not asking whether the Competition Tribunal is for all purposes a court, but rather the more narrow point as to whether it is a court for the purpose of exercising the powers set out in section 172(1) of the Constitution. [59]

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[58] See *The Stock Exchange of Hong Kong v New World Development and others* (Court of Final Appeal of the Hong Kong Administrative Region (FACV) No 22 of 2005) at paragraph 71. where the court noted that *"When considering reported cases dealing with whether a particular tribunal may be regarded as a 'court', the context in which that issue arises is all important."* In that decision the Court noted after a discussion of the English cases, how for some purposes such as the protection of the privilege that accords to legal proceedings, the notion of what a court is had been expanded, whilst it had been narrowly interpreted in relation to contempt of court cases.

[59] Note that the Tribunal has many of the attributes that the common law decisions associate with the functions of a court; it is independent and impartial, it is a purely adjudicative body performing only an adjudicative function, its decisions can be appealed not merely reviewed, it enjoys powers of review in certain instances over decisions of the Commission (see footnote 61 below), it forms part of a hierarchy of adjudicative bodies that function within the judicial system, its decisions are based on interpretations of rules of law not policy, it has a recognized set of procedures that govern its functioning, it is established by statute and not private agreement, its members who preside, whilst not enjoying permanent tenure can only be removed for cause.

[89] The first point to note about section 172(1), is that the power conferred on the court is twofold – it is to declare conduct inconsistent with the Constitution and then to grant equitable relief. It follows that an adjudicative body that can grant the former remedy must be able to grant the latter. Whether a body is a court or not, would then depend on whether it had been given the powers to declare conduct inconsistent with the Constitution, either expressly in terms of its establishing statute, or by necessary inference. If the answer to that question is yes, the adjudicative body would qualify as a court for the purposes of section 172(1).[60]

[90] The Competition Act does not grant such powers expressly. It does however grant such powers by necessary implication. In the first place section 1(2)(a) requires that the Act must be interpreted in a manner that is consistent with the Constitution. Ordinarily since all statutes must be given such an interpretation one may wonder why the section was inserted at all. The reason, we would suggest, is that the institutional framework created by the Act has constitutional implications and the subsections remind those vested with powers under the Act that they must conduct themselves in accordance with the exigencies of the Constitution. This of course does not make the Tribunal a court, but suggests that determining the constitutionality of conduct may be one of its functions. Stronger indications emerge from the functions required of the tribunal. In relation to prohibited practices, section 27(1)(a) states that it *"may adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act."*

[91] This function to try facts and impose remedies which include administrative penalties is suggestive of a body which is given far reaching powers. But appearing before this body in the guise of policeman and prosecutor of the competition system is the Commission, which as we observed earlier, has been invested with the powers of search, seizure, summons and interrogation. It seems inconceivable that given this architecture the legislature would not have intended the Tribunal to consider, when appropriate, the

[60] We will assume here that the adjudicative body in question is at the very least an independent and impartial tribunal. The Competition Tribunal has been held to be such a body in *Federal Mogul Aftermarket Southern Africa v The Competition Commission and Another* Case 33/CAC/Sept03 pages 41-43.

constitutionality of conduct of parties appearing before it, in particular parties such as the Commission which enjoy powers redolent with constitutional implications if abused.

[92] Granted section 58 of the Act, which lists the types of orders the Tribunal may grant, does not confer the express power to grant orders such as those set out in section 172(1) of the Constitution. But its powers to issue orders are not exhaustively set out in section 58 (Note the section starts with the prefatory words *"In addition to its other powers the Competition Tribunal may - ..."*). Section 27(1) of the Act provides a description of the functions of the Tribunal and, *inter alia*, provides in paragraph (d) that the Tribunal may:

> "*make any ruling or order necessary or incidental to the performance of its functions in terms of this Act"*

[93] The Competition Appeal Court has previously relied on this provision to hold that the Tribunal has the power to interdict the implementation of an unlawful merger on the basis that merger control is one of our functions and hence prohibiting their unlawful implementation must be a power incidental to that function. [61]It has also inferred a power to review intermediate mergers, a power previously thought to reside only in the court.[62] Following this approach, given as we have noted that adjudicating on prohibited practices is one of the Tribunal's functions, it follows that conducting a hearing fairly would be incidental to that function, and that determining whether evidence was admissible would be incidental to conducting a fair hearing. Inevitably, a body charged with determining questions of admissibility in the course of its proceedings, will be faced with issues as to whether evidence is admissible on constitutional grounds. This is what the applicants are asking us to do in this matter. That involves us determining whether a person's conduct, in this case the Commission's, is consistent with the Constitution. Thus from this we can

[61] *Goldfields Limited v Harmony Gold Mining Company Limited and Another* [2005] CPLR 74 (CAC) at 82 -83. In that decision the Court quoted from the case of ***Rennie NO v Gordon & Another NNO*** 1998(1) SA (A) at 22 F, where the test as to the existence of 'necessary implication' was set as follows: *'the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'*. Id at 83 d-e.

