

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No.: 88/CAC/Mar09

In the matter between:

WOODLANDS DAIRY (PTY) LTD

First Appellant

MILKWOOD DAIRY (PTY) LTD

Second Appellant

and

THE COMPETITION COMMISSION

Respondent

JUDGMENT: 26 AUGUST 2009

DAVIS JP:

Introduction

[1] On 9 February 2005, the Commissioner initiated a complaint in terms of section 49B (1) of the Competition Act 89 of 1998 (“the Act”) concerning Parmalat, Ladismith and Clover in respect of suspected prohibited practices in the milk industry.

[2] The basis of the complaint and the background information is contained in an Initiation Statement and Memorandum attached to it.

[3] The Initiation Statement sets out the nature of the dispute as follows:

“1. Over the past two months, the Commissioner’s office has been in contact with various players in the milk producing

industry. The purpose of this contact has been to establish whether there is anticompetitive behaviour (at any level) in the industry. This contact was prompted by a letter from a (small) milk producer in the Southern Cape complaining about factors in the industry affecting milk producers. The letter was sent to the Deputy Minister of Agriculture who then forwarded it to the Commissioner for his attention.

- 2. Upon receipt of the letter referred to above, I instructed Mr Johan Liebenberg and Mr Jacobus Theron to make contact with the writer of the letter to establish the factual position in the industry. Further, that they also speak to any other player in the in the industry whom the information obtained indicates has knowledge about any possible or alleged anticompetitive behaviour in the industry.*
- 3. Pursuant to this instruction, contact has been made with various industry players and as a result of which, a memorandum has been prepared detailing the progress made to date. The memorandum also mentions factual information suggesting the existence of anticompetitive behaviour in the market for the supply of milk. The memorandum is attached.*
- 4. As a result of the factual findings recorded in the memorandum, the letter received from the Deputy Minister of*

Agriculture and numerous public comments about the alleged high prices of various food products, including milk, made by the Minister of Agriculture in 2003, I believe that there exists anticompetitive behaviour in the milk industry. This anticompetitive behaviour may exist at both the supply and demand side of the market.

5. *In addition, further information has been obtained about the possible collusion and/or price fixing involving Parmalat (Pty) Limited and Ladismith Kaas (Pty) Limited. In particular, it is alleged that these firms are colluding on prices. This would amount to price fixing in terms of section 4(1) (b) (i) of the Act. The information also indicates that Clover engages in abusive behaviour by requiring all farmers that are milk producers to not sell milk to third parties (including a customer not to deal with a competitor). This conduct would amount to abuse of a dominant position.*
6. *In the light of the above and in terms of section 49 B (1) of the Competition Act as amended I initiate a full investigation into the milk industry."*

[4] The Memorandum (produced by Messrs Liebenberg and Theron) which was attached to the Initiation Statement reads thus:

"Dear Customer

In our view we have the following evidence to use as the basis for initiation.

(a) An affidavit made by Mr M T Barry, a director of Samelco (sic) (SA Milk Co-op), stating that:

(I) All the producer members of Samelco deliver their milk to Parmalat at an agreed price. At a meeting between representatives of Samelco and Parmalat on 23 September 2004, it was announced by Parmalat that the purchase price of milk for the Southern Cape producers would decrease with effect from 1 October 2004 with 10 cents per litre;

(II) The deponent was told by another farmer on the very same day that he attended a meeting of one of the competitors of Parmalat, Ladismith Kaas, where they were informed by the last mentioned that the price paid to them would also decrease by ten cents per litre. He was further informed that Mr Roy Taylor, CEO of Ladismith Kaas, told the producers that he had liaised with the management of Parmalat before the meeting and that they have

discussed the effective date and magnitude of the decrease in the milk price.

(III) The deponent, on the very same day, phoned a certain Mr Coetzee at Parmalat, who confirmed that he had earlier discussions regarding the decrease in price with Mr Roy Taylor.

