IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 15/CR/Feb07 and 50/CR/May08

In the matters between:

Pioneer Foods (Pty) Ltd	**Applicant**
And	
The Competition Commission	**Respondent**

In re the matters between

The Competition Commission	**Applicant**
and	
Tiger Brands Ltd T/A Albany	**1st Respondent**
Pioneer Foods (Pty) Ltd T/A Sasko	**2nd Respondent**
AND	
The Competition Commission	**Applicant**
and	
Pioneer Foods (Pty) Ltd T/A Sasko	**1st Respondent**
Foodcorp (Pty) Ltd T/A Sunbake Bakeries	**2nd Respondent**

Reasons

Introduction

[1] In this matter we consider two interlocutory applications brought by Pioneer Foods arising from two complaint referrals brought against them by the Competition Commission.[1]

[1] Note we gave our order in respect of these applications earlier on 25 April 2009 --- These reasons were furnished later at the request of Pioneer's attorneys. For convenience our earlier order is attached hereto marked 'A'.

[2] In both referrals Pioneer's bread making divisions are alleged to have formed part of a bread manufacturers' cartel.[2] The one cartel is alleged to operate in the Western Cape and the other nationally. In respect of both alleged cartels, certain bakery firms have applied for leniency in terms of the Commission's Corporate Leniency Program (the "CLP") whilst Tiger Brands (in the Western Cape investigation) and Foodcorp (in the National investigation)-- have been parties to consent agreements with the Commission that were made an order of the Tribunal on 28 November 2007 and 6 January 2009 respectively. Pioneer is thus the only firm that remains a respondent in respect of these complaints.

[3] Pleadings in this matter have long since closed and the matter has been set down for hearing before the Tribunal commencing on 15 June 2009. The two complaints have since been consolidated for the purpose of hearing.[3]

[4] Pioneer has brought two interlocutory applications which we heard at the same time on 3 April 2009 and which for convenience, we deal with in this decision: one was for further and better discovery, and the other, for further particulars for trial.

[5] We deal with them in turn.

Discovery application

[6] At the commencement of our hearing the discovery application involved a number of issues. Most of these have been resolved to the satisfaction of both the parties and we make no order in respect of these matters. The only remaining issue for us to consider was a category of documents in respect of which the Commission has claimed privilege.[4] Specifically the Commission claims a form of privilege known as litigation privilege.

[2] The two divisions are known as Sasko and Duens.
[3] An order consolidating the matters was made on 6 January 2009
[4] See transcript of the argument page 12. These items were contained in Annexure A of the application and were 6,7, 12-16, 19-33,60-67,79-84,and 87.

[7] It was common cause that if the privilege point failed, all these documents were relevant, and thus discoverable.[5] Conversely, if the point was upheld, then none of the documents were discoverable. It is thus not necessary for us to consider these documents individually.

[8] It is also common cause that all the documents being sought had been made in pursuance of an application by Premier Milling, a member of the alleged cartel, for leniency in terms of the Commission's Corporate Leniency Program (the"CLP") by its employees and by Tiger Brands' employees when Tiger Brands began co-operating with the Commission after the Western Cape referral.

[9] In order to appreciate the privilege claim it is necessary to understand how the CLP works.

[10] In terms of the CLP a firm that is a member of a cartel receives immunity from prosecution if it "blows the whistle" on its fellow cartel members.[6] Various prerequisites exist for a firm to be entitled to immunity, inter alia:

> *"The applicant for immunity under the CLP will qualify for leniency provided it meets the following requirements:*[7]
>
> a) *the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to the cartel activity;*
>
> b) *the applicant must thereafter offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal are completed;*

[5] See transcript page 12 lines 21-3 for the address of counsel for Pioneer and page 47 where counsel for the Commission makes the concession that they are relevant.
[6] Supplementary affidavit of Nandi Mokoena, paragraph 13.
[7] See the Commission's Corporate Leniency Policy that became effective on 6 February 2004 and which was applicable during this investigation. The Policy document has since been changed but the clauses quoted above have remained in the new Policy.

