IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: 25302/10

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE CHILDREN'S RESOURCE CENTRE TRUST	First Applicant
THE TRUSTEES FOR THE TIME BEING OF THE BLACK SASH TRUST	Second Applicant
CONGRESS OF SOUTH AFRICAN TRADE UNIONS	Third Applicant
NATIONAL CONSUMER FORUM	Fourth Applicant
TASNEEM BASSIER	Fifth Applicant
BRIAN MPAHLELE	Sixth Applicant
TREVOR RONALD GEORGE BENJAMIN	Seventh Applicant
NOMTHANDAZO MVANA	Eighth Applicant
FARREED ALBERTUS	Ninth Applicant

and

PIONEER FOODS (PTY) LIMITED	First Respondent
TIGER CONSUMER BRANDS LIMITED	Second Respondent
PREMIER FOODS LIMITED	Third Respondent

And

Case No: 25353/10

In the matter between:

IMRAAHN ISMAIL MUKADDAM	First Applicant
W.E.M. DISTRIBUTORS CC	Second Applicant
ABDUL KARIEM EBRAHIM	Third Applicant

and

PIONEER FOODS (PTY) LIMITED	First Respondent
TIGER CONSUMER BRANDS LIMITED	Second Respondent
PREMIER FOODS LIMITED	Third Respondent

REASONS IN TERMS OF RULE 49(1)(c)

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1. Two separately instituted applications came before me for hearing together in the "fast lane" of the motion court as matters of urgency. Argument started but did not finish on Tuesday, 23 November 2010 and continued on Thursday 25 November 2010.

2. As the applicants' alleged causes of action in both applications against the second respondent would have become prescribed on 27 November 2010, I was requested to and made rulings in both applications on Friday morning 26 November 2010 and undertook to give reasons for these rulings later.

3. In case number 23502/2010 (hereinafter referred to as "the consumer application") the following ruling was made:

> "The application is dismissed with no order as to costs."

4. In case number 25353/2010 (hereinafter referred to as "the distributor application") the following order was made:

> "(a) The application is dismissed.
>
> (b) Applicants to pay the respondents costs jointly and severally, in each instance including the costs of two counsel."

5. The applicants in both applications thereupon filed requests for reasons in terms of rule 49(1)(c).

6. My reasons for these rulings follow hereunder.

7. In view of the fact that the applications were heard together and as many of the points argued arise in both applications, I decided to give my reasons for the rulings on both the applications in one document.

BACKGROUND

8. The three respondents, to whom I shall respectively refer as "Pioneer" (first respondent), "Tiger" (second respondent) and "Premier" (third respondent) are three of the four primary bakeries in South Africa. Together with Foodcorp (Pty) Limited ("Foodcorp") they enjoy between 50% and 60% of the domestic bread market in the country.

9. Their customers are divided into large retail groups, such as Shoprite/Checkers, Pick n Pay and Spar, the general trade, such as cafes, smaller retailers and spaza shops and independent bread distributors or agents. They do not sell bread directly to the public.

10. The independent bread distributors resell into the informal market.

11. The respondents and Foodcorp set their prices nationally ("the list price"). They however sell their bread to the retailers and to distributors at a discount or rebate off the list price. The discount to be granted off the list price is negotiated with the retailers and may differ from retailer to retailer. Similarly the discounts granted to the various distributors may vary depending on such factors as location, daily sales volumes and transport.

12. In December 2006 the Competition Commission (hereinafter referred to as "the Commission") instituted in terms of the Competition Act, 1998 (Act 89 of 1998) (hereinafter referred to as "the Act") received a complaint of an alleged bread cartel operating in the Western Cape. After a preliminary investigation, the Commission initiated a complaint against the three respondents in the current applications. This was referred to as "the Western Cape" complaint. Premier applied for leniency and disclosed to the Commission that together with Pioneer and Tiger, it was part of a bread cartel in the Western Cape which fixed the selling price of bread and other trading conditions.

13. Premier also revealed that a bread cartel operated in other parts of the country. As a result the Commission initiated a second complaint that was referred to as "the National complaint".

14. Premier sought and was granted corporate leniency by the Commission in respect of both the Western Cape and the National complaint. On 14 February 2007 it concluded a leniency agreement with the Commission and agreed to assist the Commission in its investigations and subsequent prosecution of the other respondents before the Commission Tribunal.

15. On the same day, 14 February 2007, the Commission referred the Western Cape complaint against Tiger and Pioneer to the Competition Tribunal.

16. Tiger thereafter negotiated a consent agreement with the Commission with regard to both the complaints. In terms of the consent agreement, Tiger admitted that:

    16.1. It entered into an agreement with Premier and Pioneer during December 2006 regarding bread prices and discounts to independent distributors in the Western Cape which "amounted to an agreement and/or a concerted practice to fix directly or indirectly a selling price in contravention of section 4(1)(b)(i) of the Act".

16.2. Discussions with competitors took place nationally and in various regions regarding bread prices in the period 1994 to 2006 "which amounted to an agreement and/or a concerted practice to fix a selling price in contravention of section 4(1)(b)(i) of the Act".

16.3. Discussions with competitors took place regarding the closure of bakeries in the period 1999 to 2001 "which amounted to an agreement and/or a concerted practice to divide markets in contravention of section 4(1)(b)(ii) of the Act".

17. On 27 November 2007 the Competition Tribunal consequently made a consent order in terms of section 49D of the Act and levied an agreed administrative penalty on Tiger of approximately R98 million.

18. The complaints against Pioneer was thereafter heard by the Competition Tribunal. On 3 February 2010 the Tribunal found, with regard to the Western Cape complaint, that during December 2006 Pioneer had contravened section 4(1)(b)(i) of the Act, in that it agreed with Premier and Tiger to increase the price of toaster bread and standard loafs by fixed amounts and to cap discounts given to bread distributors in Paarl and the Peninsula.

19. In respect of the national complaint, Pioneer was found to have contravened section 4(1)(b)(i) and 4(1)(b)(ii) of the Act in that:

19.1. During 1999 it agreed with Tiger and Premier to divide markets in South Gauteng, Free State, North West and Mpumalanga amongst themselves;

19.2. During 2003 and 2004 they fixed the selling price of bread;

19.3. They would not allow customers to switch suppliers during the increase period in order to benefit from any differences in prices between the suppliers;

19.4. During July 2006 they agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area; and

19.5. During the last week of November 2006 they fixed the selling price of bread by agreeing to increase the price by 30c per loaf in Gauteng, with effect from 18 December 2006.

