COMPETITION APPEAL COURT

CASE NUMBER: 88/CAC/MAR09

DATE: 7 DECEMBER 2009

In the matter between

WOODLANDS DAIRY (PTY) LIMITED First Appellant

MILKWOOD DAIRY (PTY) LIMITED Second Appellant

And

THE COMPETITION COMMISSION Respondent

J U D G M E N T

DAVIS, JP:

This is an application for clarification of an order given by this Court on 26 August 2009, together with an application for leave to appeal against part of an order of this Court and further a cross appeal by Respondents against another part of the same order.

I propose to deal with these three questions separately and turn first to deal with the question of the clarification of the order.

The background to this issue is briefly the following: Upon

judgment having been given, an order was granted in the following terms:

> "1,3 The Respondent is directed to return forthwith to Woodlands all documents and any copies thereof in their possession and control or of their legal representatives procured from Woodlands in these proceedings, together with transcripts of the interrogation of Kleynhans and Gush."

That order was granted in the exact terms prayed for in the notice of motion. It appears that, subsequent to the order being granted, a flurry of correspondence was generated between the appellants and respondents with regard to the meaning and scope of the order. The question which vexed appellants' minds was that the Court, having accepted and found that a summons issued against first appellant was invalid, was whether the order provided that respondent could directly or indirectly use evidence yielded from the unlawful summons against first defendant. Appellants therefore wrote to respondent to procure its agreement for a clarification of the order which they considered did not, with sufficient

clarity, set out that which had been so ordered.

It is trite law that, once a Court has pronounced finally on the matter, it is *functus* and has no authority to correct, alter or supplement its judgment or order. Firestone SA (Pty) Limited v Gentiruco AG 1977(4) SA 298(A) at 306 F. But there are exceptions to this particular rule, as set out in the judgment in Mostert NO v Old Mutual Life Assurance Co (SA) Ltd 2002(1) SA 82 (SCA) at para 5. Thus, a Court may clarify its judgment or order if the latters' meaning is uncertain, and clarification is sought to give effect to its true intention.

Appellants have sought clarification in three particular ways:

1. Paragraph 1.3 of the order (the part of the order that I have already referred to) necessarily applies to "all annexures obtained by the Competition Commission ... from Woodlands, pursuant to the invalid summons and interrogation and attached to affidavits currently in the papers filed by the Commission before the Competition Tribunal in the main proceedings".
2. Paragraph 1.3 of the order necessarily requires the deletion from such affidavits of all references to and

reliance upon such annexures.

3. Paragraph 1.3 of the order precludes the Commission from relying upon such documentation discovered in any discovery affidavit. (my emphasis)

In argument before this Court, it appeared that Mr Bhana, who appeared together with Mr Dalrymple on behalf of respondent, had far less objection to paragraph 1 of the proposed clarification than to the remaining two sections thereof.

Paragraph 1, which I have set out, does no more, in my view; than bring clarity to that which was prayed for in the notice of motion. One may ask why the notice of motion was drafted in so vague and imprecise manner to give rise to these difficulties. However, if paragraph 1 of the proposed amendment does no more than bring certainty and clarity to the order so granted and is reflective of the true intention of the court, there can be no difficulty in the light of the jurisprudence which I have set out, albeit briefly, for this amendment to be granted.

The second paragraph, paragraph 2, provides that:

"Paragraph 1.3 of the order necessarily requires a

deletion from such affidavits for all references to and reliances upon such annexures..."

Again, in my view, this amendment captures the purport of the order. While Mr Bhana strenuously submitted that indirect usage of impugned documentation may raise difficulties beyond that, which are contained in paragraph 1 (direct usage), having set aside the summons, the intention of the Court was to ensure that all of the documentation procured pursuant to the investigations and other steps taken by respondent following the issue of the summons had to be placed beyond the use of respondent. For this reason, paragraph 2 appears to be a clarification that does no more than amplify the intention of the order so granted.

However, the same logic does not apply to paragraph 3. This paragraph reads:

> "That paragraph 1.2.3 of the order precludes the Commission from relying upon such documentation disclosed in any discovery affidavit."

Mr Gauntlett, who appeared together with Mr Buchanan on

behalf of the appellant, was alive to the difficulties raised by the Court regarding this proposed formulation. Accordingly, he submitted that what was intended by this paragraph was a prohibition imposed upon respondent from relying on any documentation which flowed from the summons but which was later disclosed in a discovery affidavit. It may be that documentation, which is made available after a later discovery affidavit, was actually provided because the appellant was under the false impression that the summons would never be declared to be invalid and, accordingly, it complied with the discovery process. I say this speculatively because this argument is not on the papers. However there is no basis, in my view, for now extending an order sought and granted precisely in terms of a notice of motion to restrict a process of discovery which may extend potentially way beyond the scope and purport of the initial order.