[62] In respect of the review decision, see *TWK Agriculture Limited v The Competition Commission and Others* Case Number 67/CAC/Jan07. In this matter, which was a review of a decision of the Competition Commission to approve an intermediate merger, the Competition Appeal Court held that the Tribunal had the power to review intermediate merger decisions made by the Commission, and that in this respect the Competition Appeal Court was not to be regarded as a court of first instance. (See id, Paragraph 24.) By implication, the CAC was holding that the Tribunal was a court of first instance in respect of such reviews.

derive that the power to make declaratory orders contemplated by section 172(1)(a) of the Constitution, is a power that is *"necessary or incidental to the performance of our functions"*. If it were otherwise then Tribunal proceedings would be the subject of continued postponements to have these matters decided elsewhere, with all the consequences such procedural disruptions would entail. Thus if section 27(1)(d) can be read to confer section 172(1)(a) powers on the Tribunal, and thus making it a 'court' for at least this limited purpose, it follows that the ancillary power to grant just and equitable relief in terms of section 172(1)(b) must be as well. It would be wholly anomalous to posses the power to make a conclusion of law and then not to posses the power to make a remedy in consequence of that conclusion. The constitutional mandate of bodies charged with granting such relief, is that the relief is just and equitable. It follows then that the Tribunal must be understood to have the power to grant just and equitable relief. If the Tribunal can grant just and equitable relief, and our courts have found a preservation order to be a form of just and equitable relief, it follows we must have this power as well.-

[94] The final point is whether the absence of an equivalent provision to section 35(5) of the Constitution in the Act, means that a preservation order is inappropriate. As we understand it, the purpose of the preservation order (and it accords with the terms of the one we have given) is to afford the ultimate trier of fact or adjudicator the opportunity to consider whether or not to admit the preserved evidence that was obtained unlawfully: in the interim[63] the preservation order preserves the evidence so that the interests of justice are not undermined by loss or suppression of what may be important evidence. It serves as the Constitutional Court has pointed out in *Zuma* (CC) to balance the need to protect the right to privacy with other important public considerations.[64] Both such considerations apply in administrative proceedings under the Competition Act, where we balance the privacy of some, with the public interest in competitive markets. This makes a preservation order entirely appropriate to our form of proceedings notwithstanding their non-criminal nature; the interests that underlie them in criminal proceedings are the same as in our own.

Is a preservation order just and equitable here?

[63] I.e. before the trier of fact or adjudicator comes into the picture.
[64] *Zuma* id, paragraph 220.

[95] There is no evidence in this case that the breach of privacy has been serious or in the words of the Court, affected either of the applicants' "inner core of the personal or intimate sphere."

[96] In this case neither of the applicants makes any such allegations and in the case of Milkwood, it does not allege that it has submitted any documents at all to the Commission pursuant to the summons; we have had to infer this. The applicants in this case are the firms not the individuals to whom the summonses were addressed and who were interrogated. The courts have made it clear that corporations do not enjoy rights to dignity and that their rights to privacy will be much more attenuated compared with those of human beings.[65]

[97] This being the case the applicant firms enjoy a limited privacy right. To the extent that their privacy has been invaded, the following points are worth noting. By issuing a summons and not conducting a search and seizure operation the Commission allowed the applicants to select the materials in their own time and discretion and this was a less invasive procedure than having investigators rifling through their drawers. The Commission also permitted the applicants to claim confidentiality over items that meet the Act's requirement in this regard and this means that the regime for managing this information limits the extent of public access to it. Whilst not all that is private is susceptible to being confidential under the Act, in the case of a company it is probably that which it regards as most private that is also confidential.