20. Pioneer was ordered to pay an administrative penalty in respect of both the complaints of approximately R195 million.

21. No proceedings were instituted before the Commission Tribunal against Premier as the Commission had granted Premier corporate leniency and entered into a leniency agreement with it.

22. As a result of these events the applicants, in both the consumer and distributor applications, decided to bring class actions against the respondents for damages.

CLASS ACTIONS

23. Prior to 1994 our law did not recognise class actions (**First Rand Bank v Chaucer Publications (Pty) Limited 2008 (2) SA 522 (C) at 598F-I**). This position was departed from by the enactment of section 7(4) of the Interim Constitution of 1993.

24. Section 38 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (hereinafter referred to as "the Constitution") now provides:

> **"38 Enforcement of rights**
>
> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) anyone action in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

25. In **Ngxuza and Others v Permanent Secretary Department of Welfare, Eastern Cape 2001 (2) SA 609 (ECD)** Froneman J (as he then was) pointed out that there is no cogent reason for a restrictive interpretation of the provisions of section 38 because of the narrow content given to standing under the common law, particularly not in relation to so-called public law litigation (at 619A-D).

26. With reference to **Maluleke v MEC, Health and Welfare, Northern Province 1999 (4) SA 367 (T)** he stated that the many practical difficulties that may arise in class actions "cannot justify the denial of such action when the Constitution makes specific provision for it" (at 623C).

27. Froneman J dealt with the practical objections to class actions, including the objection that the courts will be engulfed by interfering busy bodies rushing to court for spurious reasons – the so-called "floodgates" argument, and the objection that often the common interest of the applicants and those they seek to represent will be broad and vague – the so-called "classification" difficulty (at 623H-I).

28. He dealt with the "floodgates" objection as follows:

> "But I also think that the possibility of unjustified litigation can be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road." [at 624D-E]

29. The "classification" problem, he stated, can be addressed in the same manner at a preliminary stage. He pointed out that "the determination of a common interest sufficient to justify class or group or representative representation will depend on the facts of each case. The common interest must relate to the alleged infringement of a fundamental right as required by s 38" (at 624F-G).

30. In **First Rand Bank Limited v Chaucer Publications (Pty) Limited** ***(supra)*** these suggestions by Froneman J were supported (at 599, para. [26]).

31. The **Ngxuza** judgment was upheld on appeal to the Supreme Court of Appeal (**Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 (4) SA 1184 (SCA)**). Dealing with the respondent's complaint that the class in that matter was not adequately defined, that Court stated that:

> "From a point of view of practical definition it is beyond dispute that it is required for a class action that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class."

The Court concluded that the requisites for a class action were therefore present (**at 1197H-1198A).**

32. **Cilliers, Loots and Nel** in **Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa** (5th

edition) submit that the requirement that the claims of the applicants representing the class must be typical of the claim of the rest, cannot be regarded as necessary for a class action brought in terms of section 38(c) of the Constitution, as that sub-section provides that the person claiming relief may act either "as a member of or in the interest of a group or class of persons" (at 201).

33. It follows that a class action is available in terms of section 38 of the Constitution if it is alleged that a right in the Bill of Rights has been infringed or threatened. It only applies directly to infringements or threats to rights in the Bill of Rights.

34. This raises the question whether a class action is available outside the scope of section 38 of the Constitution, that is in non-Bill of Right cases and specifically where damages are sought for the alleged unlawful conduct of private entities.

35. The South African Law Commission in its paper on The Recognition of Class Actions and Public Interest Actions in South African Law (Project 88 – August 1998) ("the Law Commissions Report") concluded that legislation is needed to broaden the scope of class actions to non-Bill of Rights cases (chapter 3).

36. Although it was stressed in **Permanent Secretary Department of Welfare, Eastern Cape v Ngxuza** (***supra***) that the only issue before that court

was the issue of standing in terms of section 38(c) (at 1191E), the remarks referred to hereinabove, indicate that a general class action, not limited to Bill of Rights cases should be available in our law.

37. In **First Rand Bank Limited v Chauser Publications (*supra*)** Traverso DJP dealt with the availability of class actions in our law as follows:

> "As a point of first departure an applicant in a class action must allege that the right enshrined in the Bill of Rights is being threatened."
>
> (at 599D)

(See also **Ngxuza and Others v Permanent Secretary Department of Welfare, Eastern Cape (*supra*) at 619D**)

38. There are certainly strong indications that standing to bring class actions also in non-Bill of Rights cases should become part of our law. (**Wildlife Society of South Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others 1996 (3) SA 1095 (Tk) at 1104I-1106; Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others(*supra*)** and **Financial Services Board and Another v De Wet NO and Others 2002 (3) SA 525 (C) at 624, para. [297]**). Class actions where the claim is monetary in nature may however require, at least, appropriate rules of court. (**Cilliers, Loots and Nel, op. cit. p. 201).**

39. This question was however not argued before me. Applicants' counsel restricted her argument to section 38 of the Constitution. In the view

that I take of both the applications, I regard it unnecessary to decide this issue. For purposes of this judgment in the consumer application, I will accept (without deciding) that the applicants do have standing to bring a class action for damages.

40. As Froneman J suggested in the **Ngxuza** matter, the Law Commission's Report also recommended that a preliminary application should be brought, requesting leave to institute an action as a class action and to ask directions as to procedure before such an action is instituted (p. 40, para. 5.5.10).

41. According to the Law Commission's Report, the purpose of such a preliminary step is:

41.1. To act as a screen to potential abuse of the process;

41.2. To shield the defendant from an unreasonable burden of complex and costly litigation;

41.3. To act as a counter-balance to other reforms that might be seen as favourable to class members (for example, special costs rules);

41.4. It protects the interest of absent class members; and

41.5. The fact that most class action procedures in other jurisdictions have rules which control the raising of class actions.

(The Law Commission's Report, p. 39, par. 5.5.5)

42. The Law Commission further recommended that an application for certification as a class action may be granted when:

42.1. There is an identifiable class of persons;

42.2. A cause of action is disclosed;

42.3. There are issues of fact or law which are common to the class;

42.4. A suitable representative is available;

42.5. The interests of justice so require; and

42.6. The class action is the appropriate method of proceeding with the action.

(The Law Commission's Report, p. 50, par. 5.6.27)

43. With regard to the requirement that a cause of action must be disclosed, the Law Commission concluded that this does not mean that the court hearing the certification application must undertake a preliminary merits test. What is required is that the applicant needs to establish a *prima facie* cause of action (paras. 5.6.8 to 5.6.9, pp. 43-44).