I return therefore to my rhetorical question as to whose fault it is that this form of relief was not granted. Manifestly, it was not this court. If a party approaches a Court for relief, it is obliged to phrase its prayers with care and sufficient precision. That was not done in this case and accordingly paragraph 3 falls outside the extensions which I am prepared to accept as

being necessary clarifications of the order granted. These latter clarifications fall within the framework set out by the Court in Mostert NO *supra*. There is no basis to come to the aid of a party who, realising its mistake in the framing of the relief sought, wishes to extend relief beyond that which was placed before the Court when the matter was argued.

I now turn to deal with the application for leave to appeal. The essence of the application for leave to appeal turns on this Court's refusal to declare a series of complaints brought by the respondent against the appellants as falling outside of the Competition Act of 1998 ("the Act") and therefore should have been struck down for reasons which I shall come to presently.

It is important, before traversing the merits of this application, to emphasise that in this matter it is special leave to appeal which is required from this Court to proceed to the Supreme Court of Appeal. There is a good reason for this more onerous test. The Act envisaged that this Court, save for constitutional challenges, would be the final Court for the adjudication of competition disputes. The reason for this approach and the policy upon which it is predicated are, in my view, manifestly correct. Briefly, they can be set out thus: the

Act set up a specialist body competition tribunal and a specialist court from which decisions of that body could be appealed and finally determined. Competition law disputes require expedition. Take, for example, a merger. Were cases to have to be heard by three, potentially four, courts (if a constitutional challenge can be conceived), most mergers would never take place, even in the case of a merger which has no uncompetitive consequences. This delay can then work to the great disadvantage of the economy. Take this case as a further example. It concerns potential cartel activity. This court obviously can make no finding or any other statement as to whether the appellants in this particular case are part of a cartel. However, once cartel behaviour is investigated, it is to the obvious advantage of hard pressed consumers that these cases be determined as expeditiously as possible. What has happened in this court on previous occasions, and which is worthy of repetition in the light of this particular appeal, is that a veritable forest of interlocutory paper is generated in order to prevent cartel disputes from being determined on their merits. I would have thought that a party which is subjected to a cartel investigation would, subject to proper, fair procedures, welcome the opportunity to clear its name; that is that it does not participate in cartel activity.

There is no greater sin in competition law than cartel activity. It is for this reason that the Act has now been changed so that, in particular circumstances as provided, those responsible for cartel activities may be imprisoned. Hard pressed consumers will doubtless applaud this legislative initiative. This observation serves to illustrate the point that these cases need to be dealt with as expeditiously as possible.

Whatever the Act's design, however, the Constitution provided that the Supreme Court of Appeal has jurisdiction to determine appeals from this Court. Mindful of the initial scheme of the Act, the principle of special leave was however instituted.

It is as well to remember the purpose of the Act when one comes to give content to the nature of special leave. Briefly, special leave means that, in addition to the ordinary requirement of a reasonable prospect of success, special circumstances must exist before a further appeal can take place before the Supreme Court of Appeal. In particular, viewed objectively, there exists the requirement of the importance of the matter to the parties and the public. See for example American Natural Soda Ash Corporation v Competition Commission 2005 (6) SA 158 SCA at 172G-173A. Therefore

the question which needs to be determined in this case is not whether this is an interesting appeal, nor whether competition lawyers secreted in the monastic confines of universities may find the jurisprudence of this Court correct, interesting or palpably wrong, but whether, in the first place, on the facts of the case there is a reasonable prospect of success. Thereafter, the enquiry turns to consider the special aspects of importance to the parties and the public.

This application has been argued in reverse order. The complaint of appellants is that this Court did not determine the validity of the complaints issued by the respondent against applicants in terms of the Act and accordingly this is a matter which should be sent to the Supreme Court of Appeal. In particular, the argument advanced by appellants turns on the following: The Competition Commissioner sought on 9 February 2005 to initiate a complaint. The complaint which he initiated was a complaint directed against "the milk producing industry". Appellants contend that, in initiating a complaint pursuant to section 49B of the Act, the Commissioner may initiate a complaint against an alleged prohibited practice and therefore the complaint must specify the enterprises against which the complaint is lodged. It cannot be a complaint

against an industry.

Such an approach is not sustained, however, by the precise wording of the Act. In their heads, prepared for the purposes of this application for leave to appeal, appellants criticise the Court for its application of the wording.