[11]During the early stages of the Commission's investigation in the Western Cape complaint in 2007 Premier Foods, one of the firms whose bakery division is alleged to be a member of the supposed cartel, approached the Commission to seek immunity under the CLP. Premier allegedly " *confessed*" and in pursuance of the application was asked to provide information to the Commission which it did.[8] The process was that the Commission directed questions to Premier's attorneys which they in turn answered in the form of statements that were then forwarded to the Commission.[9]

[12]Similarly when Tiger Brands began co-operating with the Commission after the Western Cape referral the Commission forwarded questions to its attorneys which were answered in the form of summaries which were then forwarded to the Commission.[10]

[13]According to Nandi Mokoena, the Commission's investigator, the statements were not obtained:

> *"… as a matter of routine. On the contrary, they were obtained at a time when the Commission was already contemplating litigation and they were obtained for the purpose of such contemplated litigation and with a view to submitting them to the Commission's legal representatives for advice in the conduct of litigation."* [11]

[14]The Commission thus claims the documents are privileged because of litigation privilege. Litigation privilege, the Commission argues, comes about when two factors are present:

1) *The preparation of the document must have had, as a definite purpose, its being submitted to a legal advisor, whether there are other purposes or not; and*

2) *Litigation must have been pending or contemplated."*[12]

[8] See affidavit of Mokoena, supra, paragraphs 18-19.
[9] See affidavit of Mokoena, supra, paragraph 19
[10] See affidavit of Mokoena, supra, paragraph 20.
[11] See affidavit of Mokoena, supra, paragraph 22.
[12] See affidavit of Mokoena, supra, paragraph 9. Litigation is distinguishable from so called legal advice privilege. See also Chapter 23 in Phipson on Evidence, Sweet and Maxwell, 2005. As Phipson

[15]Pioneer challenges the Commission's entitlement to claim this privilege.[13] Pioneer asserts that the claim for litigation privilege is bad in law because:

1) The tribunal is not a court, and hence litigation privilege has no place in its proceedings which are not adversarial in nature;

2) Even if litigation privilege does apply to Tribunal proceedings, the documents in question were sought and obtained in pursuance of the CLP, and not litigation, and are therefore not susceptible to litigation privilege.

[16]We consider each of these arguments in turn.

1) <u>Tribunal proceedings are not adversarial</u>

[17]Pioneer argues that the tribunal is not a court, but an administrative tribunal and that its proceedings are not adversarial despite the fact that certain elements typically associated with adversarial proceedings might be evident in its proceedings. It appears that this argument is directed at bringing our proceedings in line with an English case where the House of Lords distinguished between proceedings that were adversarial in nature where such a privilege could be claimed, and proceedings which were investigative or inquisitorial, for which no claim of litigation privilege could be made. The case in which this distinction was made concerned proceedings in terms of the Child Care Act in respect of child care orders.[14] In a commentary on this case, Phipson notes that tribunals may present special difficulties in

points out, the most significant difference between legal advice privilege and litigation privilege is that is has never been possible to claim legal advice privilege for communications between client and third parties even thought the purpose may have been for lawyers to be instructed. On the other hand if a client claims litigation privilege for communications between his lawyers and third parties where no litigation is anticipated the claim will fail. (Page622) Litigation privilege thus is wider than legal advice privilege as it applies to communications with third parties, not merely clients, but at the same time is more limited as to purpose, as it applies only when litigation is in prospect or pending. (Page 633)

[13] Initially the criticism of the claim was that the basis for the claim in the Commission's original affidavit was somewhat thin, but we allowed the Commission to file a supplementary affidavit on this aspect and Pioneer to reply. Both did so.