44. Presumably as a result of the above, the present applicants brought the two applications for leave to institute the class actions.

45. I intend following the recommendations of the Law Commission as to the criteria to be satisfied before such an application may be granted, in my approach to both applications.

The definition of the class

46. The purpose of a class definition is:

46.1. to identify those who have a potential claim for relief against the respondents;

46.2. to define the parameters of the action so as to identify all the persons who will be bound by the result; and

46.3. to enable those entitled to such relief to decide whether they should "opt out" or not.

(Mulheron: The Class Action in Common Law Legal Systems (p. 334-335))

THE RELIEF SOUGHT

47. In the consumer application the following relief was originally sought by the applicants:

"1. That this matter is heard as one of urgency in terms of rule 6(12) of the rules of court ("*the rules*") and that the forms and service provided for in the rules be dispensed with;

2. Directing that a rule *nisi* be issued calling upon the respondents to appear and show cause, if any, to the above honourable court on **18 FEBRUARY 2011** at 10h00 or so soon thereafter as the matter may be heard, as to why a final order should not be granted in the following terms:

2.1 declaring that all bread consumers in the Western Cape Province (*"the consumers"*) who were prejudicially affected by bread prices in consequence of the respondents' breach of section 4(1)(b)(i) and (ii) of the Competition Act, No. 89 of 1998 (*"the Act"*) constitute members of a class;

2.2 declaring that the class so constituted shall be an *"opt out"* class;

2.3 declaring that the members of the class will be bound by the judgment in the class action unless they give written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys that they wish to be excluded as members of the class;

2.4 declaring that the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, to the extent necessary, have the requisite standing to bring the class action against the respondents on behalf of the consumers for damages pursuant to the findings made by the Competition Commission (*"the Commission"*) and/or the Competition Tribunal (*"the Tribunal"*) that the respondents breached the aforementioned provisions of the Act;

2.5 declaring that the respondents' breach of the aforementioned provisions of the Act also amounted to an infringement of the rights guaranteed to consumers in the Bill of Rights, more particularly sections 27(1)(b) and 28(1)(c), read with sections 184(1) and (2) of the Constitution;

2.6 declaring that the applicants are entitled to sue the third respondent as a defendant in the class action despite the absence of a certificate in terms of section 67(6)(b) of the Act, alternatively that they are given leave to apply to this court on the same papers duly supplemented, if necessary, for leave to join the third respondent as a defendant to the action proceedings instituted out of this court once the certificate is provided by the Commission and/or Tribunal;

2.7 that respondents make discovery on oath of all documents relevant to the class action by no later than 31 January 2011;

2.8 that the application and action proceedings, once transferred from the South Gauteng High Court to this court, shall be

consolidated with the application and action proceedings issued out of this court in connection with the class action;

2.9 that the respondents bear the costs of giving notice of the class action to the class in the manner provided in paragraph 4 below;

2.10 that the respondents pay the costs of this application jointly and severally, the one paying the others to be absolved;

3. That pending the return day:

3.1 the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, shall act as representatives of the class;

3.2 the applicants, assisted as aforesaid, may institute a damages action forthwith against the respondents on behalf of the class;

3.3 the respondents are ordered to make discovery on oath of all documents relevant to the class action by no later than 31 January 2011;

4. That the members of the class are given notice of this action in the following manner:

4.1 by publication of this order in one edition in each of the Cape Times, The Argus, Die Burger, Die Son and the Daily Voice in English, Afrikaans and isiXhosa;

4.2 by broadcasts of the contents of this order on 3 separate consecutive weekdays between 7am to 9am and 5pm to 7pm on each of the following radio stations: SAFM, 567 Cape Talk, Radio Good Hope, Heart 104.9 and Kfm in English, Afrikaans and isiXhosa;

4.3 that the respondents, during the period 17 to 31 January 2011 append sticky labels on the front of all of their respective bread packaging advising consumers of the class action, and further:

4.3.1 that it is an "*opt out*" class unless the consumer gives written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys, Ref: Mr C P Abrahams, Tel. 021 914 4842 that they wish to be excluded;

4.3.2 that unless they give notice of their intention to "*opt out*", the judgment in the class action shall be binding on all members of the class; and

4.3.3 that electronic copies of the application may be obtained by any interested party on request by accessing breadinfo@ak.law.za;

5. That the respondents are entitled to anticipate the return day hereof on five days' written notice to the applicants' attorneys of record;

6. That any party may re-enrol this matter on five days' written notice to the other parties for the purposes of obtaining directions from this court as to the further conduct of this matter;

7. Condoning service of this application upon the respondents prior to the hearing by facsimile and email transmission at the fax numbers and email addresses at the foot of the notice of motion;

8. that the order, once granted, may also be served at the aforesaid fax and email addresses.

9. That this application and court order thereafter be served upon the respondents by the sheriff at their respective registered offices or principal place of business;

10. Alternative relief."

48. Prior to the hearing of the consumer application, the applicants amended their notice of motion and filed an affidavit by Charles Pieter Abrahams (hereinafter referred to as "Abrahams") in support thereof. The important amendments were the following:

48.1. Paragraph 2.7 of the original notice of motion was amended to read as follows:

"2.7 That the respondents make discovery on oath of all documents relevant to the class action by no later than one month after the grant of the final order;"

48.2. Paragraph 2.8 was amended to read as follows:

"2.8 That any action proceedings, once transferred from the South Gauteng High Court to this court, shall be consolidated with any action proceedings issued out of this court in connection with the class action;"

48.3. Paragraph 2.3 of the original notice of motion was deleted in its entirety.

48.4. Paragraph 4 was amended to read as follows:

"4. That the members of the class are given notice of this action in the following manner by the respondents, within one week of the rule *nisi* being confirmed:

4.1 By publication of this order in one edition in each of the Sunday Times, Rapport, Cape Times, The Argus, Die Burger, Die Son and The Daily Voice in English, Afrikaans and IsiXhosa;