> "Significantly the Court does not suggest that this is the plain meaning of the word used (the words employed in section 49B. It canvasses none of the authorities we cited regarding the proper departure point and approach in construing invasive powers such as these. It is accepted by implication therefore that the Commission may initiate a complaint or accept as a complaint from the public against the "car industry" or the milk industry or the like, with the immediate right to invoke the invasive powers of section 49A and B against any entity or individual arguably within in."

Stopping at this particular point, the attraction of these submissions must be tested against the wording employed by the Act. The Act provides that Commissioner may initiate a complaint against an alleged prohibited practice; no more, no

less. A prohibited practice means a practice prohibited in terms of Chapter 2 of the Act, which contains the central provisions of the Act regarding uncompetitive behaviour and structures. For example, section 4(1) refers to an agreement between or a concerted practice by firms, that is an agreement or concerted practice which involve acts such as the fixing of a price. That is what cartels do. Cartel behaviour is not found in the behaviour of one firm. It is to be found in the behaviour of a number of firms. There is nothing in the Act to suggest that an investigation against an industry, that is an industry comprising of a number of firms, is not a matter which was not envisaged by the Act nor does it appear that the wording, that I have cited, cannot bear the weight of this particular reading. To the contrary. Consider if appellants' submissions were correct. It would be very difficult to initiate proceedings against cartels. Respondent would have to specify each firm. It could never in fact investigate, for example, in a hypothetical case, the banking industry. It would have to specify, the particular banks and, if it omitted one or two of them out, it would encounter difficulty in enforcement. This kind of Austinian formalism is the kind of jurisprudence employed during apartheid, and is not reflective of the purposive jurisprudence which seeks to balance the exercise of

power, captured in a doctrine of proportionality which is central to the constitutional structure.

The appellants go even further. They contend that the NPA will be at large to determine firstly what, for their purposes is the industry in question and then proceed to summon or interrogate even entities against which no specific word of complaint has been made. An NPA warrant could be validly obtained against the residents of a suburb or town! I only have to cite this particular submission for a reasonable reader to realise that it is devoid of any legal merit. But even were I wrong in this regard, the facts of this case justify the conclusion that there are no reasonable prospects of success.

The heads of argument prepared by the appellants for the hearing are very revealing. They begin thus:

> "This appeal and the cross appeal to it raise important questions. The central enquiry concerns the powers of the Commission under section 49B read with section 49A and section 50 of the Competition Act to procure under compulsion both documents and oral evidence by interrogation. Was the Tribunal correct in holding for Woodlands and

> Milkwood as it did, that on the facts of this matter in a central respect the Commission was unauthorised in law in procuring their documents and interrogating its officers? But was it wrong to leave undetermined all their other attacks on the Commission's actions. Above all was it wrong not to pronounce on the use of the illegally obtained evidence when this had been pertinently raised on the papers and in argument? Conversely was it wrong in holding itself to be a court under the constitution ..."

That hardly seems to indicate that the central line of attack was the complaint lodged against appellants. Mr Gauntlett submitted, in answer to a question about appellants' case before this Court, that I was unfair to have raised it in this fashion, because, later in their heads of argument, a considerable amount of care was taken to set out why an investigation into an industry was unsustainable in terms of section 49A and B of the Act. But the outline of appellants' argument is significant in that it shows that the purpose of this particular line of argument relating to complaints. The line of argument was sourced in a letter of the Commissioner, to

which I have made reference, that is of 9 February 2005.

Mr Gauntlett submitted that, because this letter purported to be an investigation into the entire industry, the complaint had to be set aside. Thus:

> "The investigation of Woodlands and Milkwood is fatally flawed, the irregularities gross and the consequence is to nullify. The further grounds really fall away if this attack is sustained."

In short, the essential argument before the Court was this: because of the letter of 9 February 2005, there was an investigation into an industry. That was not sustainable in terms of section 49A and B. Accordingly, because it was not legally sustainable, everything that flowed therefrom stood to be set aside, including all the information so procured. This Court agreed with appellants' conclusion but on a different basis. It set aside the use of all the information. It has now clarified this order. Neither in this argument nor in any papers was I able to find a legal argument about the validity of a series of further, specific complaints generated dating 13 March 2006 and later on 6 December 2006 against the

appellants. Mr Gauntlett said these complaints were granted because respondent thought it may be wrong in relation to the 2005 complaint.