[14] Re L[1997]A.C.16

determining whether litigation privilege can be claimed.In a passage relied upon by Pioneer Phipson states:

> *" The issue will usually be whether the proceedings were adversarial or merely fact gathering."*[15]

[18]Phipson then lists certain activities which seem to be of the fact gathering nature, and inter alia mentions "*tax or competition investigations*."

[19]Phipson goes on to suggest that:

> *" Where a tribunal is administrative, it is unlikely that it will be possible to claim litigation privilege."*

[20]Phipson does not seem to be saying anything more than litigation privilege may not be claimed in certain species of tribunal and the essential issue is whether they are merely fact gathering. If they are Phipson seems to suggest that the privilege wont apply. Although competition investigations find their way on to the purely factual list, no reasons for why this conclusion is made are offered nor, it is worth mentioning, are British competition proceedings analogous to our own.

[21]In a recent Australian decision, the Administrative Appeals Tribunal had to decide whether litigation privilege applied in its proceedings. The tribunal noted that the characterisation of inquisitorial or adversarial was not particularly useful:

[15] Phipson, op cit page 637.

"We think it is more useful to look at the proceedings themselves and enquire whether they carry features that warrant the recognition of privilege, rather than to strive for a label and then to attribute consequences to the label. That process runs the risk of promoting form over substance."[16]

[22]We commend this approach. Whether litigation privilege applies to the Tribunal is a matter of substance not form, a matter of engaging with the question of whether the rationale for litigation privilege should apply in our proceedings.

[23]The problem we have with Pioneer's approach is that it seeks to strive for the label and attach consequences to it. In seeking to strive for a label Pioneer argues that the Tribunal has been classified an administrative tribunal in past dicta of the Competition Appeal Court (CAC) and hence, not being thus a court, there is no warrant for extending court attributes such as litigation privilege to its procedures.

[24]Neither of the dicta relied upon, support the notion that the Tribunal proceedings are not adversarial nor more importantly do they comment on the issue of litigation privilege or its place in our system. The first is concerned whether the tribunal was a court of law for the purpose of section 35(3) of the Constitution which deals with rights of the accused in a criminal trial. Section 35(3)(c) refers to the right to be publicly tried before " an ordinary court". The CAC was simply making the uncontroversial suggestion that the Tribunal was not a court in that context. [17]

[16] Farnaby and Military Rehabilitation and Compensation Commission [2007] AATA 1792 (21 September 2007) , par 16

[17] Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and another [2005] CPLR 50 (CAC), 69g

[25]In the other decision the CAC is again in a different context observing why the standards set out in the Promotion of Administrative Justice Act apply to Tribunal proceedings.[18]

[26]Having made this observation from the case law which with respect is no more than finding labels in decisions made in one context and relying on them to characterise proceedings on another, Pioneer proceeds to argue that the Commission is neither analogous to a litigant in civil proceedings nor a prosecutor in criminal proceedings. This is again a process of labelling. It does not ask the question why the Commission should forfeit entitlement to litigation privilege.

[27]We do not need to decide whether tribunal proceedings are adversarial or inquisitorial or some hybrid of both. We have previously held that whether we have certain powers that attach to a court is a matter to be answered by reference to the context.[19] We cited there authority for the proposition that a body may be considered a court for a purpose but not for another. Thus even if the tribunal lacks all the features associated with an 'ordinary court" does not mean that one is entitled to dispense with the specific question as to whether attributes of a court apply in specific situations.

[28]The label administrative tribunal is applied to a wide range of institutions which widely vary from one another in their procedures and objectives. A tribunal such as ours has closer kinship to an ordinary court, in its function and procedure, than it does to many institutions classified as administrative tribunals.

[29]Using the label to serve as the foundation for characterisation can lead to error. The proper approach is to ask, as the Appeals Tribunal did in Farnham, whether the justification for legal privilege can be found in our proceedings.