[98] The applicants themselves have not made much of the invasion of privacy. Indeed this application's lateness, and its piggy backing on a more technical case on whether the Commission was entitled to summons at the time, suggests that the invasion of privacy is a more consequential technical complaint. One would have expected the applicants at this stage of proceedings, given that they now know what the case against them is, to be able to refer to documents submitted to the Commission in pursuance of the summons that have no bearing on the issues in the case and thus demonstrate the extent of the

[65] In *Zuma* the Constitutional Court held "… *in Thint's case we are dealing with the search of the offices of a company. As a corporate entity, Thint does not bear human dignity and thus its rights of privacy are much attenuated compared to those of human beings." Zuma* (CC) para 77.

invasion of their privacy. Instead there is no discussion of any of the documents provided. All we are told is that documents were supplied but not what was supplied.

[99] On the other hand the public interest in the administration of justice may be undermined by the failure to issue a preservation order. The prohibited practice claims the applicants face in this case are very serious and involve allegations of collusion in markets to which many consumers are exposed.

[100] In this case the appropriate considerations of what is just and equitable require us to issue a preservation order. Because of some uncertainty as to whether both applicants have provided documents to the Commission we shall make the order appropriate to both *ex abundanti cautela*.

Remedies in respect of the interrogations

[101] We must finally turn to whether we should offer any remedy in respect of the interrogations that came about pursuant to the summonses. The applicants as we noted above seek orders providing that all evidence *"oral or documentary"* pursuant to the unlawful investigation be excluded from being used in evidence against either respondent in any proceedings before the Tribunal.[66] Counsel for the applicants suggested that the phrase "any proceedings" may have been too wide and that we could consider narrowing this to the present proceedings.

[102] The interrogation remedies appear to be premised on two self-standing foundations. In the first place it is argued that if the summonses are invalid then anything they later yield by way of evidence from an interrogation must be excluded as they are equally vitiated by the unlawful summons. They cite for authority a case that held that even if a detention of a person is not assailable it is tainted if pursuant to an invalid arrest warrant. [67]

[66] Prayer 5 of the Notice of Motion.
[67] See applicants' heads of argument paragraph 56, referring to *Minister of Law and Order v Hurley 1986 (3) SA 568 (A)*.

[103] The second attack on the interrogation is self standing in the sense that it does not rely on the unlawfulness of the summons *per se* but rather the unfairness in the manner in which the Commission approached the interrogations.[68] The Commission is accused of being deceptive in that the witnesses were apparently lulled into believing from remarks made at the commencement of the interrogation that the enquiry would relate to the conduct of Parmalat when in fact the spotlight was turned onto the applicants. The applicants do not spare the Commission here, and accuse them of having *"deliberately duped"* the witnesses.[69]

[104] At this stage we are not certain if the Commission will indeed use evidence yielded from these interrogations, and if so how. We do not in our legislation have an equivalent of section 35(5) of the Constitution which provides in relation to the rights of an accused that:

> *"Evidence obtained in a manner that violates any right in the Rill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."*

[105] The relevant constitutional right to be asserted in our proceedings, which are not of a criminal nature, would be an applicant's rights to a fair administrative hearing in terms of section 33. It does not follow that because information may have been obtained pursuant to an unlawful summons that this *ipso facto* means that the information should be excluded. The case authority relied on is the nexus between an arrest and detention and not a summons and subsequent interrogation and with respect to the applicants, the two scenarios are not analogous in terms of the public interest at stake. The authority also precedes the present constitution and the lively debate in our jurisprudence about whether exclusion of direct evidence necessarily excludes so called derivative evidence. Thus in *Ferreira v Levin* the Constitutional Court held that:

> *" We are not obliged to follow the absolutist United States approach which, as pointed out in Thompson Newspapers in a passage already referred to 'is*

[68] See heads of argument id, paragraph 68.
[69] See Heads of argument paragraph 66.

undoubtedly rooted in the explicit and seemingly absolute right against self-incrimination found in that country's constitution." [70]

[106] We would thus conclude that exclusion of the evidence on the interrogation at this stage, solely on the grounds that it was procured from an unlawful summons would be following an absolutist approach not recognised in our laws as founding a case for administrative unfairness.

[107] It remains for us to consider whether the alleged deception is something that we can conclude at this stage of the proceedings on the papers as having been sufficiently established in fact and in law as being unfair.

