IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No.: 87/CAC/FEB09

In the matter between:

SENWES LIMITED	**Appellant**
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	**Respondent**

JUDGMENT: 13 November 2009

DAVIS JP

Introduction

[1] On 3 February 2009, the Competition Tribunal ('the Tribunal') made an order in which it held that the appellant had contravened section 8(c) of the Competition Act 1998 ("the Act") by engaging in what it classified as 'a margin squeeze'. Appellant has approached this court on appeal against this decision.

[2] In its determination, the Tribunal rejected respondent's ('the Commission') argument that appellant's conduct fell to be considered in terms of section 8(d) of the Act; that is the impugned conduct should have been classified as a species of price discrimination and thus should have been assessed in terms of sections 8(d) and 9(1) of the Act. The Commission has cross appealed against this finding.

Background

[3] Appellant is a public company that operates in the agricultural sector, inter alia, by providing grain storage facilities and marketing as well as trading in grain. For most of its 99 years of existence, it was a co-operative but was converted into a public company in April 1997.

[4] Senwes' silos are located mainly in the Free State and, to a lesser extent in the Northwest, Gauteng and the Northern Cape. The silos were built between the mid 1960's and the mid 1980's, at a time when grain cooperatives played a unique role in the storage and handling of large quantities of grain as well as the marketing thereof. The role of these cooperatives was largely attributable to their appointment as agents of the Maize Board. As Professor Vink, who testified before the Tribunal, observed:

> "*The grain cooperative has always played a unique role within the cooperative movement, and in the marketing of grains, largely as a result of their appointment as agents of the Boards. Yet, in terms of the Marketing Act, producers always had majority representation in the Boards, and producer representatives were always members of a cooperative, and often Board members for their cooperative. Hence, there were principal/agent problems with respect to many of the decisions that were taken in the normal course of business of both the cooperatives and the Boards*."

Prof Vink noted that, until the early 1990's, "some of the grain cooperatives were the main agents for the maize board, earning a substantial portion of their total income from handling and storing of grain on behalf of the board". It is thus not surprising, given the regulated nature of the industry, that Senwes enjoyed a near monopoly in its own area, owning 56 of the 80 silos in the areas in which it operated and having 90% of the storage capacity in 45 of these silo areas.

[5] Until 1995, legislation ensured that cooperatives were forbidden from entering into competition with one another. Grain production was subjected to a centralised system of planning. Farmers were obliged to sell their product to the Maize Board which, in turn, was obliged to buy from them at a regulated price. The Maize Board then sold the product to millers who processed the grain for the final consumer.

[6] In 1995 the various marketing boards, including the maize board, were abolished and the trading of grain was no longer regulated by legislation.

[7] However, the physical infrastructure pertaining to grain storage was unaltered. Hence, the monopoly position in relation to silos did not change. Ownership, however, did change in that, cooperatives previously owned by farmers in the relevant area, became public companies, such as appellant, and were now owned by shareholders,

many of whom were institutional investors. Thus, Senwes was run for the benefit of these shareholders and not, as had previously been the case, the community of farmers within its area.

[8] Referring to the existing monopoly regarding storage and the possibility for change in access for storage facilities, Professor Vink noted that the construction costs of new conventional silos were high while 'new storage technologies such as silo bags of storage bins have their own shortcomings'.

[9] After 1995, grain was traded as a commodity, subject to market forces. In 1995, grain began to be traded on the South African Futures Exchange (SAFEX). In her evidence, Dr Theron described the manner in which the producer price was fixed: 'The producer price, or the farm gate price, is usually determined by the interaction between the buyers (traders, users of grain, etc.) and the sellers (farmers). However, in the grain markets the producer prices derived from the SAFEX spot price minus the average transport differential and the handling and storage classes plus a location premium… Futures traded on a futures market (such as SAFEX) are generally labeled 'derivative' since their prices are 'derived' from the spot markets. In the grain markets we have a situation where the spot prices are derived from their futures prices (specifically the price of the near future)… [i]t is sufficient to note that prices on both the 'SAFEX and spot

markets are market determined and competitive. However, the final producer price (and all other prices along the supply chain) are influenced by the handling and storage costs…”.

[10] In order for grain to trade on SAFEX, it is traded by way of a negotiable instrument. The instrument is referred to as a silo certificate and is issued by silos which are registered with SAFEX, as is the case with Senwes. Silos certificates represent the holder’s entitlement to a fixed quantity of grain stored in a particular silo. In the case of maize, each certificate represents a hundred tons of maize. A certificate can be traded many times. Ultimately, a holder is entitled to collect the quantity specified in the receipt from the silo which issued it. The holder is liable for any outstanding storage and handling costs. The certificate records any storage and handling fees paid to the date endorsed by the silo owner on the certificate which would include the costs incurred as of the dates the certificate was issued.

[11] The SAFEX price becomes particularly important when traders purchase grain from farmers, in that they use this price as the basis for the contract. They then make deductions based on the SAFEX tariff for transport, storage and handling.