4.2 By broadcasts of the contents of this order on three separate consecutive week days between 7.00 a.m. to 9.00 a.m. and 5.00 p.m. to 7.00 p.m. on each of the following radio stations: SAFM, 567 Cape Talk, Radio Good Hope, Heart 104,9 and KFM in English, Afrikaans and IsiXhosa;

4.3 By appending sticky labels on the front of all of their respective packaging advising consumers of the class action for a period of 14 consecutive days, and further:

4.3.1 that it is an "opt out" class unless the consumer gives written notice to the applicants' attorneys of record, Abrahams, Kiewitz Attorneys, Ref: Mr C P Abrahams, Tel. 021-9144842 that they wish to be excluded;

4.3.2 that unless they give notice of their intention to "opt out", the judgment in the class action shall be binding on all members of the class; and

4.3.3 that electronic copies of the application may be obtained by any interested party on request by accessing breadinfo@ak.law.za;"

49. The amendment to paragraph 2.7 was necessary to bring the prayer for early discovery, which formed part of the rule *nisi* which was to be enrolled for hearing on 18 February 2011, in line with that date.

50. As the applicants would no longer be bringing a similar application in the South Gauteng High Court, as was foreseen in the original founding affidavit, paragraph 2.8 was amended to delete reference to such an application in that paragraph.

51. Paragraph 3.3 fell away as a result of the amendment to paragraph 2.7.

52. Paragraph 4 was made part of the rule *nisi* and the areas in which publication were to take place were broadened. This change was explained by Abrahams to have been necessitated by the fact that the applicants would no longer bring a similar application in the South Gauteng High Court. Consequently it would be necessary to publish in additional newspapers.

53. Despite their declared intention not to bring a similar application in the South Gauteng High Court, paragraph 2.1 of the notice of motion was

not amended. It remained limited to "all bread consumers in the Western Cape". When this issue was raised with counsel for the applicants, she moved for an amendment of paragraph 2.1 of the amended notice of motion to insert the words "or elsewhere" between the words "the consumer" and the word "who" in the second line of paragraph 2.1.

54. Tiger opposed the granting of this amendment, but it was not opposed by Pioneer and Premier.

55. In the exercise of my discretion, I decided to allow the amendment as it was clearly an oversight. The affidavit by Abrahams in support of the amendment made it clear that the application would no longer be limited to consumers in the Western Cape and case law supports the contention that a second application in another jurisdiction would not be required (see **Permanent Secretary Department of Welfare Eastern Cape and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) paras. [22] – [24] at pp. 1201-1202**).

56. The original notice of motion in the distributor application was similarly amended. In its amended form it reads as follows:

> "1. That this matter is heard as one of urgency in terms of rule 6(12) of the rules of court ("*the rules*") and that the forms and service provided for in the rules be dispensed with;
>
> 2. Directing that a rule *nisi* be issued calling upon the respondents to appear and show cause, if any, to the above honourable court on **18**

FEBRUARY 2011 at 10H00 or so soon thereafter as the matter may be heard, as to why a final order should not be granted in the following terms:

2.1 declaring that all bread distributors in the Western Cape Province (*"the distributors"*) who were prejudicially affected by bread prices in consequence of the respondents' breach of section 4(1)(b)(i) and (ii) of the Competition Act, No. 89 of 1998 (*"the Act"*) constitute members of a class;

2.2 declaring that the class so constituted shall be an *"opt in"* class;

2.3 declaring that the distributors will be bound by the judgment in the class action unless they give written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys that they wish to be included as members of the class;

2.4 declaring that the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, to the extent necessary, have the requisite standing to bring the class action against the respondents on behalf of the distributors for damages pursuant to the findings made by the Competition Commission(*"the Commission"*) and/or the Competition Tribunal (*"the Tribunal"*) that the respondents breached the aforementioned provisions of the Act;

2.5 declaring that the respondents' breach of the aforementioned provisions of the Act also amounted to an infringement of the rights guaranteed to distributors in the Bill of Rights, more particularly sections 22, 27(1)(b) and 28(1)(c), read with sections 184(1) and (2) of the Constitution;

2.6 declaring that the applicants are entitled to sue the third respondent as a defendant in the class action despite the absence of a certificate in terms of section 67(6)(b) of the Act, alternatively that they are given leave to apply to this court on the same papers duly supplemented, if necessary, for leave to join the third respondent as a defendant to the action proceedings instituted out of this court once the certificate is provided by the Commissioner and/or Tribunal;

2.7 that respondents make discovery on oath of all documents relevant to the class action by no later than one month after the grant of the final order, including a list containing the full names, addresses and telephone numbers of their respective distributors for the period January 2004 to date;

2.8 that any action proceedings, once transferred form the South Gauteng High Court to this court, shall be consolidated with any

action proceedings issued out of this court in connection with the class action;

2.9 that the respondents bear the costs of giving notice of the class action to the class in the manner provided in paragraph 4 below;

2.10 that the respondents pay the costs of this application jointly and severally, the one paying the others to be absolved;

3. That pending the return day:

3.1 the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, shall act as representatives of the class;

3.2 the applicants, assisted as aforesaid, may institute a damages action forthwith against the respondents on behalf of the class;

4. That the members of the class are given notice of this action in the following manner by the respondents, within one week of the rule nisi being confirmed:

4.1 by publication of this order in one edition in each of the Sunday Times, Rapport, Cape Times, The Argus, Die Burger, Die Son and the Daily Voice in English, Afrikaans and isiXhosa;

4.2 by broadcasts of the contents of this order on 3 separate consecutive weekdays between 7am to 9am and 5pm to 7pm on each of the following radio stations: SAFM, 567 CapeTalk, Radio Good Hope, Heart 104.9 and Kfm in English, Afrikaans and isiXhosa;

4.3 give written notice to all their respective distributors during the period January 2004 to date by prepaid registered post and thereafter file an affidavit annexing proof of service together with the tracking sheet from the Post Office that the letters have been collected, in which the respondents advise the distributors:

4.3.1 that a class action is being brought by the distributors arising from the finding of the Commission and/or the Tribunal that the respondents breached section 4(1)(b)(i) and (ii) of the Act;

4.3.2 that it is an "*opt in*" class action and that any distributor who fails to give written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys, Ref: Mr

C P Abrahams, Tel. 021 914 4842 that they wish to be included in the class, shall be excluded therefrom;