[108] We were not referred to any authority on this point in administrative proceedings, and the Competition Appeal Court has already shown a reluctance to apply rights in criminal trials to respondents in Competition Act hearings even when they faced an administrative penalty.[71] For instance an accused person is afforded a right to silence in terms of section 35(h) of the Constitution. No such right is accorded to a respondent firm in terms of the Competition Act. The burden of the criticism of the Commission from the applicants is that they did not know they were going to be accused, rather than the width of the language of the summons which we have held to be the ground for setting it aside.

[109] Whether fairness required them to be so advised in an interrogation is not a matter we have to decide now, but it is clear that the obligation to answer would not have been different even if they had, because the applicants, let alone their employees who are not respondents in any event, enjoy no right to silence in respect of prohibited practices.[72] Thus the suggestion that the Commission did not apprise the applicants' employees that their firms were potential respondents, in order to induce them to impart information they

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[70] See *Ferreira v Levin NO and Others ;Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC) at paragraph 150

[71] *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission* (33/CAC/Sep03) where the CAC stated, at page 43, *"The Tribunal as contemplated in the Competition Act, is an impartial body. There is no merit in his attack of the Tribunal as not being impartial and independent."*

[72] Section 49A (2) which states that *"A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self-incriminating."*

might otherwise have not, is on its own, without legal significance.[73] Respondents or not they were obliged to answer truthfully to the questions.

[110] It is premature at this stage to make such an order without knowing if and if, how the Commission would make use of such interrogations in the hearing of the evidence and this should await the hearing itself. The issue of fairness would then be a question of fact which the panel hearing this matter should determine. We would need to hear from the persons who were the subject of the interrogations and those who conducted the investigation. This is not a decision that can be properly determined now on the papers.

[111] Both the Competition Appeal Court in relation to another fairness issue raised by another respondent in these proceedings and the Constitutional Court exhibit a reluctance to determine this type of issue in preliminary litigation.[74]

[112] As the Court noted:

> *"Furthermore, it is highly desirable that the trial court be the one primarily concerned with ensuring trial fairness in general and with the admissibility of evidence in particular by applying its discretion in terms of section 35(5) of the Constitution…"*[75]

And as the Court noted in its earlier decision in *Ferreira v Levin NO*:

[73] Record pages 14-18.
[74] Clover Industries (CAC) cited above paragraph 34 where Patel JA states,
"*I am in agreement with the Tribunal's finding that:*
'At this point in time preparations are still at an early stage with witness statements yet to be filed. In our view it would be premature for us to determine questions of fairness at this stage of the proceedings. It is only at a later stage that the prejudice that Clover would suffer can be fully ascertained and be effectively dealt with.'
Clover is at liberty to take whatever steps it is later advised to take at the trial in order to overcome any prejudice which may be occasioned to it."
[75] *Zuma* (CC) paragraph 222.

"In my view an approach where a blanket exclusion of derivative evidence is not applied but where instead it is dealt with on the flexible basis of discretionary admissibility, as outlined above, passes section 33(1) muster."[76]

[113] Accordingly it is premature to grant any relief in respect of the use of evidence arising from the interrogations of the applicants' employees and this should be left for the panel that hears this matter should the issue arise in the hearing.

COUNT 5

[114] Woodlands alleges that count 5 of the complaint referral has not been initiated against it. Count 5 as it is formulated in the referral says:

"It is alleged that Clover and Woodlands fixed the prices of processed milk ("UHT- Long Life") to the retail market in contravention of section 4(1)(b)(i) of the Act.

It is alleged that Woodlands and Clover agreed on trading conditions by artificially manipulating the market through arrangements regarding price signals and volumes in the market for raw milk in contravention of section 4(1)(b)(i) of the Act."[77]

[115] In its answering affidavit in this application the Commission stated that count 5 had been validly initiated against Woodlands and that this was to be found in annexure K to the founding papers. In reply Woodlands contended that this could not be so, and the Commission has now conceded that this reference was erroneous. During oral argument the Commission contended that annexure I was the correct initiating complaint in respect of count 5.

[76] *Ferreira v Levin NO* cited above paragraph 150
[77] Par 15 of the main Complaint Referral dated 7 December 2006.

[116] It is common cause that the conduct forming the basis of count 5 needed to be initiated by the Commissioner against Woodlands to be validly referred. It is also common cause that in practice when the Commissioner initiates a complaint, he acts in terms of section 49B(1) and makes use of a prescribed form CC 1. Form CC1 as it appears in the rules of the Competition Commission, contains, inter alia, the requirement that the names of the firms whose conduct is the subject of the complaint be stated, and a concise statement of the conduct that is the subject of the complaint. In this case it is also common cause that although we have a single referral (the December referral) it has been preceded by several CC1's. To the extent that we have some in the record of these proceedings, the Commission's practice seems to be to fill in the pre-printed *'Concerning"* block, the names of the firms who are respondents in respect of a particular set of allegations, and then to attach to the CC1 form what it terms an 'initiating statement' a document that succinctly describes the conduct alleged to form the prohibited practice.