(b) A statement signed by nine of the eleven producers at the meeting of Ladismith Kaas held 23 September 2004, stating the following:

(I) It is confirmed that the following information was conveyed at this meeting by Mr Roy Taylor.

(II) He confirmed that he did contact the management of Parmalat prior to the meeting, who told him they had already decided to lower the price by 10 cents.

(III) He also confirmed that if he should not lower his price, the future existence of Ladismith Kaas would not be in danger.

(IV) Ladismith Kaas, subsequent to the revelation that they spoke to Parmalat about the lowering of the purchase price of milk, announced that they would also lower their price by the same amount on the same day.

(c) *A copy of circular No 4/2004 from Clover to its producers dated 30 September 2004, in which reference is made of a Clover Industries Limited ('CAL') board meeting held on 9 September 2004, where it was decided that management will act strictly against milk producers 'selling off' milk, without prior permission, to third parties. This conduct may lead to the cancellation of the Producer's Delivery Agreement. This may, in line with the Patens judgment, give rise to a contravention of either section 5 or section 8 of the Act.*

Recommendation

It is recommended at this stage that the Commission initiate a complaint against Parmalat and Ladismith Kaas regarding the fixing of the purchase price of milk in contravention of section 4(1) (b) of the Competition Act.

It is further recommended that the Commission also initiate a complaint against Clover regarding the possible contravention of section 5 and/or section 8."

- [5] From the Initiation Statement and Memorandum, it is apparent that respondent ('the Commission') had obtained specific information about a possible collusion and/or price fixing involving Parmalat and Ladismith Cheese which is prohibited in terms of section 4(1) (b) (i) of the Act. In

addition, the Commission had obtained evidence indicating that Clover might be abusing its dominant position and contravening section 5 and/or section 8 of the Act; hence the initiation of the complaint.

- [6] On 22 March 2005, acting in terms of section 49A (1) of the Act, the Commissioner issued a summons against Dr HAJJ Kleynhans, the Chief Executive Officer of first appellant ('Woodlands'). It was apparent from the summons itself that the Commission was concerned with an investigation into prohibited conduct in the milk industry under case number 2005/Feb/1424 (being the case number of the initiation statement referred to above).
- [7] On 1 April 2005, Woodlands' attorneys wrote a letter to the Commission, and having acknowledging receipt of the summons, they recorded Woodlands' wish to cooperate fully with the Commission and to comply, to the extent possible, with the provision of documents contained in the summons.
- [8] The letter also recorded the view of Woodlands' attorneys that the description of the complaint referred in the broadest of terms to the kinds of activities that constituted prohibited practices as defined in the Act, and did not provide any particularity regarding the actual complaint. The letter proceeded to call for information to enable Woodlands "to comply fully with

the demand in the summons". What was called for was the identification of the parties to the alleged collusion and/or price fixing, the subject matter of such collusion and/or price fixing, the parties to the alleged restrictive vertical practices, the subject matter of such restrictive vertical practices, the kind of abuse of dominance being investigated, the subject matter of such abuse of dominance and the parties to such an abuse of dominance.

[9] On 6 April 2005, the Commission replied to Woodlands' attorneys. This letter contained the following:

1. *The Commissioner initiated the complaint against Parmalat SA (Pty) Limited, Ladismith Cheese Company (Pty) Limited and Clover Industries limited in terms of section 49 B(1) of the Competition Act 89 of 1998 (as amended) ("the Act").*
2. *The Commissioner initiated the complaint to establish whether there is anti competitive behaviour at 'any level' of the industry. Through this, we allowed ourselves the opportunity to evaluate the entire industry. Therefore, it would be premature for the Commission to comment in any industry relationship and to conclude on the applicable sections of the Act as such an early stage of the investigation.*

3. *Also please note that the Commission may decide to initiate further complaints against additional parties during the course of their investigation.*
4. *We strongly advise you to adhere to the timeframe of the summons”*

[11] After this letter, Woodlands raised no further complaints about the summons. Woodlands and Dr Kleynhans elected to comply with the summons, to attend the interviews with the Commission and provide the documentation called for in terms of the summons.