4.3.3 that the distributors give written notice to Abrahams Kiewitz Attorneys of their intention to opt in within four calendar months of the respective dates of receipt of their registered letter;

4.3.4 that any distributor who fails to give such notice by the cut-off date of four calendar months of receipt of the registered letter may apply to court for leave to join in as a member of the class;

4.3.5 that the judgment given in the class action will be binding on all members of the class;

4.3.6 consequently, and unless other distributors give notice to opt in as aforesaid, they will be excluded from receiving payment of any damages recovered in the class action;

4.3.7 that electronic copies of the application may be obtained by any interested party on request by accessing breadinfo@ak.law.za;

5. That the respondents are entitled to anticipate the return day hereof on five days' written notice to the applicants' attorneys of record;

6. That any party may re-enrol this matter on five days' written notice to the other parties for the purposes of obtaining directions from this court as to the further conduct of this matter;

7. Condoning service of this application upon the respondents prior to the hearing by facsimile and email transmission at the fax numbers and email addresses at the foot of the notice of motion;

8. That the order, once granted, may also be served by way of the aforesaid fax numbers and email addresses.

9. That this application and court order shall thereafter be served upon the respondents by the sheriff at their respective registered offices or principal place of business;

10. Alternative relief."

57. A similar amendment to paragraph 2.1 thereof as in the consumer application was sought by the applicants and was similarly opposed by Tiger. For the same reasons as set out above, I decided to grant the amendment.

URGENCY

58. The applicants in both the applications contended that I should hear the applications as matters of urgency. The respondents contended that I should refuse to hear the applications on an urgent basis and should strike the matters from the roll.

59. The founding affidavits filed in the respective applications advance the following reasons as to why the applications should be heard on an urgent basis:

59.1. The proposed claim against Tiger would have become prescribed on Saturday 27 November 2010.

59.2. The certificate in terms of section 65(6)(b) of the Act must be filed with the Registrar of this court when proceedings are instituted. The applicants' attorney had been instructed in August 2010 to represent the distributors and to bring an action on their behalf. This led to the decision to also launch an action on behalf of the consumers. Although a certificate in respect of Tiger was issued on 16 August 2010, the applicants were unable

to obtain a certificate in respect of Pioneer until late in the week before the application was launched, despite the fact that the attorneys learnt a few weeks before the application was launched that an appeal Pioneer intended to launch against the findings by the Commission Tribunal had been settled. The certificate in respect of Pioneer was only issued on 10 November 2010. It is furthermore in the interests of justice that the damages to be sought in both actions should not be sought piecemeal but in a single action. Accordingly, the applications should not be dealt with individually. (No such certificate in respect of Premier was obtained. I will deal with this aspect hereunder.)

59.3. As the applicants are seeking a rule *nisi*, the respondents would be at liberty to present their case on the return day. Consequently there will be no prejudice to them.

60. The respondents submissions against urgency can be summarised as follows:

60.1. The applications raised involved legal issues which should not be dealt with in haste.

60.2. The urgency was self created as the certificate in terms of section 65 of the Act was only requested more than two years

after the order was made in the case of Tiger. No reasons for this delay were given.

60.3. Even if the relief may be urgent in the case of Tiger, it is not urgent in the cases of Pioneer and Premier.

60.4. The authority the applicants seek, to institute actions as representatives of a class, is not something which can be granted on an interim basis.

61. I am not convinced that the rule *nisi* point raised by the applicants is valid. I am asked to authorise that the applicants, assisted by their attorneys of record, may act as representatives of the two classes and to grant the applicants leave to institute damages actions on behalf of the two classes. Yet in terms of the rules *nisi* sought in both applications the court, on the return day, will have to certify the classes. I must accordingly grant the applicants leave to institute actions on behalf of classes of plaintiffs which classes will only be defined on the return day of the rule *nisi*. I am of the view that the definition of the two classes must be certain, before leave is granted to the applicants to institute actions on behalf of the classes. That is not something which should be decided after leave has been granted to institute the actions and after the actions had been instituted.

62. As the basis for the intended class actions for damages to be brought against the respondents will be their alleged conspiracy to manipulate the bread price, *prima facie* they should be co-defendants in a single action.

63. It is common cause that any proposed action against Tiger, based on the alleged unlawful agreement between the respondents to fix the price of bread, had to be instituted before 27 November 2010. That makes any application for leave to institute such an action urgent. As the intended actions against the respondents are to be instituted in the same proceedings, it follows that the applications for leave to institute the class actions are urgent.

64. As to the self created urgency argument, the facts deposed to in the founding affidavit sufficiently answers that argument. A section 65 certificate was required in respect of Pioneer before the application could be brought. Such a certificate cannot be given before all appeal processes in respect of the findings by the Commission Tribunal have been concluded. In Pioneer's case that appeal was settled some weeks before the applications were launched, but a section 65 certificate was only issued by the Tribunal on 10 November 2010 and received by the applicants' attorneys of record in the week before the proceedings were launched.

65. Although it is far from ideal to deal with these applications on such an urgent basis, and although the respondents were certainly placed under extreme pressure to deal with the issues raised, I am of the view that to disqualify the applicants from bringing the applications as matters of urgency and thus in all probability effectively barring them from bringing their intended claims against Tiger, due to prescription, will not be in the interests of justice.

66. In these circumstances, I decided to hear both the applications as matters of urgency.

THE CONSUMER APPLICATION

67. As to who will qualify to be members of the class on whose behalf the applicants wish to institute a class action, the founding affidavit in the consumer application, deposed to by Marcus Chinasamy Solomon ("Solomon"), the centre coordinator of first applicant, is somewhat confusing. Initially he stated that the "application relates only to bread consumers whose rights were adversely and unlawfully breached by the respondents" (para. 22). Further in his founding affidavit, Solomon stated that "the affected customers in the Western Cape constitute a very substantial number of people, running into literally millions" (par. 48) and that "the applicants have resolved to bring a class action claim on behalf of the members of the class of affected consumers in

the Western Cape" (par. 49). Mr Solomon points out that every consumer who bought bread products during the period in question suffered damages as a result of the alleged unlawful price fixing and other prohibited practices. He then continues to describe the class on whose behalf the applicants wish to institute an action for damages as follows:

> "The class consists of all consumers of bread in the Western Cape who were affected by the unlawful conduct of the respondents.
>
> For practical purposes, that amounts virtually to the public at large in the Western Cape." (pars. 63 and 64)

As pointed out above this was thereafter broadened to consumers of bread in the whole of the country.

