IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG: PRETORIA

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: YES

17/7/2015
DATE

SIGNATURE

CASE NO: 31044/13

17/7/2015

In the matter between:

THE ALLENS MESHCO GROUP OF COMPANIES	First Applicant
ALLENS MESHCO (PTY) LTD	Second Applicant
HENDOK (PTY) LTD	Third Applicant
ASSOCIATED WIRE INDUSTRIES (PTY) LTD	Fourth Applicant
INDEPENDENT GALVANISING (PTY) LTD	Fifth Applicant
GALVE WIRE (PTY) LTD	Sixth Applicant
WIRE FORCE (PTY) LTD	Seventh Applicant
CAPE WIRE (PTY) LTD	Eighth Applicant
FOREST WIRE (PTY) LTD	Ninth Applicant
AGRI WIRE (PTY) LTD	Tenth Applicant
AGRI WIRE NORTH (PTY) LTD	Eleventh Applicant

AGRI WIRE UPINGTON (PTY) LTD	Twelfth Applicant
BARCO (PTY) LTD	Thirteenth Applicant
and	
THE COMPETITION COMMISSION	Respondent

JUDGEMENT

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1. In this application the applicants seek to review and set aside the refusal by the Competition Commission to grant them immunity from prosecution in terms of the Commission's Corporate Leniency Policy ("the CLP") for their participation in a cartel. The applicants operate in the market, downstream from the manufacturer, of products involving galvanised wire, barbed wire, diamond mesh and other wire products.

2. The respondent is a statutory body established in terms of section 19 of the Competition Act, Act 89 of 1998 (the "Act"). Section 79 of the Act allows the Commission to prepare guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of the Act. Section 21 provides for the functions of the Commission. Of relevance for the present application is the CLP developed by the Commission and duly published in the Government Gazette. It is necessary to briefly refer to certain aspects of the CLP before referring to the facts of the present application.

3. The CLP referred to is the one published in 2008. In its Preface and Introduction the CLP briefly refers to the purpose and aims of the Act and then continues to set out the need for the CLP and what it entails. According to the CLP the overriding purpose of the Act is to promote and maintain competition in the economy and to prevent any form of anti-competitive conduct by a firm or a group of firms arising from agreements. The role of the Commission is to investigate, control and evaluate restrictive practices and abuse of dominant position.

4. This CLP refers to section 4 (1) (b) of the Act which is aimed at eradicating and preventing cartel activity which, according to the CLP, harms the economy at large. This CLP then, in paragraphs 2.4 and 2.5, states the following:

> "2.4 Cartel operation is often collusive, deceptive and secretive, and is conducted through a conspiracy among a group of firms, with the result that it becomes difficult to detect or prove without the assistance of a member who is part of it.
>
> 2.5 In its endeavours to detect, stop, and prevent cartel behaviour, the Commission has, in line with other international jurisdictions, developed this policy to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution."

5. Paragraph 3 of the CLP sets out what the CLP is. It is only necessary to refer to the first two subparagraphs which state that the CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP; and that it is a compliance mechanism devised to encourage cartel participants to disclose to the Commission a cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct.

6. Consequently it is stated further in paragraph 3.5 that

> "... a firm which is involved, implicated or suspecting that it is involved in cartel activity, would be able to come forward of its own accord and confess to the Commission in return for immunity. In other words, if a cartel member realises that such conduct may be a contravention of the Act, it could of its own free will without waiting for the Commission to investigate them, report the cartel activity to the Commission under the CLP."

7. According to paragraph 5.5 the CLP is aimed at cartel activity:

> "5.5.1 which the Commission is not aware of; or
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> 5.5.2 which the Commission is aware of but in relation to which it has insufficient information, and no investigation has been initiated yet; or
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> 5.5.3 in respect of pending investigations and investigations already initiated by the Commission but, having assessed the matter, the Commission is of the view that it has insufficient evidence to prosecute the firms involved in the cartel activity."