[12] On 30 August 2005, the Commission issued a summons against Mr Stephen Fick of second appellant ('Milkwood'). According to the Commission, it was clear that the summons concerned an investigation into the milk industry under case number 2005/Feb/1424.

[13] Some six months after the summons had been issued against Dr Kleynhans, and some five and a half months after Woodlands' letter concerning the summons, the interrogation of Dr Kleynhans and Mr Owen Gush took place.

[14] The interrogation of Mr Fick took place on the same day, 22 September 2005. The persons involved from the Commission in the interrogation of

Dr Kleynhans of Woodlands and Mr Fick of Milkwood were Louise Du Plessis, Johan Liebenberg, H.B. Senekal, Hilton Pietersen and Koos Theron.

- [15] On 13 March 2006, the Commission initiated a complaint in terms of section 49B(1) of the Act concerning Clover, Woodlands, Parmalat and Lancewood. The complaint concerned price fixing of the purchase price of raw milk from milk producers in contravention of section 4(1)(b)(i) of the Act by way of certain forms of conduct.
- [16] On 12 May 2006, the Commissioner initiated a complaint in terms of section 49(B)(1) of the Act concerning both Nestle and Woodlands. The Initiation Statement made it clear that it had been alleged that Nestle and Woodlands entered into milk exchange agreements and that Woodlands, through an agreement with a competitor, fixed the selling price of UHT milk; both alleged to be in contravention of section 4(1)(b)(i) of the Act.
- [17] On the same day, 12 May 2006, the Commissioner initiated a complaint concerning Clover, Parmalat and Woodlands. The Initiation Statement recorded that it had been alleged that Clover, Parmalat and Woodlands were involved in the removal of surplus milk through which they were able to indirectly fix the purchase and selling price of milk and processed products in contravention of section 4(1)(b)(i) of the Act.

[18] On 6 December 2006, the Commissioner initiated a complaint in terms of section 49B(1) of the Act concerning Milkwood and Woodlands. The Initiation Statement alleged that Milkwood and Woodlands agreed to fix the prices of UHT milk and that they agreed not to compete in certain areas by allocating markets.

[19] On 7 December 2006, the Commission referred these various complaints to the Tribunal.

The appellants' case before the Tribunal

[20] The appellants then approached the Tribunal for an order to set aside the complaints which has been initiated by the Commission against both Woodlands and Milkwood, on the basis that they were unauthorized, in that there was a contravention of section 49 B of the Act. They further prayed for an order to set aside the referral by the Commissioner to the Tribunal of both Woodlands and Milkwood in respect of the complaints referred to above, in that they were unauthorised and in contravention of section 50 of the Act together with a declaration that all evidence, whether oral or documentary elicited by the Commission, directly or indirectly, pursuant to the investigation of Woodlands and Milkwood, had been unlawfully obtained and thus could not be used in evidence against either of these parties in a hearing before the Tribunal.

[21] The Tribunal found that it was a prerequisite for the legality of a summons in terms of section 49 A that the stipulation of a prohibited practice had to be accompanied by some measure of particularity as to its nature so as to be sufficient to guide the addressee to appreciate the scope and boundaries of the request for documentation. The Tribunal found that neither the Woodlands nor the Milkwood summons contained the requisite particularity and accordingly found both to be void for vagueness and over breath. Having so found the two summonses to be void, the Tribunal crafted a preservation order, in effect ordering the registrar to keep a copy of all the documents required by the Commission, pursuant to the summonses ,until such time as the registrar was notified by the Commission that the documents could be returned to the appellants on the conclusion of the proceedings or the date upon which the Commission decided to abandon the proceedings. It is essentially against this remedy crafted by the Tribunal that the appellant approached this court for relief.

Appellants' case

[22] The essence of appellants' appeal to this court thus turned on an appeal against the granting by the Tribunal of the preservation order and the ancillary consequences thereof. However, the Commission lodged a cross appeal against the finding that the Woodlands and Milkwood summonses were vague, over broad and thus void.