[30]Phipson explains that the rationale for the privilege is that a party should be free to:

[18] Patensie Sitrus Beherend Beperk v Competition Commission and Others [2003] 2 CPLR 247 (CAC), 269e
[19] Woodlands Dairy (Pty) Ltd and Another v Competition Commission, Competition Tribunal Case No: 103/CR/Dec06, par 93

"seek evidence without being obliged to disclose the result of his researches to the other side."[20]

[31]The Tribunal sits to adjudicate disputes originating from other parties be they the public prosecutor in the form of the Commission or the private party who may be a complainant in our proceedings. Against them as an adversary is the respondent firm, accused of unlawful conduct. We go through a process of pleadings, discovery, witness statements and oral testimony with rights of cross examination, to establish whether a case has been made against the respondent. Throughout parties enjoy procedural rights of fairness which we must safeguard. The entire process is suffused with the attributes of an adversarial system – the very system in which litigation privilege has long been recognised.

[32]The logic of the submission by Pioneer is exposed if we consider whether Pioneer could be forced to hand over its witness statements to the Tribunal. Doubtless they would be horrified by such a suggestion and with good reason. If the respondent can claim litigation privilege then no doubt if a private complainant was the referrer of the complaint, so could it.

[33]It remains then to consider whether the Commission, because it is the public prosecutor should be denied this privilege as an exception to a general recognition of litigation privilege for other parties to our proceedings.

[34]It is not clear whether Pioneer is making out such an argument but it seems to be. It observes that the Commission's function is to initiate complaints and refer them to the Tribunal and that the Tribunal has inquisitorial powers. It does not argue why this deprives them of the status of litigant. Indeed the more obvious conclusion from this observation is that they are.

[35]Pioneer then argues that there is already in existence a regime set up in Act and rules, to protect confidential information. It seems to be arguing that because this regime exists it excludes any notion that the Commission can rely on litigation privilege. This is not a logic we find easy to follow. The Act regulates the use of what it terms confidential information,essentially business

[20] Phipson op cit page 633.

secrets, and the rules then classify certain classes of information as being restricted, but only for a period of time. The creation of this regime is to deal with a special need to control information in Competition Act proceedings. Their expression in the Act and rules does not seek to make them exhaustive on all topics pertaining to the public disclosure of information in the Commission's possession. Litigation privilege has as its source the common law's protection of the rights of litigants. It thus has a separate origin and rationale for its existence that neither the Act nor rules seek to modify or negate. We find it hard to follow Pioneers' conclusion that:

> *" The scope of the Act and the relevant rules is therefore inconsistent with the notion that ordinary litigation privilege would apply."* [21]

[36]We conclude that parties in our proceedings are entitled to litigation privilege and that no exception exists to deny such a privilege to the Commission.

2) Privilege not applicable because of the object for which the statements were obtained.

[37]Pioneer argues that because the documents were obtained for the purpose of the CLP, even if litigation privilege can be claimed in our proceedings, it does not apply in these circumstances. The argument is that the CLP is a process outside of the present litigation, hence documents owing their genesis to the former, cannot be privileged in the latter.

[38]This suggests that the CLP is a proceeding, independent of and external to, litigation in the tribunal. But it is not. The very purpose of the CLP as Mokoena explains in her supplementary affidavit is for firms who have been part of a cartel to come forward with the carrot of immunity offered in return for information and co-operation. But that is not an end in itself. The information obtained from immunity applicants under the CLP is intended for the purpose of litigation against the remaining firms alleged to be part of the cartel. The informants furnish the Commission with the information which forms the basis of its decision to refer a complaint. The extract from the CLP that we cited above clearly obliges applicants to cooperate with the Commission "*until the*

[21] Pioneer Supplementary Heads of Argument paragraph 6.

Commission's investigations are finalised and the subsequent proceedings in the Tribunal are completed."

[39]That in the process an ancillary outcome, the award of indemnity is afforded, does not detract from fact that the Commission's central object is to use the information to conduct litigation in the Tribunal against such members of the alleged cartel as contest proceedings. Thus the inescapable conclusion is that inherent in this process is the contemplation of litigation.