8. Paragraph 5.6 provides that it is only a firm that is "first to the door" to confess and provide information in accordance with the CLP to the Commission in respect of cartel activity, which would qualify for immunity under the CLP. Other members of the cartel who wish to come clean on their involvement in the cartel to which the applicant has already confessed, may receive favourable or more lenient treatment from the Commission outside the provisions of the CLP. The CLP would not apply where another firm has already made a successful application for immunity under the CLP in respect of the same conduct. (See paragraph 7.1.2).

9. Paragraph 9 sets out the different forms of immunity available through the CLP. Conditional immunity may be granted which precedes total immunity or no immunity. Total immunity would only be granted after the Commission has completed its investigation and referred the matter to the Tribunal or the Appeal

Court, as the case may be. Until that has occurred, the Commission may revoke the conditional immunity. No immunity would be granted if the applicant fails to meet the conditions and requirements under the CLP. (See paragraph 9.1.3.1).

10. Paragraph 11 sets out the procedure to be followed by an applicant who wants to receive immunity in terms of the CLP. Some of the salient features of this procedure are the following. The applicant must make an application for immunity in writing to the Commission. The application must contain "... information substantial enough to enable the Commission to identify the cartel conduct and its participants in order to determine whether or not an application for immunity has been made in respect of the same conduct." It is not necessary for the applicant to disclose its identity at this stage. If another firm has already made an application in respect of the same conduct, the Commission must advise the applicant accordingly. If no firm has already made an application, the Commission must advise the applicant accordingly and the applicant must thereafter make an arrangement for the first meeting with the Commission.

11. At such a first meeting the applicant must bring all the relevant information, evidence and documents at its disposal, whether written or oral, relating to the cartel activity for consideration by the Commission. The applicant must reveal its full identity and answer all the questions that the Commission may ask in relation to conduct being reported and all matters relating thereto. The purpose of this meeting is to find out whether the applicant's case would qualify for immunity under the CLP. (See paragraph 11.1.2).

12. If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, a second meeting is arranged. If the conditions and requirements have not been met, the applicant would be advised accordingly which means that no immunity had been granted.

13. The aim of the second meeting is to discuss and grant conditional immunity to the applicant pending finalisation of any further investigations by the Commission in the matter and final determination by the Tribunal or the Appeal Court, as the case may be. At this stage the applicant will be required to bring forward any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral. A written agreement between the applicant and the Commission, otherwise known as the conditional immunity agreement, which will be granted subject to the conditions and requirements of the CLP, will then be agreed upon between the applicant and the Commission.

14. After the granting of conditional immunity the Commission will do its own investigations relating to the cartel activity. Further meetings may be arranged by the Commission to revoke the conditional immunity or to solicit further documents or information to enable the Commission to complete its investigations. If the Commission is satisfied, a final meeting is arranged with the purpose of informing the applicant that the Commission intends to institute proceedings in relation to the alleged cartel and to request the applicant to continue to cooperate fully and expeditiously in the proceedings. Conditional immunity will continue to apply until

the Tribunal or the Appeal Court, as the case may be, has reached a final decision regarding the matter.

15. Arguably the most important feature of the CLP is the manner in which it encourages a cartel member to report the unlawful cartelist conduct. This is done by way of the principle of "first at the door". A member of a cartel knows that any hope it would have to escape the penalties which would follow if being found to be part of such conduct, would be to report such conduct to the Commission and, more importantly, to be the first one of the cartel members to do so. To do so belatedly would, as a general proposition, not result in immunity being granted and may, depending on the circumstances, at best for such an applicant, result in receiving more lenient treatment.

16. Due to the importance of establishing who reported a matter first to the Commission, paragraph 12 of the CLP provides for a mechanism by which a so-called "marker" can be placed by a prospective applicant for immunity in order to protect that applicant's place in the queue of applications for immunity. It is necessary to refer fully to the relevant parts of paragraph 12. It reads as follows:

"12. **Can a marker be placed?**

12.1 Prior to making an application for immunity pursuant to section 11.1 of the CLP, a prospective applicant may choose to apply to the Commission for a marker (the "marker application"). The marker application is made in writing to the Manager of the Enforcement and Exemptions Division of the Commission by one of the following means:

(i) Facsimile: ...