[23] Mr Gauntlett, who appeared together with Mr Buchanan on behalf of appellants, correctly approached the dispute on the basis of dealing initially with the implication of the cross appeal. In short, if the two summonses issued against appellants by the Commission were invalid, the investigation, which flowed therefrom, would also be invalid and accordingly evidence, whether oral or documentary, procured as a result of these invalid summonses stood to be struck down.

[24] Although a range of issues were raised in the heads of argument of both parties, including the appealability of the decision of the Tribunal and the validity of the preservation order, when the matter was argued before this court the dispute turned essentially on the following questions:

- a) Were the summonses valid;
- b) If they were not valid, then how should the evidence, which was procured pursuant thereto, be treated.

The validity of the summonses

[25] In order to determine the validity of the summons it is necessary to turn to the two key sections which were central to the dispute. Section 49 A headed 'Summons' provides thus:

“(1) At any time during an investigation in terms of this Act, the Commission may summon any person who is believed to be

able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject –

(a) to appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or

(b) at a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.

(2) A person questioned by an inspector conducting an investigation, or by the Commissioner or other person in terms of subsection (1), must answer each question truthfully and to the best of that person's ability, but the person is not obliged to answer any question if the answer is self incriminating.

(3) No self incriminating answer given or statement made to a person exercising any power in terms of this section is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 72 or

section 73 (2) (d) and then only to the extent that the answer or statement is relevant to prove the offence charged.”

Section 49 B, headed “Initiating a Complaint” provides as follows:

“49 B Initiating a Complaint

- (1) The Commissioner may initiate a complaint against an alleged prohibited practice.*
- (2) Any person may –*
 - (a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or*
 - (b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.*
- (3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*
- (4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.”*

[26] Mr Gauntlett submitted that, on the basis of the so called Malherbe letter, the Commission purported to initiate a complaint on 9 February 2005. In its initiation statement, the Commissioner made reference to the memorandum of Liebenberg and Theron and hence the allegation of the

existence of anti-competitive behaviour in the market for the supply of milk. The Commissioner then stated that, in terms of section 49 B (1) of the Act, he would initiate a full investigation into the milk industry. In Mr Gauntlett's view, the initiation statement sought to invoke "draconian powers of sections 49 A and B" without any specification against whom they might be applied.

[27] In this connection, Mr Gauntlett referred to an exchange of correspondence between Woodlands' attorney and the Commission. On 1 April 2005, Woodlands' attorney wrote:

"The complaint has simply said to relate to 'anti competitive behavior in the milk industry' including 'possible collusion and/or price fixing possible abuse of behaviour as well as restricted vertical practices.

In our view, this description of the complaint merely refers in the broadest of terms to the kinds of activities that constitute prohibited practice in terms in terms of the Competition Act ... and does not provide any particularity for regarding the current complaint."

[28] On 6 April 2005, the Commission responded:

"The Commission initiated the complaint to establish whether there was an anti-competitive behaviour at 'any level' of industry through this, we allowed ourselves the opportunity to evaluate the entire

industry. Therefore, it would be premature for the Commission to comment on any industry relationship and to conclude on the applicable sections of the Act at such an early stage of investigation.

Also please note that the Commission may decide to initiate further complaints against additional parties during the course of the investigation.”

[29] The essence of appellants’ argument was that section 49 A and section 49 B, clearly provided that there had to be an initiation of a complaint against specified entities and that this decision had to precede any investigation relating to them.