68. Apparently in an attempt to bring the intended class action directly within the ambit of section 38 of the Constitution, Solomon stated the following:

> "74. I am furthermore advised that section 38(c) of the Constitution expressly provides that a person acting in the interest of a class of persons may approach a court for appropriate relief alleging that a right in the Bill of Rights has been infringed or threatened. Individual applicants have also joined in this application. This is permitted in terms of section 38(a) of the Constitution. The numbers of consumers affected are such that not everyone can act in their own name. It is for this reason that their interests are protected in terms of section 38(b) of the Constitution. The applicants, in bringing this application are also acting in the public interest, within the meaning of section 38(d) of the Constitution. The first to fourth applicants are also acting in the interests of their members, as envisaged in section 38(e) of the Constitution.

75. In the class action, the applicants will indeed allege that rights in the Bill of Rights have been infringed:

75.1 in terms of section 8(2) of the Constitution, a provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by that right. In terms of section 8(3), a court, when applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) is enjoined:

> *"(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that the legislation does not give effect to that right; ..."*

75.2 The functions of the Human Rights Commission are regulated in sections 184(1) and (2) of the Constitution which also finds application in circumstances where the respondents have trammeled upon the basic human rights of the consumers;

75.3 Bread is part of the staple diet of very many South Africans. A very large number of South Africans – some say of the order of 50% - live in poverty. For such people, a small increase in the bread price, which they pay on a daily basis, can have a very material impact on their ability to obtain sufficient food for themselves and their families. It is not for nothing, I submit, that one of the colloquial ways of referring to a state of poverty and hunger is *"living below the breadline"*.

75.4 I have been advised that section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient food, and section 28(1)(c) provides that every child has the right to basic nutrition. I have been further advised that this at the very least places a negative obligation on persons such as the respondents to desist from preventing or impairing the right of access to sufficient food, and children's rights to basic nutrition. The unlawful conduct which resulted in an unlawful increase in the bread price had that result;

75.5 ... ...

76. I submit that in any event, even if the unlawful conduct of the respondents did not amount to a breach of the constitutional rights of the members of the class, it would be in the interests of justice for the applicants to be given leave to represent the affected consumers. This is the only effective means by which the affected consumers can obtain access to justice, and vindicate their rights."

69. The class the applicants wish to represent thus constitute all the bread consumers "in the Western Cape or elsewhere" who were prejudicially affected by the alleged increased bread prices in consequence of the respondents' alleged unlawful acts in contravention of section 4(1)(b)(i) and (ii) of the Act.

70. As pointed out above, the applicants also allege that certain rights contained in the Bill of Rights were infringed as a result of the respondents' alleged unlawful acts. The rights in question are, according to the applicants, the right to have access to sufficient food (section 27(1)(b) of the Constitution) and the right of every child to basic nutrition (section 28(1)(c) of the Constitution).

71. The respondents dispute that section 27(1)(b) and 28(1)(c) of the Constitution place any duty on them as these sections, they submit, do not have horizontal application. The applicants met this argument by submitting that the sections place a negative duty on entities such as the respondents to desist from preventing or impairing the right of access to sufficient food and children's right to basic nutrition (see **Standard Bank of South Africa v Saunderson 2006 (2) SA 264 (SCA) at 272, para. [12]**).

72. Although I am inclined to agree with counsel for respondents that the sections in question do not place a positive duty on private entities

such as respondents, I am not at all convinced that it may not be found, should the matter be allowed to go to trial, that the sections do place a negative duty on the respondents in the sense contended for by the applicants. That will depend on the evidence to be led and the findings thereon by the trial court. This is accordingly not a decision which I should make at this stage of the proceedings (see the Law Commission's Report, p. 43, pars. 5.6.8-5.6.9).

73. Although the argument before me was limited to section 38 of the Constitution and the alleged infringement of the bread consumers socio-economic rights, in particular the alleged infringement of their sections 27(1)(b) and 28(1)(c) rights, the founding affidavit as pointed out hereinabove, did not limit the class on behalf of which applicants wish to institute the proposed damages action, to those consumers whose rights in terms of section 27(1)(b) and 28(1)(c) have allegedly been infringed. The class they wish to represent is much wider and includes all the bread consumers in the country who were allegedly prejudicially affected by bread prices in consequence of the respondents' alleged unlawful acts.

74. If the class should be limited to those bread consumers whose rights in terms of section 27(1)(c) and 28(1)(b) of the Constitution had allegedly been infringed, the problem arises how to identify the class, especially as the applicants wish to bring the proposed class action on an "opt

out" basis. It would therefore be of paramount importance that those consumers who qualify as members of the class, should be able to establish that fact from the notice to be given to the public as envisaged in the notice of motion. To describe the class as, for instance, all bread consumers whose rights in terms of section 27(1)(f) and 28(1)(b) have been infringed by the respondents' alleged unlawful acts, will not enable members of the public to decide whether they are included in the definition or not.

75. I raised this problem with counsel for the applicants, who took the position that the description of the class in paragraph 2.1 of the notice of motion, that is bread consumers "who were prejudicially affected by bread prices" in consequence of the respondents' alleged unlawful actions, is a sufficient description for members of the public to decide whether they are members of the class or not.

76. I do not agree that this description is sufficient to identify the class, if the class action is to be instituted only on behalf of those consumers whose rights in terms of section 27(1)(c) and 28(1)(b) were allegedly infringed. This description includes all the bread consumers in the country who, as is alleged, paid more for bread than they would otherwise have done and include, presumably, also corporate entities such as companies operating hotels, restaurants and the like as well as millions whose rights

in terms of section 27(1)(c) and 28(1)(b) were not, by any stretch of the imagination, threatened or infringed.

77. It would be nearly impossible to define this intended class sufficiently for purposes of a damages action to enable those members of the public who may qualify as members of the class to decide whether to "opt out" or not and for the respondents to know who qualify as members and who not.

78. This problem is exacerbated by the various orders made by the Commission Tribunal as set out hereinabove. It is not at all clear during what periods and in which parts of the country the alleged unlawful acts of the respondents allegedly affected the price of bread. As already referred to, Solomon confined his founding affidavit to the Western Cape, but the application was thereafter broadened to include as members of the proposed class, all bread consumers in the country who were prejudicially affected by bread prices in consequence of the respondents' alleged unlawful acts. No attempt was however made to describe the period or periods applicable. This is not surprising in view of the orders made by the Commission Tribunal.