(ii) Electronic Mail: ...

(iii) Hand Delivery: ...

The marker application must identify that it is being made to request a marker, the applicant's name and address, the alleged cartel conduct and its participants and justify the need for a marker.

12.2 The Commission may grant, at its discretion and on a case-by-case basis, a marker to protect the applicant's place in the queue of applications for immunity. In granting the marker, the Commission will determine on a case-by-case basis the period of time within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in section 10 of the CLP. If the applicant submits at a later stage an application for immunity along with the necessary information, evidence and documents within the time limit determined by the Commission, such application for immunity and information, evidence and documents will be deemed to have been provided on the date when the marker application was granted by the Commission."

17. Paragraph 13 and 14 deal with the revoking of conditional immunity and the effect of an unsuccessful application for immunity. Paragraph 15 provides for oral statements under the CLP and it is for present purposes only necessary to quote the first sentence of paragraph 15.1. It reads as follows:

"15.1 When submitting in writing its application for immunity or its marker application, the applicant may apply to the Commission to request that information regarding the alleged cartel be provided orally."

18. As far as the current application is concerned the following may briefly be referred to. The applicants stated that during July/August 2008 they had reason to believe that their group of companies may have contravened certain prohibited practices contained in section 4 (1) of the Act. Mr R.B. Allen ("Mr Allen") who describes himself as the chairman of the first applicant and who is also the deponent to the affidavits filed on behalf of the applicants, submitted a marker application on behalf of the applicant's on 5 August 2008.

19. The Commission acknowledged receipt of the marker application on 12 August 2008 and undertook to evaluate the application and to revert. On 15 August 2008 the commission wrote to the applicants a letter with the following contents:

"Subject: FW: Allens Mescho marker application

We refer to the application for a marker submitted on behalf of the Allens Mescho Group of companies dated 5 August 2008.

After an evaluation of your marker application we wish to inform you that:

1. The Commission has granted a marker and is in the process of granting conditional leniency to the applicant who is "first through the door" with regards to price-fixing, market allocation and collusive tendering on wire and wire products, including those products listed in your marker application.

2. Your client is second through the door in relation to the price-fixing conduct stated in its marker application and/or conduct stated in par 1, and we therefore hereby grant a marker in respect of the application referred to above.

3. From the evaluation it seems that there are different parties referred to in the application indicative of agreements in certain products, where it is possible that your client may be first through the door. However, the success of your client's application for leniency would depend on the information supplied by your client, pursuant to the granting of the marker. It is possible that some of the information which your client furnishes to us may overlap with that furnished by the first CLP applicant. Your client will accordingly only be given leniency on new information furnished.

We look forward to receiving further information in support of your application by 19 August 2008."

20. Although the applicants were thus granted a marker, they were also informed of the marker granted and conditional immunity to be granted to CWI which was first to the door in respect of matters to which the applicants referred in their marker application. It was, however further noted that there might be areas in what the applicants wished to disclose which were not covered by CWI's application, in other words, which would be new information, and in respect of which the

applicants might then very well be first at the door. All would thus depend on the information subsequently submitted and the contents of the ultimate application for immunity by the applicants, if same were to be submitted.

21. The representatives of the applicants met with the Commission on 27 August 2008 to discuss the marker application and its effect on certain referral proceedings against the second applicant then pending before the Tribunal. Subsequent thereto the parties exchanged letters relating, *inter alia*, to the applicants' objection to the granting of leniency to CWI on 28 August 2008. The applicants objected to CWI relying on the marker obtained by their parent company and also stated, in the letter by its attorneys, that the products underlying the applicants' marker application fall outside the product market of the pending leniency application of CWI. In its answering affidavit the Commission stated that based on the correspondence, the Commission understood that the leniency application to be submitted by the applicants would contain new information that would disclose prohibited practices in relation to different products and thus in respect of different markets to that already disclosed by CWI. The Commission also noted that at that stage, that the Commission was only in possession of the applicants' marker application and that the applicants have not yet submitted a leniency application nor have they submitted concrete information. Although the CLP refers to both an application for "leniency" and an application for "immunity", they both bear the same meaning.