[30] By contrast, Mr Bhana who appeared together with Mr Coetzee and Mr Dalrymple on behalf of the Commission, submitted that complaints were initiated against prohibited practices not against specified parties. Once a complaint had been initiated, the Commission was enjoined to investigate the alleged prohibited practice. The investigation could take place on an industry wide basis, provided that what was being investigated was a practice which was prohibited in terms of chapter 2 of the Act. Thus, the Commission was entitled to investigate any party in the course of its investigations into a prohibited practice and such a party need not be named or contemplated in the initiated complaint. In this connection, Mr

Bhana referred to a dictum of this court in Glaxo Welcome and 7 others v National Association of Pharmaceutical Wholesalers and others (15/CAC/Feb02) at para 15, in which the following was stated by this court about the need to consider the substance of the complaint in interpreting section 49B:

“Section 49B focuses on a ‘prohibited practice’ and does not require a complainant to identify prohibited conduct with reference to various sections of the Act. A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act. What is required is a statement or description of prohibited conduct. In this regard form CCI, prescribed in terms of section 21 (4) and 49B of the Act, is instructive. The form requires a complainant to ‘provide a concise statement of the conduct’ that is the subject of a complaint. A complaint need only identify the conduct of which it complained.”

- [31] In addition, Mr Bhana submitted that section 49A empowered the Commission to summon ‘any person who is believed to be able to furnish any information on the subject of investigation, or to have possession or control of any book, document or other object that has a bearing on the subject’. This section therefore contained no requirement that persons subjected to a section 49 A summons must already be the direct subject of the complaint as initiated in terms of section 49 B (1).

Evaluation

- [32] When the two critical sections are evaluated, it appears that section 49 A permits the Commissioner to summons any person who is believed to be able to furnish any information on the subject of the investigation. Section 49 B (3) provides that, upon initiating or receiving a complaint in terms of this section, the Commission must direct an inspector to investigate that complaint as quickly as practicable.
- [33] That phrase would appear to refer to the investigation which is related to the complaint. The *dictum* of this court in Glaxo Welcome which was cited by Mr Bhana develops a substantive as opposed to a formalistic approach to the definition of a complaint. The question arises as to whether the complaint had to be against a specified entity as opposed, for example, to an industry. The spirit of the Glaxo Welcome *dictum* seeks to promote the objectives of the Act, which, in this context, means the investigation of practices that may well undermine the central objective of the Act: the promotion of a competitive economy. In the present case, the wording of section 49 B does not refer to a specific entity. Hence it is permissible to read the provision to promote its purpose as sourced in the Act. Were this restrictive interpretation to be applied, it would hamper investigations triggered off by a complaint against a practice carried on by an entire industry. That interpretation, not supported by the wording of section 49 B(1), could prove to be subversive of a central purpose of the

Act and the approach previously adopted by this court in Glaxo Welcome, *supra*.

[34] Mr Bhana also referred to section 21 (c) of the Act in which it is provided that the Commission is responsible for the investigation and evaluation of alleged contraventions of chapter 2. Therefore, in his view, on a proper reading of the Act the initiation or receipt of a complaint is not a prerequisite for the conducting of investigations by the Commission but the latter is entitled and indeed carries a responsibility to investigate practices prohibited in terms of chapter 2 of the Act. The responsibility does not arise only on the initiation or receipt of a complaint.

[35] That construction appears to extend the description of the functions of the Commission into an autonomous set of powers, separate from the approach to investigations as set out in section 49 B of the Act, which is the only substantive section dealing with the question.

[36] Given this court's interpretation of section 49 B, the solution lies in an engagement with the wording of section 49 B rather than a contrived extension of the meaning of section of section 21 of the Act. The advocated purposive interpretation of section 49 B supports the argument that the complaint does not have to be framed against a specific entity.

The summonses

[37] This conclusion leads to the question of the validity of the summonses. With regard to the Woodland summons, the Tribunal placed considerable emphasis on the following passage in the summons:

“The gist of the complaint initiated by the Commissioner relates to the reasonable believe (sic) that there exists anti-competitive behaviour in the milk industry. The alleged prohibited practices include possible collusion and/or price fixing, possible abusive behaviour as well as restrictive vertical practices.

You are summonsed in terms of section 49A of the Competition Act No 89 of 1998 (as amended) as part of the above – described investigation by the Competition Commission. It is believed that you are able to furnish information on the subject of the investigation, or have in your possession or control a book, document or other that may have a bearing on this investigation.”

