

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 79/CAC/JUL08 & 103/CR/DEC2006

DATE: 17/11/2008

5 In the matter between:

CLOVER INDUSTRIES (PTY) LTD 1ST APPELLANT

CLOVER SA (PTY) LTD 2ND APPELLANT

LADISMITH CHEESE (PTY) LTD 3RD APPELLANT

And

10 THE COMPETITION COMMISSION 1ST RESPONDENT

PARMALAT (PTY) LIMITED 2ND RESPONDENT

WOODLANDS DAIRY (PTY) LIMITED 3RD RESPONDENT

LACNEWOOD (PTY) LIMITED 4TH RESPONDENT

NESTLE SA (PTY) LIMITED 5TH RESPONDENT

15 MILKWOOD DAIRY (PTY) LIMITED 6TH RESPONDENT

And in the matter between:

CLOVER INDUSTRIES LIMITED 1ST APPELLANT

CLOVER SA (PTY) LTD 2ND APPELLANT

20 And

DAVID LEWIS, N.O. 1st RESPONDENT

JUDGMENT

(Application for Leave to Appeal)

DAVIS, JP:

This is an application for leave to appeal against an order of
5 this Court of 19 September 2007, in which this Court, given the
urgency of the proceedings, made an order against appellants,
without reasons.

Reasons were then handed down on 12 November 2008. On 19
10 September 2008; this court received an application for leave to
appeal. Argument was heard this morning.

There are, in essence, two separate questions which are the
subject of the appeal.

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The first turns on the question as to whether a letter from a
dairy farmer, Mrs Malherbe, constituted a complaint in terms of
section 49B(2) of the Competition Act 89 of 1998 ('the Act'),
and if so, whether the complaint had been investigated within
20 the prescribed period of one year, as stipulated in terms of
section 50(1) of the Act.

The second issue is an application for leave to appeal against
a review which was brought by the first and second appellants,
25 which turns on the proceedings which the Competition Tribunal

('Tribunal') is due to hear and which hearing flows out of a corporate leniency agreement concluded between the Competition Commission and first appellant on 3 February 2006, the details of which are set out in the principal judgment.

There is, at the outset, the question of what approach should be adopted to leave to appeal. It is important to emphasise that the scheme of the Act was to ensure expedition in the resolution of disputes. In the very nature of the disputes which arise from the Act, it is important that these be resolved fairly, but with due expedition. As a result, Parliament created an architecture in which appeals from the Tribunal would be heard by this court, which would be the final court for all matters contained in the Act.

Unfortunately, the drafters of the Act omitted to consider the provisions of S168(3) of the Constitution; in particular to whether the Supreme Court of Appeal could be excluded, especially from matters set out in section 62(1) of the Act, read together with section 62(3) of the Act. These provisions of the Act were subjected to the scrutiny of the Supreme Court of Appeal in American Natural Soda Ash Corporation v Competition Commission, 2005(6) SA 158 (SCA). The Court found that the appellate jurisdiction of the Supreme Court of

Appeal could not be excluded by the Act.

The Supreme Court of Appeal, by way of the judgment of Cameron and Nugent, J J A, further held that:-

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“Leave to appeal from the Supreme Court of Appeal is required before an appeal may be prosecuted from the competition appeal court on the matters set out in section 62(1) of the Act, and special leave must be sought accordingly.”

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Mr Rogers, who appears on behalf of the second respondent, produced extremely helpful and thoughtful argument with regard to the implications of these findings. In his view, where a matter falls within section 62(2) of the Act, leave to appeal must be sought in the first instance from this court in terms of section 62(4). On the other hand, if a matter falls within section 62(1) of the Act (that is the section which was subject to the forensic examination by the Supreme Court of Appeal to which I have already made reference) leave must be sought directly from the Supreme Court of Appeal. In such a case special leave will be the test.

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In Mr Rogers's view, the question in this particular case regarding the complaint in terms of section 49B turned on

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whether the Tribunal had jurisdiction to entertain a complaint, in that the complaint allegedly had not been timeously referred to it as required by section 50(2) of the Act. Accordingly, this matter fell within section 62(2) and the ordinary test for leave to appeal should apply.