[117] The Commission's approach in this case to the completion of the forms has not been consistent. Thus in Annexure G which we are told was the first initiating complaint filed in the case, the names of three firms are mentioned in the '*Concerning'* block on the front page, they also are mentioned in the narration in the initiating statement, but in the concluding paragraph of the statement the Commissioner states:

> *"In light of the above and in terms of section 49B(1) of the Competition Act as amended I initiate a full investigation into the milk industry."*

[118] Thus the face of the form and its interior final paragraph are inconsistent. One limits the initiation to three named firms the other makes it much wider.

[119] In Exhibit K which the applicants allege is the complaint initiating statement in respect of count 5 the firms referred to on the front page of the form are Lancewood and Clover SA Pty Ltd (Clover) and consistent with this, both firms are mentioned in the final paragraph of the initiation statement where the Commissioner states:

> *"In the light of the above and in terms of section 49B(1) of the Act, I initiate a complaint against Lancewood and CSA for alleged contraventions of sections*

4(1)(a) and 4(1)(b)(i) of the Act, thereby supplementing the original initiation referred to above".

[120] However in a paragraph above that in the statement the Commissioner states as follows:

"Furthermore it is alleged that CSA, through an agreement with Woodlands Dairy (Pty) Ltd ("Woodlands"), agreed to fix the retail price of UHT milk. It is also alleged that Woodlands and Clover agreed on trading conditions by artificially manipulating the market through arrangements regarding price signals and volumes in the market for raw milk. Thus it is alleged that the aforementioned conduct results in the direct and/or indirect fixing of a selling price and/or trading condition".

[121] The content of this language closely mirrors that of count 5 and hence we assume, for this reason, Woodlands contends that this is the initiating statement that founds count 5. However, Woodlands argues the absence of specific language referring the complaint against Woodlands (its name is absent on both the front page "*Concerning"* block and in the concluding paragraph of the initiating statement) means that the count has not been properly initiated against it, and hence absent this prior jurisdictional fact, cannot properly be referred against it.

[122] This initiating statement does not seem to be limited to count 5 as Lancewood is not a respondent in terms of count 5, but is mentioned.

[123] Annexure I, which the Commission now relies on as the complaint initiating document, does mention Woodlands both in the *"Concerning"* block and in the concluding paragraph of the initiating statement. However in this CC1, Woodlands is twinned with Nestle, not Clover, and it is the latter, not the former, who is its co-accused in respect of count 5. The narration of the complaint contains the following pertinent paragraph:

"More specifically it is alleged that Nestle and Woodlands entered into milk exchange agreements with <u>other milk processors</u> whereby it was agreed that their respective milk surpluses would be sold at prevailing procurement prices to

each other instead of passing on the ultimate price advantages of surplus milk to the consumer through processed products thereby effectively fixing a trading condition. Furthermore, it is alleged that Woodlands through an agreement with a competitor fixed the selling prices of UHT milk". (Our emphasis)

[124] The factual statement of this conduct again mirrors that alleged in count 5 – its notable difference is the absence of express mention of Clover as an accused, and the inclusion of an express mention of Nestle, despite the fact that the latter were never charged with count 5. Nestle is charged with Woodlands in respect of count 1 and 2. However, the quoted portion also contemplates agreements that Woodlands was alleged to have with other processors. In the first underlined portion there is a reference to milk exchange agreements with "other processors" and in the second a reference to an agreement with "a competitor" to fix the selling price of UHT milk. The language of the initiation document insofar as it related to Clover appears to sufficiently foreshadow the conduct that informs count 5 of the referral.

[125] Thus if there had not been an Annexure K, this initiating statement would, in our view, have constituted the necessary factual basis for referring a complaint against Woodlands in respect of count 5. Notably I is initiated on the 12 May 2006, and thus prior to K, which is only initiated on 6 December 2006, a day prior to all the complaints being referred to the Tribunal.

[126] Although the Commission gives no explanation for this, Annexure K may have been an *ex abundante cautela* prophylactic attempt to ensure that in the vast maze of respondents and counts, not all of whom are charged with the same conduct, that everyone was covered.