(Part I)

In part two of the summons the following warning appears:

“You must produce each document (as specified in Part III below) in its entirety by including all attachment and all pages, regardless of whether they directly relate to the specified subject matter.”

On the basis of the description set out in Part One of the summons, Woodlands was required, in terms of Part Two, to produce each document (as specified in Part III below) in its entirety by including all attachments

and all pages, regardless of whether they directly relate to the specified subject matter.

[38] Documents are defined in extremely sweeping terms in Part Three to include:

- a. All Business Plans, Strategic Plans and Annual Reports of the company.
- b. All planning documents and documents that discuss competitive strategy or competitors and their possible actions in respect of milk procurement.
- c. All internal Presentations and Research Papers, regarding milk procurement, prepared for or substituted to management or the Board of Directors.

[39] The managing director, Dr H Kleynhans, was required to produce 'all diaries reflecting any meetings and appointments for the period', 'all messages received on his behalf', 'all flights undertaken during the period as well as the purpose thereof', 'all his expense accounts and records', 'all telephone records ... indicating all received and outgoing calls for the individuals'.

[40] Mr Gauntlett thus submitted, given the sweeping obligations imposed on first appellant in terms of the summons, that the Tribunal had correctly

concluded that some particularity in the stipulation of a prohibited practice was necessary and furthermore that a measure of detail was required to guide the addressee of the summons to appreciate the boundaries as to the request for the documentation contained within the summons.

[41] In his defence of the summons, Mr Bhana submitted that the following requirements were necessary for a valid summons in terms of the Act:

1. An investigation in terms of the Act must be in process
2. The Commissioner needs to hold the belief that the person sought to be summonsed would have:
 - 2.1 Information on the subject of the investigation;
 - 2.2 be in possession or control of a book or document that has a bearing on the subject;
3. The information believed to be held must concern "*the subject of the investigation*";
4. The summons must contain details of the time and place of the interrogation;
5. The summons must specify the books, documents or other objects required to be delivered;
6. It must furnish the time and place for the delivery of such books, documents or objects.

[42] In Mr Bhana's view, there was no requirement, in terms of section 49 A, that the summons should specify the particular offence being investigated or contain any details of the offence. The summons need only set out that it was issued in terms of the Act, that the Commissioner believed the addressee would be able to furnish any information on the subject of the investigation or has possession or control of any book, documents or other object that has a bearing on that subject and specified the books, documents and objects to be produced.

[43] Within the context of these competing submissions, a considerable debate took place between counsel and this Court as to the implications of the decision of the Constitutional Court in S v Zuma 2009 (1) SA 1 (CC), in which the Constitutional Court was required to determine the constitutional validity of certain search warrants.

[44] No cogent argument was addressed to the court on the potential implications of the distinction between a search warrant as set out in section 29 of the National Prosecuting Authority Act, Act 32 of 1998 ('NPA Act') and a summons issued in terms of section 49 A of the Act. Nor was I able to find any material implication as to the use of one or either term from research as undertaken. However the distinction does, for reasons set out, not appear to be relevant to the present dispute.

- [45] In Zuma, *supra* at paragraph 136, the essential argument, with regard to whether the search warrants in that case were valid, turned on the determination of the warrants being sufficiently circumscribed to the searches authorised so as not to authorise 'too broad a search of the various premises'. Further, the question arose as to whether the scope of the searches was defined with sufficient particularity to render the warrants intelligible to the persons being searched. In short, it was contended that the warrants should have specified the alleged offences in exact terms as well as where, when and by whom the offences were suspected to have been committed.
- [46] Of particular significance to this dispute was the approval by Langa CJ at para 137 of the *dictum* in Powell NO and others v Van der Merwe NO and others 2005 (5) SA 62 (SCA) at para 59 namely 'that a warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises',
- [47] Furthermore, Langa CJ went on to find that the requirements of section 29 of the NPA Act had to be interpreted so as to promote the spirit, purport and objects of the Bill of Rights. In particular, the learned Chief Justice emphasized the importance of the State's power under section 29 in the fight against crime as well as the constitutional protection of the privacy of the individual which was subjected to the search. In short, the NPA Act

had to provide safeguards which ensured that the infringement of privacy went no further than was reasonably necessary in the circumstances to implement the State's mandate to curb crime.