22. On 16 September 2008 the applicants' attorneys wrote an e-mail to the Commission attaching "documents specifying the required product information for each product identified in our marker application."

23. According to the Commission's answering affidavit the Commission evaluated these documents on receipt thereof. In this regard it was stated that it became clear that the applicants disclosed the alleged participants in cartel agreements in respect of various products, as well as the alleged terms of such agreements, but did not include any evidence of the agreements. It also did not provide any detailed information of which of the applicants was involved in each agreement. In fact, the documents did not disclose any information that would be sufficient to establish a prohibited practice as against the applicant or any other party. These documents and information were, in themselves, insufficient to form a basis for the grant of leniency. Furthermore, the documents did not disclose prohibited conduct in relation to new products or markets. All of the products and markets disclosed in the documents sent by the applicants' attorneys had already been covered by CWI's application. This meant, according to the Commission, that the applicants were not "first in line" in respect of any of the relevant products or markets.

24. According to the Commission the marker application thus did not meet the specified requirements for the granting of leniency. On 19 September 2008 the applicants were informed in writing as follows:

"RE: ALLENS MESCHO GROUP OF COMPANIES - MARKER APPLICATION

1. We refer to the marker application of 5 August 2008 made on behalf of the Allens Mescho Group of Companies and your subsequent e-mail of 16 September 2008.

2. We confirm that your client is second to apply for a marker for price-fixing in relation to galvanised wire, barbed wire, diamond mesh, nails, hard drawn wire, black annealed wire, field fence and wire netting. The aforementioned conduct is described in your e-mail of 16 September and involves Allens Mescho, Hendok, Associated Wire Industries, Independent Galve Wire, Wireforce, Cape Wire, Forest Wire, Agriwire, Agriwire North, Agriwire Upington, Barco, Consolidated Wire Industries, Barnes Wire Industries, Scaw Metals, Davsteel and Cape Gate.

3. However, your client's position in the queue will be reconsidered if the first applicant fails to comply with the conditions of the marker as set out in the Corporate Leniency Policy ("CLP").

4. Please note that in the event that the Commission grant immunity to another applicant, your client may still cooperate with the Commission as contemplated in section 5.6 of the CLP."

25. Subsequent to the receipt of this letter the applicants took no further steps in relation to their marker application and neither did they submit an application for immunity. The next action by the applicants was the current application seeking to review and set aside the aforesaid decision contained in the letter of 19 September 2008.

26. It is not necessary for purposes of this judgement to refer to all the grounds upon which the applicants attacked the aforesaid decision by the Commission and I shall only refer to certain salient features thereof. Firstly, the applicant's proceed from the premise that the granting of a marker and the granting of immunity is one integrated process and that two separate applications need not be made in terms of the Commission's CLP. Secondly, the applicants submitted that the Commission failed to consider the applicants' application. It was submitted that the Commission's attitude was that the applicants would not be considered at all because it was not "first to the door" and that they were beaten by CWI who got there first. According to the applicants they had identified additional parties who

were involved in the cartel and that they also had different information to that provided by CWI. Thirdly, it was submitted that the Commission was obliged, in the proper exercise of its discretion, to consider each application on its own merits, which was not done, and if it had been done, immunity should also have been granted to the applicant. Fourthly, it was submitted that the decision was also not taken by the Commissioner or the Deputy Commissioner, who could act on behalf of the Commission, but by another official who did not have the authority to do so. I shall refer to these aspects again below.

27. The Commission argued a number of points in limine but it is only necessary to refer to the one relating to the applicants unreasonably delaying the institution of the present review proceedings.