Is this a basis for special leave? Could it possibly be, on any basis without more one, that these specific complaints would be set aside because somewhere along the line, some months earlier, an authority may well have overstretched the scope of its power when it initiated its initial complaint. The fact that it does something incorrectly is not visited with no consequences. In this case, the consequences are clear: because the summons was invalid, all of the documentation which flowed therefrom must be set aside. But how, I ask rhetorically, does this impugn the validity of the later complaints of March and December 2006? No argument was raised against these complaints, save that respondent was 'guilty' for trying to act correctly. But these complaints remain valid in the absence of plausible legal argument of which neither in the heads nor orally was there any! Were the Court to set aside these complaints it would be impossible in the future for the competition authority to say: 'we have made a mistake, we now want to start all over again'.

To return to the test for special leave. How, if the only argument against the March and December complaints is the one proffered by Mr Gauntlett, that respondent acted to correct 'its initial error, can any other Court come to a conclusion different to this Court? What practical purpose would be served by setting aside the early complaint which as a result of this judgment has no further legal consequence, but where a detailed complaint remain? The case, as argued in this application, was not at all the case argued at the main hearing. The case then argued was a case which effectively turned on the following: The March 2005 letter was invalid. Thus as this action was authorised by an improper complaint, information from the subsequent investigation and the procured documentation could not be utilised. But this documentation has been dealt with by this Court.

Suddenly, having been so ordered, the Court is now asked to set aside a whole range of further complaints without more. That does not pass the ordinary test, let alone the special test for leave. We were also informed during the hearing that parties who may or may not be part of a cartel but who are under investigation, but not before us, may now separately approach this Court with the very same argument. That may

have no immediate relevance but what does have relevance is the point made by Mr Bhana during the course of the main hearing, which for various reasons I decided not to deal with at that time. This appeal compels me to make some mention thereof. Mr Bhana noted, in his main heads, that the point with regard to this question of industry wide application was only taken (if indeed it was so raised) in the faintest possible terms in the founding affidavit. He made the point in his heads that, there was 'a throw away' submission that the Act does not permit a form of generalised industry wide investigation. This ground of appeal which was relied upon was not pertinently raised in the founding affidavit. Had this been done, respondent could have dealt with the matter fully. Mr Bhana contended that when Clover took the point in an earlier case, notwithstanding that counsel for Woodlands and Milkwood were present both before the tribunal and this Court, they remained silent on the point. Woodlands in fact contradicted itself in their founding affidavit when it said:

> "An analysis of these complaints reveals that they are confined to specific purported complaints involving certain identified processes but not Woodlands or Milkwood."

In short, this litigation appears to be developed like a jurisprudential chain novel. When Clover came to court, Woodlands and Milkwood said nothing. Milkwood and Woodlands now approach this Court and the possibility is then raised that others will bring a similar argument. How, I ask, will we ever implement the promise of the Competition Act with this kind of conduct?

In summary, the consequences of the illegal Woodland summons have been dealt with, as sought in the initial notice of motion. On the facts, the Milkwood summons was valid and little argument was now advanced to contend to the contrary, save about the 'illegal' complaint. No serious argument was advanced against the March and December complaints. Accordingly, the test for special leave has not been met.

I turn therefore to deal with the question of the application for counter appeal. The argument put up by Mr Bhana is that it is important that the scope of the Act with regard to summonses and investigations in terms of section 49B be finally determined. That may be an important point, although I am uncertain as to what more can be offered by our Courts than the constitutional jurisprudence set out in the principal

judgment based on the approach of the Constitutional Court which was central to the debate before this Court. In this case, the Woodlands summons, for all the reasons that were set out in this judgment, did not pass an intelligibility test. The summons would not pass an intelligibility test, even if a court altered the nature of the test, so long as there was a test which held that a reasonable reader of a summons needed to know the case it was required to meet does not appear on these facts this summons could ever pass muster.

For this reason, the cross-appeal is not susceptible to special leave because for, the same reasons as I have articulated in respect of the appeal, it is a case to be determined on the facts and no more. It does not matter whether there would be an alteration of the jurisprudence, as important as that may be; for on these facts, the result would remain the same. The order which was appealed is one which, in my view, does not hold reasonable prospects of success.

For these reasons the following order is made:

1. The order of 26 August 2009 is altered to read insofar as paragraph 1.3 is concerned:

This paragraph applies to all annexures obtained by the Competition Commission (the Commission) from Woodlands pursuant to the invalid summons and interrogation and attached to affidavits currently included in the papers filed by the Commission before the Competition Tribunal in the main proceedings.

This paragraph necessarily requires the deletion from such affidavits of all references to and reliance upon such annexures.

2. The appeal is DISMISSED, the cross appeal is also DISMISSED. There is no order as to costs.

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DAVIS, JP

PATEL, JA & DAMBUZA, AJA: agreed.