[48] For this reason, Langa CJ concluded that there was a tension between these competing concerns and:

“This tension reflects the need to strike a balance between the privacy and other personal interest of individuals on the one hand and the public interest in the fight against crime on the other both of which are relevant constitutional principles.” par 140

Accordingly, Langa CJ found that a warrant issued in terms of section 29 had to be intelligible; that is in a sense that it is reasonably capable of being understood by the reasonably well informed person who comprehends the relevant empowering legislation and the nature of the offences under investigation. para154

[49] In finding that the warrants met the intelligibility test, Langa CJ pointed to the particulars set out in the Preamble to the warrants in which it was stated:

“[t]hat the nature of the criminal investigation appears from information placed on oath before the judge who issued the warrant. The investigation arises, the warrants state, from the reasonable belief that certain offences had been committed or that

attempts have been made to commit them. The suspected offences are listed as corruption in contravention of Act 94 of 1992 fraud, money laundering in contravention of Act 121 of 1998 and tax offences in contravention of Act 58 of 1962". para 163

On this basis, the court held that any reasonably well informed person who had a knowledge of the Act and the relevant classes of offences would have a fair idea of the ambit of the authorised search. para 169

[50] By contrast, the summons issued against Woodlands referred to a reasonable belief that there exists anti-competitive behaviour in the milk industry. The alleged prohibited practices "include possible collusion and/or price fixing possible abuse of behavior as well as restricted vertical practices." A reasonably well informed reader of this summons would encounter considerable difficulty in divining precisely the ambit of the implications of the summons in relation to Woodlands and its organisation, structure and its conduct. In short, the specificity contained in the Zuma warrant is absent from this summons which fails to provide the necessary specificity about the link between the alleged offences and the potential role of the addressee. Whether it is a summons or a warrant, the same constitutional imperative applies: a balance must be struck between the legitimate purpose of the investigating authority to fulfill its legislative

mandate and the constitutional protection of privacy. The summons fails to achieve this balance owing to its breadth and vagueness.

The Milkwood Summons

[51] The Milkwood summons contains a Part Three in which the following passage differs significantly from the formulation adopted in the Woodlands summons:

“Part III: Matter in respect of which you are required to answer question relating to the following:

- *Possible collusion between competitors through the allocation of markets fixing of trading conditions and/or price fixing relating to the procurement and processing of milk*
- *Possible abusive behaviour by requiring milk producers to not sell milk to third parties*
- *Issues arising from the information submitted in response to the Commission’s summons dated 22/03/2005”*

[52] In this case, the summons specifies in far more detail, than did the Woodlands’ summons, the nature of the enquiry and consequently the purpose of the summons. It affords a reasonably well informed person, with a knowledge of the Act, a fair idea of the ambit of the enquiry and the purpose of the summons. It also illustrates that the Commission could

have formulated a similar section for the Woodland summons on the basis of the information available to it.

[53] The Tribunal made much of the third bullet point, that is issues arising from the information submitted in response to the Commission's summons dated 22 March 2005. In short,

"Given the criticism that we had of the unbounded nature of the Woodlands summons this request to comment on another's documents solicited in this way makes the Milkwood interrogation again an unbounded one given the context set by Part I. This means that Fick is unaware of whether the investigation travels beyond bullet points one and two of Part III cited above, and indeed whether he will be interrogated on matter that form part of an industry wide investigation, an unlawfully wide remit for a section 49A interrogation."

[54] However, it would be incorrect to consider this an unbounded requirement, in that Milkwood could have had access to the information so submitted and would accordingly have been entitled to examine such documentation in order to formulate a response; hardly the unrestricted form of enquiry which is so manifest in the Woodlands summons. In other words, reading the three bullet points together, Milkwood would reasonably have been able to determine the nature of the investigation and the impact upon itself.