[40]There is thus no basis for refusing to recognise litigation privilege because the statements in question were generated through the CLP process.

[41]In summary then we find that the Commission is entitled to claim litigation privilege in our proceedings and that the statements made in this matter in the course of the CLP fall within that privilege.

[42]We therefore make no order for further and better discovery and the application is dismissed.

Further particulars

[43]Pioneer requested further particulars from the Commission in September 2008 in relation to both the national and Western Cape cartel allegations. The Commission supplied some but not all the particulars requested.

[44]In both the complaint referrals, the cartel allegations are premised on a series of meetings and telephone calls involving various of the alleged conspirators over a period of time. In relation to meetings at which representatives of Pioneer attended, the Commission gives a detailed description of where, when, who and what was discussed. Other meetings and telephone call are alluded to, but not in the same detail. It is not alleged that Pioneer representatives attended these meetings or participated in these phone calls.

[45]Pioneer's complaint was that it wants the same particularity in respect of each of the meetings and phone calls mentioned in the referrals i.e those which it is not alleged to have attended. Thus it requested further particulars to solicit

this. The questions ask for details as to 'when, where, who and what' in relation to those meetings. In addition questions are asked in relation to allegations of increase in bread prices – Pioneer wants to know what the price was before the alleged increase, what price it increased to and, what the increment was.

[46]The Commission argued that Pioneer had been given sufficient particularity in both complaints of the meetings it had attended in complaint referral. It was surprising to the Commission that Pioneer wanted particularity of meetings that it was not alleged to have attended. Counsel pointed out that the pleadings in respect of both complaints, where Pioneer is implicated, contain all these particulars. The Commission argued that the allegations concerning the other meetings are there for context. It is not its case that Pioneer was in attendance at these meetings.

[47]The Commission noted correctly that the complaint referrals contained sufficient detail to enable Pioneer to plead to the case, which it did. It had not taken an exception to the pleadings.

[48]We have in past been agnostic as to whether further particulars are a right parties have in our proceedings. As Pioneer points out there have in the past been cases where we have ordered such particulars. [22] There is no reason in this matter to change that view. Fairness in our guiding rubric and where particulars are warranted, we may order them to be furnished.

[49]In this matter no case has been made out. Firstly the pleadings have given Pioneer more than sufficient detail on meetings that its representatives were alleged to have attended. But most importantly Pioneer will receive all the Commission's witness statements on an agreed date, prior to the commencement of the hearing. It will thus, as the Commission points out, have more information about the hearing than parties would ordinarily enjoy in court proceedings.

[50]When this was pointed out by us in argument to counsel for Pioneer his response was that this ought to have been in the pleadings and that as a

[22] See Tribunal Decision dated 31 October 2003 in The Competition Commission v South African Airways (Pty) Ltd, Tribunal Case No: 18/CR/Mar01, 31 October 2003

matter of fairness that they were entitled to have this material in pleadings as opposed to witness statements. We have not fully comprehended why fairness should dictate such formality. If fairness requires knowing what case you have to meet Pioneer will be in a position to know all this once it has the witness statements. The request for particulars is superfluous in this proceeding and is accordingly refused.

[51] Parties would be well advised in the future when the furnishing of witness statements has been ordered prior to hearing, to avoid requests for further particulars for trial, until such statements have been furnished and then only if the statements are so devoid of content that the request is necessary to ensure a fair hearing.

_____ 21 May 2009

N Manoim **Date**

Date

Concurring: D Lewis, Y Carrim

Tribunal Researcher: Rietsie Badenhorst

For the Applicant: Adv JA Newdigate SC assisted by Adv EW Fagan SC, instructed by Cliffe Dekker Hofmeyr Incorporated

For the Respondent: Adv DN Unterhalter SC assisted by Adv KH Shozi, instructed by Cheadle Thompson & Haysom Inc