28. The applicants stated that they were informed of the decision to refuse them leniency, and the reasons for it, on 19 September 2008. The present application was only launched on 20 May 2013 - some 4 years and 8 months later. The question is whether this extraordinary delay can be condoned.

29. In terms of section 7 of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"), proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned became aware, or ought reasonably to have become aware, of the relevant decision and its reasons. In terms of section 9 of PAJA the period of 180 days may be extended by a court where the interests of justice so require.

30. The approach to the issue of delay was set out by Brand JA in Opposition to Urban Tolling Alliance v SANRAL and others [2013] 4 All SA 639 (SCA) at paragraph 25 as follows:

"[25] As to the purpose and function of the delay rule under section 7 (1) of PAJA and its common law predecessor, Nugent JA explained in Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) at paragraphs 22-23:

> '[22] It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule - reiterated most recently by Brand JA in Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 321 - is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more importantly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41E - F (my translation):
>
> 'It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed - interest reipublicae ut sit finis litium. . . . Considerations of this kind undoubtedly constitute part of the underlying reasons for the existence of this rule.'
>
> [23] Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Wolgroeiers Afslaers, above, at 42C).'

[26] At common law, the application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg Associated Institutions Pension Fund and others v Van Zyl and others 2005 (2) SA 302 (SCA) at paragraph 47 ... . Up to a point, I think, section 7 (1) of PAJA

requires the same two-stage approach. The difference lies, as I see it, in the Legislator's determination of a delay exceeding 180 days as per se unreasonable. Before the fluxion of 180 days, the first enquiry in applying section 7 (1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislator; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see e.g. Associated Institutions Pension Fund (supra) at paragraph 46. That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see e.g. Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) at paragraph 54)."

31. *In casu* the review application was launched outside the 180-day time period, even on the applicants' own version. The delay was thus *per se* unreasonable and this court can consequently not entertain the application unless it can also find, as envisaged in section 9 of PAJA, that it would be in the interest of justice to do so. In order to come to a decision in this regard the court should, in my view, *inter alia*, have regard to the facts of the case, the extent of the delay, the reasons for the delay and any prejudice which the parties or the public may suffer. It is for the party bringing the review to persuade the court that its delay should be condoned.

32. The applicants submitted that the delay was not caused by any tardiness on their part but was occasioned by the fact that the basis for the review only became apparent to them during October 2012 after the SCA-judgment in the Agri matter to which most of the applicants were parties, and more specifically after leave to appeal was denied by the Constitutional Court during December 2012.

33. According to the applicants the SCA judgment made them aware of the fact that the reasons given by the Commission for its decision triggered one or more grounds of review. According to the applicants it became clear that decisions made in terms of the CLP are expressly authorised by section 21 (1) (a) of the Act and that the section places a responsibility on the Commission to implement measures to increase market transparency. Consequently, so it was submitted by the applicants, it became clear to them that the Commission must consider every application submitted to it and must itself come to a decision in respect of such application. According to the applicants the period of 180 days should be calculated from the time they became aware as aforesaid, with the result that the present application was launched shortly after the expiry of the 180 days period.

34. In my view this explanation does not constitute a valid excuse. Section 21 of the Act is quite clear as to the functions of the Commission and so is section 79 which allows the Commission to prepare and publish in the Gazette guidelines to indicate the Commission's policy approach to any matter within its jurisdiction in terms of the Act. The Commission is quite clearly and administrative body whose decisions can be taken on review in terms of the provisions of PAJA. The applicants did not need any judgment or ruling by the SCA or the Constitutional Court to make them aware of the availability of the provisions of PAJA.

35. But even if the officials of the applicants were unaware of their rights in this regard, it was incumbent upon them to take comprehensive legal advice on the remedies available to them at the time that they were advised of the Commission's decision. There can be no doubt that if they had done so, they would have been advised of

their rights and they would have been in a position to bring the present review timeously. The failure of the applicants to do so for more than four years cannot assist them.