79. The orders made by the Commission Tribunal indicate that various periods were involved in different regions of the country and that certain regions were not affected at all. For instance Pioneer was found to have agreed with Tiger and Premier during 1999 to divide

markets in South Gauteng, Free State, North West and Mpumalanga amongst themselves; to have fixed the selling price of bread during 2003 and 2004, to have agreed not to compete on price in the Vanderbijlpark area and to have fixed the selling price of bread in Gauteng in December 2006. Tiger was found to have had discussions with competitors nationally and in various regions regarding bread prices during the period 1994 to 2006 and regarding the closure of bakeries during the period 1999 to 2001. As Premier entered into a corporate leniency agreement, no findings were made against Premier. The parameters of the intended damages action are thus also not defined so as to identify all the persons who would be bound by the result.

80. Insofar as it is necessary to decide, for purposes of the intended class action for damages based on section 38 read with sections 27(1)(b) and 28(1)(c) of the Constitution, whether the applicants have made out a case for an identifiable class of persons, I find that they have not.

81. Although counsel for the applicants restricted her argument on the class, as I understood her, to section 38 of the Constitution, the averments in the founding affidavit as I have shown above go much further. The applicants want to include as members of the class all consumers of bread in the country who were "prejudicially affected by bread prices in consequence of the respondents' breach of section

4(1)(b)(i) and (ii)" of the Act. As stated by Solomon, this amounts "virtually to the public at large". (It was for this reason that I enquired from counsel when the matter was called, whether there would be objections to me hearing the matter as I am also a bread consumer who, on the allegations in the founding affidavit, might have been prejudicially affected).

82. This raises the question earlier referred to, whether a class action should be made available in South African law in non-Bill of Rights matters and in particular for damages claims, by developing the common law. As I pointed out above, this difficult question was not argued before me and in the light of the view I take of the matter as pleaded in the papers, I do not intend to decide this issue. As I have already indicated, I will accept, without deciding, that the applicants do having standing to bring a class action for damages.

83. Although the description of this broad class of consumers as contained in the notice of motion is sufficient to identify those who may have a potential claim for damages against the respondents, the notice of motion is silent on the alleged period or periods during which the alleged damages claim arose. The parameters of the intended damages action, as in the case of the narrower class, are therefore not defined so as to identify all the persons who would be bound by the result.

84. On this basis I find that the applicants have also not made out a case for a sufficiently identifiable class of persons on the broad approach to the class they wish to represent.

85. I furthermore regard the applicants' alleged cause of action as a further hurdle in this application. As stated above, with reference to the Law Commission's Report, in an application for certification the applicants need to disclose a cause of action (p. 50, para. 5.6.27).

THE CAUSE OF ACTION IN THE CONSUMER APPLICATION

86. On behalf of the respondents it was submitted that it is not possible to discern the applicants' cause of action with any certainty from the allegations contained in the founding affidavit.

87. The applicants refer to their cause of action as a claim for damages based on the unlawful actions of the respondents in contravention of the Act. The proposed claim is clearly not contractual. No personal injury element is alleged. It seems that it is also not a delictual claim for pure economic loss. It may be that the applicants intend to bring what can be referred to as a consumers claim (The Law Commission's Report, para. 1.2.3, page 3, footnote 11) based on anti-competitive behaviour. Such an action is however not available in our law and I do not regard the provisions of section 65 of the Act to have created such a cause of action.

88. Furthermore, the relief the applicants wish to claim in the proposed class action is described as follows in Solomons' founding affidavit:

88.1. "An order for the delivery and debatement of an account to establish the extent of the overcharge and/or price fix conducted by the respondents".

88.2. "An order for the establishment of a trust or trusts which will receive such damages as may be awarded to the class, and which will make payments in order to promote the interests of the class, particularly (but not limited to) promoting access by all to sufficient food".

88.3. "An order that the respondents pay to the trust or trusts, an amount representing the damages suffered by members of the class as a result of the overcharge and/or price fix".

89. As stated above, the respondents do not supply bread directly to the consumers, but to the retail trade and the bread distributors. The bread consumers purchase their bread from the various retail shops and in the case of the distributors, from those in the informal trade to whom the distributors supply bread.

90. There can thus be no contractual obligation on the respondents to render accounts to the consumers. The applicants also do not contend that such a contractual obligation exists. Neither is there a

statutory duty. There is also no fiduciary relationship between the respondents and the consumers which would oblige the respondents to account to the consumers (**Phillips v Fieldstone Africa (Pty) Limited 2004 (3) SA 465 (SCA) at 477, para. [27]**).

91. Accordingly, on the facts alleged in the papers, the consumers have no right to demand that the respondents render accounts to them and for a debatement of such accounts.

92. I consequently find that no cause of action has been disclosed by the applicants.

93. Moreover, in the case of Premier, no certificate in terms of section 65 of the Act is in existence. As this is a prerequisite for the institution of civil proceedings, the applicants' cause of action against Premier is also, on this basis, fatally defective.

CONCLUSION

94. In the light of my findings with regard to the applicants' failure to sufficiently identify the class they wish to represent and to disclose a cause of action, the application in the consumer application stands to be dismissed.

Costs

95. Both Pioneer and Tiger asked for costs to be awarded against the applicants should the application be dismissed. Premier did not ask for a costs order against the applicants save for a costs order against the third applicant.

96. Although the application was brought on behalf of an extremely wide class of persons, the primary intention of the applicants was clearly to benefit the poor and to promote access by all to sufficient food.

97. As the primary intention of the applicants was to promote the advancement of constitutional justice, I have in the exercise of my discretion decided not to make a costs order against them, albeit that the respondents are not part of the State machinery.

ORDER

98. Accordingly, in the consumer application, the application is dismissed with no order as to costs.

THE DISTRIBUTOR APPLICATION

99. According to the first applicant's founding affidavit in this application, the affected bread distributors in the Western Cape number approximately 100. Many are small businesses.

First applicant's complaints

100. First applicant avers that in late 2005 and early 2006 he was distributing bread for both Tiger and Premier. In September 2006, he started purchasing from Premier's bread trucks. On 15 December 2006 he complained about the price increase and Premier terminated his bread supply as from the next day. First applicant regards this as an unlawful breach of contract. Attempts thereafter to obtain bread from Pioneer were unsuccessful.