[127] In our view nothing turns on the fact that there may have been subsequent surplus initiations to Annexure I. Annexure I contains an express referral of conduct that forms part of count 5 and states that it has been initiated against Woodlands. This complies with the requirements set out for a valid complaint in the *Glaxo* case and other CAC decisions.

[128] Indeed as long as the conduct that forms the prohibited practice has been initiated in a CC1, the Commission is free to organise the referral in whatever manner it sees fit. Thus it would have been competent to initiate a complaint into a more broadly stated section 4 (1)(b) case in respect of the processors' allegedly collusive procurement of milk, and then to have alleged that this collusion took a variety of forms, even if those forms were not yet specified or exhaustively specified in the CC1. In the referral the Commission no doubt chose to break this up into several counts because not all firms were part of specific activities. The architecture of the complaint and the referral need not be identical; provided that conduct in the latter has been foreshadowed somewhere, in some form, albeit succinct, in the former. In this case as we have seen, it is. Nor is it at all surprising that this happens. Initiations will always precede a referral. Between the time of initiation and referral much may change in the Commission's formulation of the case. Provided that the relevant conduct in the referral finds its analogue in a prior initiation that suffices.

[129] We are satisfied that count 5 has been validly referred against Woodlands.

CONCLUSION

[130] We have found that both the summons in respect of Woodlands, dated 22 March 2005 and the summons in respect of Milkwood, dated 30 August 2005 are void. We find in the circumstances of this case that notwithstanding such declaration of invalidity a preservation order will be appropriate and we have accordingly made one. For the reasons given in our decisions the remaining prayers are either not ripe for determination or are superfluous given our finding in respect of the summons. The prayer to set aside count 5 in respect of Woodlands is dismissed.

COSTS

[131] In accordance with our normal practice in complaint referral matters we are not competent to make a costs award either for or against the Commission.[78]

[78] *The Competition Commission v Sasol Chemical Industries (Pty) Ltd & Others* Case Number 31/CR/May06 and 45/CR/May06.

ORDER

1. The summons in respect of Woodlands, being Annexure B annexed to the founding affidavit of Alexander Gutsche, and the summons in respect of Milkwood, being Annexure A annexed to the affidavit of Stephen Fick, (the 'summonses') are declared void;

2. The Commission must make one copy of all the documents produced by the applicant/s to the Commission pursuant to the summonses and deliver the copy to the Registrar of the Tribunal, and return, after keeping an inventory, the originals to the applicants or their duly appointed attorneys. This paragraph of the order must be complied with within four (4) business days of the date of this order.

3. The registrar must keep the copied documents in the registry in safe custody until:

    a. Notified by the Commission that the copied documents or some of them may be returned to the applicant/s;

    b. The conclusion of the proceedings under case number CT 103/CR/Dec06; or

    c. The date upon which the Commission decides to abandon such proceedings;

    in which event the documents must be returned forthwith to the applicant/s.

2. The provisions of paragraph 3 above are subject to:

    a. Any order of any competent court;

    b. The lawful execution of any summons or search warrant in the future; or

    c. The duty of either the applicants or the registrar to comply with any lawful summons or subpoena in the future.

3. The Commission must not take any steps to obtain access to the original or retained documents contemplated in paragraphs 2 and 3, without giving reasonable notice to the applicant/s. For the purpose of this paragraph 'reasonable notice' means a time period

which allows the applicant/s a reasonable opportunity to challenge the proposed proceeding in the Tribunal.

4. For the purpose of this order,

    a. the term 'document' bears the same meaning as it does in the Woodlands summons referred to in paragraph 1; and

    b. the costs of copying the documents shall be borne by the Commission;

    c. 'Safe custody' means a place under the control of the Tribunal registry in which the documents can be retained securely, and to which the public does not have access.

5. The remaining prayers sought by the applicants are dismissed;

6. Subject to paragraph 6(b), there is no order as to costs.

_____ **17 March 2008**

N Manoim **DATE**

Tribunal Member

D Lewis and M Madlanga concurring

Tribunal Researcher	:	R Kariga
For the first and second Applicants	:	J Gauntlett (SC) assisted by R.G Buchanan S.C., instructed by Rushmere Noach Incorporated.
For the Commission	:	R Bhana (SC) assisted by A Coetzee and T Dalrymple, instructed by Knowles Hussein and