36. I did not understand the applicants' case to be that the existing law had been altered or reversed by the SCA in the Agri matter and that they now find themselves with a remedy which they did not previously have. But even if that were to be the case of the applicants, it would be without any merit. Firstly, the judgement by the SCA did not alter or reverse existing law in any manner. It also did not create a right which had not previously existed for the applicants. But, secondly, even if it did, and having regard to the extraordinary long delay, the principles applied in the matters of S v Franco and Another; S v Lasovsky Brothers (Pvt) Ltd and Others 1974 (4) SA 496 (RA), R. v Brodie, 1935 T.P.D. 114, Sloman v Attorney-General; Rabinowitz v Attorney-General, 1944 S.R. 144 and the cases therein referred to, should, in my view, also apply to a review application such as the one presently before this court.

37. In the result the conclusion is inescapable that, for approximately 4 years and 8 months and without good cause, the applicants failed to bring their current application.

38. As far as the facts of the case are concerned I do not deem it necessary for purposes of this judgment to analyse and discuss all the submissions made by the respective parties and I shall merely refer to certain salient features.

39. The first issue to be addressed is the question whether the applicants ever submitted an application for leniency. According to the Commission's version the

applicant failed to submit a leniency application as a separate application from the marker application, as required by the CLP. This, according to the Commission, frequently happens if an applicant's marker application is unsuccessful. There was no document submitted by the applicants which reflect that it constitutes an application for leniency. All the documents referred to the marker application. The applicant sought to overcome this difficulty by submitting, *inter alia*, that the application for a marker and the application for leniency is one integrated process and that two applications are not necessary.

40. In my view this submission cannot be sustained. From the passages of the CLP quoted above it is quite clear that the application for a marker application and the application for leniency are two separate applications and that each has to comply with its own set of procedural and other requirements.

41. It was also submitted on behalf of the applicants that the documents and information which the Commission allowed them to submit subsequent to the marker application and the meeting between the parties, is proof of the fact that the Commission was dealing with the applicants' leniency application. This submission is not factually correct. Firstly, the applicants mentioned in the marker application that the facts provided in that application will be expanded upon in the leniency application which were to follow. This clearly envisaged a further and separate application. Furthermore, the Commission was clearly also of the view that the information submitted up to that point disclosed no more information than had already been received from CWI in respect of CWI's application for a marker and their application

for leniency. The initial reference by the Commission to information and documents was clearly in relation to the applicants' marker application.

42. As mentioned before, in the letter dated 15 August 2008 the Commission informed the applicants that they were "second through the door" in respect of price-fixing, market allocation and collusive tendering regarding the stated products. However, in the next paragraph the Commission specifically stated that "it seems that there are different parties referred to in the application (of the applicants) indicative of agreements in certain products, where it is possible that your client (the applicants) may be first through the door." The Commission then proceeded to explain the obvious namely that the success or otherwise of the applicants' application for leniency would depend on the information supplied by the applicants pursuant to the granting of the marker. The Commission was clearly referring to a future application for leniency still to be submitted which would have to entail more than what had been disclosed at that point, if the applicants wanted to receive any form of immunity.

43. The next sentence of the letter then states another obvious fact as follows: "It is possible that some of the information which your client furnishes to us may overlap with that furnished by the first CLP applicant. Your client will accordingly only be given leniency on new information furnished." It is obvious that the applicants could not expect leniency in respect of information already in possession of the Commission. As stated before, they could only, *ceteris paribus,* expect leniency in respect of information of which the Commission was unaware.

44. The final letter dated 19 September 2008 accords with the aforesaid. It specifically refers to the marker application and confirms that the applicants were second to apply for a marker in respect of the conduct and items stated. In paragraph 3 of the letter reference is only made to the applicants' "position in the queue", which is a response to the marker application. It does not refer to the leniency application.

45. In light of the aforesaid it may already at this stage be mentioned that the applicants' application, which is aimed at reviewing an alleged refusal to grant immunity, cannot succeed. The Commission never had an application for immunity, as envisaged in paragraph 11 of the CLP, before it. It was at that point only dealing with the marker application and merely mentioned as an aside that their analyses of the matter showed that the applicants would have to present more, or rather, new information in its application for immunity if they were to have any hope of success.