Conclusion

[54] In my view, while the Woodlands summons manifestly fails to meet the intelligibility test which should be applied to a summons under section 49

A, that is a test which seeks to balance the legislative requirements of the Commission to investigate alleged anti-competitive conduct and to protect the constitutional guarantee of privacy of the addressee of the summons. However, the Milkwood summons, for the reasons advanced, complies with the test and is accordingly valid.

Consequences of this finding

[55] The Tribunal, having found that the summonses were void, then proceeded to fashion 'a preservation order'. In this connection, the Commission contended that the Tribunal was entitled to grant a preservation order, relying upon the decision of the constitutional Court in Thint (Pty) Ltd v National Director of Public Prosecution and others; Zuma and other v NDPP 2009 (1) SA 1 (CC).

[56] Only a court is entitled to make such an order in terms of section 172 (1) (b) of the Republic of South Africa Constitution Act 108 of 1996. ('Constitution'). See para 220 of Thint, *supra*. Manifestly, the Tribunal is not a court as envisaged in section 172 of the Constitution and accordingly it is not competent for it to make such a preservation order, sourced as such power is in section 172 of the Constitution.

[57] Mr Bhana referred in support of his submission that the evidence from the void summons should not be declared to be inadmissible by this court to

the judgment of Kriegler J in Key v Attorney-General Cape Provincial Division and another 1996 (4) SA 187 (CC) at para 13:

“In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavor by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin (1) SA 1984 (CC), fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.”

[58] On the basis of this *dictum*, Mr Bhana submitted that it was neither possible nor desirable for this court to strike a balance between the appellants' private interest and the Commission's public interest at so earlier stage of proceedings which went to the heart of the regulation envisaged in the Act, namely allegations of cartel behavior. In his view, the trial court would be in far a better position to evaluate and strike the appropriate balance between the private and public interests at stake and accordingly it would not be appropriate for this court to interfere.

[59] In this case however, it is the Tribunal which itself will be 'the trial court'. This is not a case like that of Key where another court, the Constitutional Court, was asked to rule in advance on conduct pending a criminal trial in the High Court. Further, in Key's case Kriegler J stressed that it was not yet known if the impugned evidence would ever be employed; the state might in fact not have used it at all, having other evidence at its disposal. In this case, it was certain that the evidence was to be used and that, without it, the Commission would have no case against either Woodlands or Milkwood.

[60] Even when a court has the power to grant a preservation order, there was a strong indication from the Constitutional Court in the Thint case *supra*, that, ordinarily, a court would order a return of objects seized in terms of overly broad warrants in order to ensure the protection of the rights of

privacy when it has been unfairly breached by the relevant authority. That consideration has weight in countering the approach urged upon this Court by the Commission.

[61] As both sides have met with partial success in this appeal, a costs order would be inappropriate.

[62] In the result the following order is therefore made.

1. The decision of the Competition Tribunal dated 17 March 2008, is set aside and replaced with the following order:

- 1.1 The application to set aside the complaints initiated by the Competition Commission against Woodlands and Milkwood (numbers 1,2,4,5,6 as against Woodlands and 6 as against Milkwood) are dismissed.

- 1.2 The summons in respect of Woodlands, being Annexure B annexed to the founding affidavit of Alexander Gutsche, is declared to be void.

- 1.3 The respondent is directed to return forthwith to Woodlands all documents and any copies thereof in their possession and control or of their legal representatives procured from Woodlands in

these proceedings together with transcripts of the interrogation of Kleynhans and Gush.

- 1.4 The application brought by Milkwood against the summons issued against it on 30 August 2005 is dismissed.
- 1.5 The summons issued on 30 August 2005 in respect of Milkwood is declared to be valid.
- 1.6 There is no order as to costs

DAVIS JP

Patel JA and Dambuza AJA concurred