101. On 22 February 2007 first applicant entered into a written agreement with Premier to supply him with bread but, on 3 March 2007, this agreement was also terminated by Premier for no valid reason.

102. He claims to have suffered damages as a result of the alleged unlawful acts by the respondents estimated at more than R5 million.

Second applicant's complaints

103. Second applicant is a close corporation. It was distributing bread for Pioneer. It obtained a contract to supply bread to prisons. Pioneer then refused to supply it with bread as it was also supplying prisons.

104. During 2002, second applicant started to distribute bread for Tiger.

105. As a result of Pioneer informing Tiger that second applicant was its distributor, Tiger terminated second applicant's contractual arrangement with it for no valid reason.

106. Second applicant continued to distribute bread for Pioneer but in December 2006 its rebates were reduced by Pioneer.

107. Second applicant estimates that it suffered a loss of approximately R4 million as a result.

Third applicant's complaints

108. Third applicant distributed bread for Pioneer. In December 2006 Pioneer reduced the rebate he had received by 20c a loaf.

109. After December 2006 Pioneer appointed a distributing agent in the area where third applicant distributed bread. This agent undercut third applicant's prices by R1,50 per loaf. His rebate was thereafter further reduced by Pioneer. He estimated his loss at approximately R4 million.

SECTION 22 RIGHTS INFRINGED?

110. The applicants allege that their rights as contained in section 22 of the Constitution were infringed by the respondents' unlawful conduct. Section 22 provides that "every citizen has the right to choose their

trade, occupation and profession freely. The practice of a trade, occupation or profession may be regulated by law."

111. As in the consumer application, the applicants in the distributor application also want leave to institute a class action on behalf of all the bread distributors in the country to recover damages, allegedly suffered by them, from the respondents in consequence of the respondents' alleged unlawful conduct.

112. In **JR1013 Investments CC and Others v Minister of Safety and Security and Others 1997 (7) BCLR 925 (E) at 930C-E** the following was said with regard to the intention behind section 22 of the Constitution:

> "We have a history of repression in the choice of a trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions upon where and for how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens of the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs."

(See also **City of Cape Town v A D Outpost (Pty) Ltd and Others 2000 (2) SA 733 (C) at 747B-F**)

113. Section 22 provides protection for individual citizens as opposed to juristic persons (**City of Cape Town v A D Outpost (Pty) Ltd (*supra*) at 747F**).

114. It follows that a juristic entity such as second applicant, and presumably as many of the other prospective plaintiffs, can not claim the protection afforded by section 22.

115. Furthermore, it is clear that the rights in section 22 can not be said to have been infringed in the circumstances the applicants allege. Unlike the case in the consumer application, this is a decision which I can make at this stage.

116. In consequence, I find that the applicants' attempted reliance on the allegation that their rights in section 22 of the Constitution have been infringed by the alleged unlawful acts of the respondents, is without merit.

117. As in the consumer application, I accept (without deciding) that the applicants should be afforded standing to represent a class in non-Bill of Rights matters.

118. I am however not satisfied that this is a case where common questions of law or fact arise in respect of all the members of the intended class.

118.1. First applicant, as I understand his averments, alleges that Premier unlawfully breached the contractual arrangement between them on 11 December 2006. Pioneer thereupon refused to supply him, reportedly as a result of an agreement with the other respondents. He later, on 22 February 2007, entered into a new agreement with Premier, which Premier again unlawfully terminated on 3 March 2007. He never had any dealings with Tiger.

118.2. In any action for damages, first applicant may bring against Premier, the terms of the various agreements and the cause of the alleged breaches would be in issue, as well as the reason why Pioneer refused to supply bread to him and whether there was an obligation on Pioneer to supply him with bread. Furthermore he had no dealings with Tiger.

118.3. Second applicant complains that Pioneer refused to supply it with bread, as it was in competition with Pioneer to supply bread to the prisons. It thereafter distributed bread for Tiger until its agreement with Tiger was unlawfully terminated by Tiger, reportedly as it was a distributor for Pioneer. It never had any dealings with Premier.

118.4. Any action for damages second applicant may bring against Tiger, will involve the terms of its agreement with Tiger and the

cause of the alleged breach thereof by Tiger. His dispute with Pioneer will also involve the supply of bread to the prisons.

118.5. In third applicant's case his rebate was reduced by Pioneer in December 2006. Thereafter Pioneer competed with him by appointing a distributing agent in his area who undercut his prices and when he complained his rebate was further reduced by Pioneer. He had no dealings with Tiger or Premier.

119. Tiger, in its answering affidavit, stated that it supplies bread to 22 distributors in the Western Cape. Taking first respondent's estimate of 100 distributors in the Western Cape, Tiger had no dealings with approximately 80 of these distributors. If this is extrapolated country-wide, there must be a vast number of distributors with whom Tiger did not conduct any business. The position would probably be approximately the same for Premier and Pioneer.

120. In these circumstances, I am not convinced that the issues of fact and law to be decided in respect of the various distributors and the respondents with whom they had dealings, are such that the matter should be dealt with as a class action against the three respondents.

121. I may add that in the case of Premier, the absence of a certificate in terms of section 65 of the Act has the same effect in this application as in the consumer application.

122. For these reasons I find that the applicants have not made out a case for leave to institute a class action on behalf of the distributors.

Costs

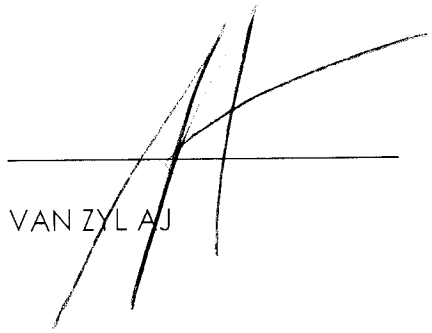
123. There is no reason why the normal rule should not apply. The respondents asked for the cost of two counsel. In view of the complexity of the issues raised and the urgency with which the matter was brought to court by the applicants, costs of two counsel are warranted. It bears mentioning that the applicants asked for the costs of three counsel.

ORDER

124. Accordingly in the distribution application the following order is made:

(a) The application is dismissed.

(b) Applicants to pay the respondents' costs jointly and severally, in each instance including the cost of two counsel.



VAN ZYL AJ