The difficulty with this argument is that the submissions of the first and second appellants as put forward this morning by Mr Pretorius, considered the issue to be an interpretive one, namely the meaning of section 49B.

The key question which vexed the Court in this case was whether the so-called Malherbe letter constituted a 'complaint' as opposed to the provision of 'information' by a third party, in this case Ms Malherbe.

The basis of the Court's judgment was that a distinction had to be drawn between section 49B(2)(a), where a person submits information concerning an alleged prohibited practice to the commission and (b) where there is a submission of a complaint against an alleged prohibited practice in the prescribed form.

There must be significance in the legislative distinction drawn between a complaint and the submission of information, otherwise part of the section is redundant. Try as the

appellants might by way of reference to previous case law, it is impossible to blur this distinction to the extent that any submission of information to the Commission will always constitutes a complaint. This legislative distinction informed the basis of this Court's finding. The Court determined that Ms Malherbe was not a complainant. If she was not a complainant, there was no complaint. If there was no complaint, then section 49B(2)(b) would not apply. The logic may be simple, but in my view, to an ordinary reader it is compelling.

This dispute initially involved an interpretive question. If there is distinction between a complaint and the submission of information, and if the architecture of section 49B is to be maintained as this Court determined, that in effect is almost the end of the matter. The only further question would be whether the letter from Ms Malherbe, factually determined, constituted a complaint.

In Glaxo Welcome and Others v National Association of Pharmaceutical Wholesalers, this Court, in the case of a complaint which had clearly been intended to be a complaint, adopted a generous approach to whether the complaint had to be produced in a prescribed form. It held:-

“While the complaint need not be drafted with precision or even a reference to the Act, the allegations of the conduct and the complaint must be cognisably linked to particular prohibited conduct or practice, there must be a rational recognisable link between the complaint referred to in a complaint and the prohibitions in the Act, otherwise it would not be possible to say what the complaint is about and what should be investigated.”

The Court, in effect, identified the document as a complaint and waived the requirement for the document to be produced in the prescribed form.

In this case, Mr Rogers sought to pull his argument from the boot straps so as to attain his sought after principled elevation of the case by means of a submission that this dispute constituted a vitally important jurisprudential point which was manifestly in the public interest; that is to determine whether section 49B of the Act must be interpreted in the manner decided upon by the Court. Hence, only upon such an initial decision would the further, factual determination be necessary.

But, in my view, the question for determination turns primarily on a factual issue: did Ms Malherbe initiate a complaint or did

she not? Thus, the question which has to be determined is:
what was her intention in generating the letter?

Furthermore, were this Court to blur the distinction, as urged
5 on the strength of the Glaxo Welcome case as interpreted by
Mr Pretorius, there would be no distinction between
information provided to the Commission and a complaint. That
would certainly work to the disadvantage of the Commission in
investigating anti-competitive behaviour, for the Act would then
10 refuse to recognise an informant who was not a complainant.

If this case depends on an analysis of the Act and then
whether Ms Malherbe was a complainant, the matter may well
need to be appealed directly to the SCA for consideration, on
15 the test of special leave. If this court must give leave but
decline the invitation of Mr Bhana, who appeared with Mr
Coetzee and Mr Dalrymple that this court should also apply a
test of special leave, on the ordinary test of reasonable
prospects of success I consider that, in this case, there
20 remains no basis to grant the application for leave to appeal.
Simply stated, Mrs Malherbe was not a complainant as
defined. Given this finding, this is not the case to deal with
the question of the forum for leave in an appeal based upon
s62(1) read with s62(3) of the Act.

25 The second issue is far more problematic to the future of

competition litigation and the irritation shown by this Court this morning is reflective of comments that I wish to make after due consideration.

5 In very useful heads of argument, Mr Bhana contended that this was a case in which special leave is required. I did not take Mr Pretorius to object to that position. Again, the result should not be any different to the ordinary test, and for the reasons already articulated, we have considered both
10 situations.