46. The next two issues relate to the submission by the applicants that the Commission failed to consider their application, and, if it did so, did not consider all the relevant factors. These submissions cannot be sustained. I refer to what I have stated above and the contents of the letters from which it clearly appears that the Commission had fully investigated the marker application, including the additional documents and information, and had compared that with the applications of CWI. Furthermore, in his affidavit Mr Thulani Kunene, the Acting Deputy Commissioner, confirmed the contents of the founding affidavit in so far as it related to him and also added that he and Me Shan Ramburuth, who was the Commissioner at the time, considered the application for leniency by CWI and that he evaluated the marker application as well as the additional documents submitted by the applicants. He further stated that he

determined that the applicants did not raise any new information or justify the grant of leniency to any of the applicants, either as second applicant in line or at all.

47. The applicants' submissions that the Commission did not consider their application at all or did not do so properly, appears to be all based on assumptions made by the applicants. It would appear that most of these assumptions were made as a result of the applicants' erroneous viewpoint, based on a misinterpretation of the provisions of the CLP, that the application for a marker and the application for immunity is one integrated process. As stated before, marker and leniency applications are separate and distinct from one another. A marker application does not contain sufficient information and will not justify the granting of leniency. In order to consider a leniency application, a specific procedure is followed and much more information is required by the Commission than is the case with a marker application. The Commission stated what type of information would be required to justify the grant of leniency and why it says that the applicants did not present such information to it. With reference to this version and the version of the applicants, this court cannot go beyond the version of the Commission and more particularly the evidence of Mr Kunene in this regard.

48. A further issue which is to be considered in respect of the condonation issue, is that of prejudice. In response to the applicants' rather bald statement that the substantial delay in this case did not cause any prejudice to the Commission, the Commission stated that the delay is highly prejudicial to the Commission and to the public at large. In respect of the applicants themselves the Commission submitted that the present review proceedings are designed to prevent the referral against the

applicants from being prosecuted to completion. The Commission further submitted that it pursues this and other referrals in the public interest, to prevent and penalise prohibited anti-competitive conduct. Where its ability to do so is undermined, particularly because it is required to oppose a belated application like the present one, the public interest is harmed. The Commission also pointed to the fact that referral proceedings seek to impose administrative penalties against the applicants which will deter them from engaging in prohibited practices in future and which would compensate the public at large through the fiscus. Any delay in the imposition of penalties affords the applicants time to restructure their affairs and thus potentially to frustrate the imposition and collection of any fine.

49. There is merit in the aforesaid submissions by the Commission. Further prejudice of course also arises, especially after an extended period as is the case *in casu*, from the fact that review applications often require detailed facts or events to be related to the court for consideration. Administrative bodies, which act through its officials, might find such information to be unavailable due to the normal turn-over of personnel or even due to the mere inability of such officials to recall the detailed facts and circumstances of matters in times gone by. Reference should also be made to the prejudice referred to by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) quoted above.

50. In summary, nothing which the applicants have put forward negates the aforesaid evidence and inferences of prejudice and potential prejudice to the Commission and the public at large.

51. Consequently, having regard to, inter alia, all the aforesaid, I am of the view that the applicants have failed to show that the interests of justice require an extension of time as envisaged in section 9 of PAJA for the bringing of this application. In the result the application cannot be entertained and should be dismissed.

52. If I were to be wrong in respect of the delay issue, I am nevertheless satisfied, as already mentioned, that the applicants have never submitted an immunity application and that the Commission has not made a decision by which it denied immunity to the applicants. The application to set aside such a decision is thus misplaced and should be dismissed.

53. As far as costs are concerned, costs should follow the event and should also include the costs of two counsel.

54. In the result the following order is made:

1. The application is dismissed with costs which costs shall include the costs of two counsel.

C.P. RABIE

JUDGE OF THE HIGH COURT