Briefly speaking, appellants were faced with a choice. They knew what an immunity entailed, what was required, if the leniency agreement was signed and what the leniency policy
15 entailed in this case. The agreement was signed on 3 February 2006, some six weeks after being advised by this Commission of the conditions under which appellants would be granted conditional immunity and, after being advised in respect of which conduct conditional immunity would and
20 would not be granted. There was no compulsion to enter into the leniency agreement and first and second appellants have no entitlement to leniency, knowing that the Commission, intended to investigate a possible abuse of dominance by appellants, based on the sale of C quota milk. Nonetheless
25 they entered into that agreement.

It is abundantly clear from the agreement and the analysis thereof undertaken by the Court that the Commission regarded the conduct underlying the third complaint as separate and distinct from the conduct underlying the sixth complaint. There can be no doubt that appellants were aware thereof. When appellants entered into the agreement they were also aware that they might find themselves in a position of having to co-operate with the Commission on one complaint referral and face prosecution on another. That possibility is foreseen by a reading of the agreement. Throughout the process they were represented by an impressive, highly skilled legal team. They were faced with a choice: take the immunity in respect of the surplus removal scheme and risk prosecution on the C quota milk and assume the consequences that flow therefrom, or decline the immunity and defend all charges brought. It must have been a hard choice, but one which they were legitimately entitled to make on a voluntary basis. Having elected to take the immunity in respect of the surplus milk scheme, the consequences of having to co-operate with the Commission on one complaint and being immune from the other, flowed from these actions. That was also the basis of the finding of the Court.

25 That of course leaves open the question as to whether it is a

matter which is appropriate for leave in the first place, given that, notwithstanding all of the protestations over lack of fairness and sudden discovery of constitutional obstacles, as was set out eloquently by my brother, Patel, J A in the main judgment, it is difficult to know what consequences as to fairness will flow until the substantive matter is heard by the Tribunal.

In my view, there can be no prospect of success, neither because the dispute is of great importance to the parties as determined, because of, the (arguably) interlocutory nature of the appeal, and secondly because this question is not of great public importance to the public, save, that the prosecution of cartel behaviour is of great public importance. But even on the ordinary test for leave, the agreement is clear and speculation about fairness is not required for immediate determination. That therefore leads me reluctantly to make the following remarks.

The most egregious form of anti-competitive behaviour is cartel behaviour. Whatever the differences between the Chicago and the ordo-liberal schools of competition law, on one issue there is unanimity: the prohibition of cartel behaviour and price-fixing. Price-fixing must be rooted out. In a country such as South Africa, where food prices have

risen at an alarming rate, and where mal-distribution of wealth continues to be blight on this nation, such behaviour is unconscionable.

5 That a party enters into a leniency agreement, admits certain egregious uncompetitive behaviour and accepts the consequences thereof, but later seeks effectively to resile therefrom by way of a range of technical arguments, should not be countenanced, particularly having been advised by
10 experienced lawyers in the first place.

There is a more general problem affecting the South African legal system at present, which is that all too many cases are run in every single available court on the basis of all manner
15 of conceivable technical arguments that a lawyer can imagine so as to ensure that matters are never brought to finality.

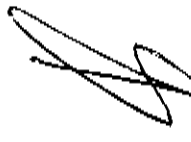
The entire dispute of which the agreement is but a part is a case that requires determination by the Tribunal. Of course, I
20 do not opine on the merits of the case before the Tribunal. But there has been an agreement and certain admissions have been made. An attempt is now made effectively to circumvent this agreement. This approach raises a problem upon which
25 this Court should comment. Competition law must be prosecuted in this country with fairness but also with

expedition. The legal community, which appears both in this court and the Tribunal, owe their clients a paramount duty, but they also owe, as officers of the Court a duty to the integrity of the legal system. There needs to be a debate in the legal profession of South Africa as to the role of lawyers in relation to balancing the interests of clients and duty as officers of the court enjoined to uphold the integrity of the system without which there can be no rule of law. Given the conclusions of the Court, there is no need to deal with the question of the right of the 'late comer appellants', to joint the fray at this stage.

For all of these reasons, the application for leave to appeal is
DISMISSED WITH COSTS, INCLUDING COSTS OF TWO

15 COUNSELS.

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DAVIS, JP

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MAILULA, JA and PATEL, JA agreed.