[12] It appears that the traders' actual transport costs may well be lower than those provided by the tariff because the distance for transport is shorter than the generalised calculation under the tariff and the trader may employ alternative transport which could prove to be cheaper than rail. SAFEX also sets a rate for handling and storage based on the daily rate which is reviewed annually.

[13] Turning to the storage of grain, when a farmer brings grain to a silo, it is stored according to its grade. The consignment of grain loses its identity as the property of a particular farmer, but the farmer obtains a receipt for the quantity of grain delivered. This owner's receipt is not however equivalent to the SAFEX certificate.

[14] Appellant's policy towards storage was to offer a daily rate for storage at the SAFEX tariff and then, after a period, to set a ceiling on that rate for the balance of the season. In other words, once a farmer had paid the daily rate for storage for up to 100 days, the rate was capped and the farmer could store free until the end of the season. Once the new season commenced, storage was again charged on a daily basis. This can be illustrated thus: Assume that a farmer stored for 150 days. The system farmer will pay the equivalent of 100X daily costs of storage. The storage for the last 50 days would be free. This tariff, referred to as the 'capped tariff', was offered to storage customers, regardless of whether they were

farmers or traders until May 2003. In 2001, a deferred tariff was introduced as an option, in terms of which billing for storage would be deferred until 1 January or when the grain was sold, (which ever was the sooner) and the amount charged would be the lower of the daily tariff or the capped tariff.

[15] In May 2003, appellant removed the capped tariff for traders and offered it only to farmers. This new tariff became known as the 'differential tariff', as it differentiated between traders and farmers. A trader who stored for longer than 100 days continued to pay the daily tariff. When a farmer, who stored under the capped tariff sold to a trader, a farmer could still benefit from the capped tariff but the trader would pay storage from the date of sale at the daily rate. If a farmer applied for a silo certificate, he would be regarded as a trader and would then have to pay storage at the daily tariff rate from the date of the request for the silo certificate. Furthermore, the Commission contended that, around 2003, farmers were informed that, if they sold to a third party as opposed to appellant, they would receive a less favourable price because appellant would not charge them for storage or allow a discount on storage charges while traders would deduct from their offer price, the full costs of storage at a daily rate. With this background, it is now possible to examine the nature of the complaint.

The Complaint

[16] In respondent's referral affidavit, the essence of the complaint was set out thus:

> *"Senwes abuses its dominance in the handling and storage of grain market by charging in effect lower storage fee to a producer who agrees to sell the grain stored in Senwes' silos to Senwes. Producers who sell their products to third parties that compete with Senwes downstream pay a higher fee for the storage of grain. CTH alleges that his practice has made it virtually impossible for it to compete with Senwes in the trading market within the relevant geographic area*."

In an affidavit, deposed to by Mr Maphumulo, the following is stated as the justification for this complaint:

> "*1. Senwes makes a distinction between storage charges for producers and traders in terms of what it refers to as the deferred storage tariff. This tariff comprises the daily tariff over a 100-day period (this is also regarded as a "ceiling amount" payable) and also includes the handling tariff.*
>
> *2. The ceiling amount benefit accorded to producers applies until the beginning of the next season. When the new season begins the producer is obliged to pay uncapped storage charges in respect of stored grain. This benefit is*

only applicable to grain harvested by a producer himself, not grain purchased by a producer in his capacity as a trader.

3. *The Commission's investigation revealed that Senwes' failure to accord a similar benefit to traders who store their grain in its silos effectively means that traders are compelled to store their grain on daily tariffs, which are more expensive.*

4. *The storage fee differentials also depend on whether a producer would ultimately sell his/her grain to Senwes or not. The capped fee (yearly or deferred storage tariff) i.e. the ceiling amount only applies in situations where the farmer concerned intends to sell his grain to Senwes. However, if the farmer wishes to sell the grain to a third party, like CTH, the capped storage tariff is not applied, and is not available.*

5. *Section 8(d)(i) of the Act provides that a dominant firm may not require or induce a supplier or customer to not deal with a competitor. Senwes has contravened this section of the Act by inducing producers not to deal with a competitor, viz, CTH, among others.*

6. *Senwes' pricing policy for grain storage is such that it favours or facilitates a situation whereby it would not be financially feasible for a farmer to sell his/her grain to a*

competitor of Senwes. This practice gives Senwes an unfair advantage over its competitors in the grain trading market. This conduct thus constitutes an inducement to suppliers and customers not to deal with Senwes' competition. The effect of this is to impede new firms from entering into the grain trading market or to impede existing firms from expanding within that market.

7. Senwes leverages its dominance in the upstream market for grain storage to create an advantage for itself in the downstream market for trading in grain."

The Tribunal's determination

[17] The Tribunal first dealt with the Commission's case brought under section 8(d)(i) and, in particular, whether appellant had engaged in exclusionary behavior that constituted inducement to farmers not to trade with rival traders as it denied the benefit of the capped storage to any farmer who sold his grain to a third party trader. The Commission argued that this act constituted an abuse by appellant as a dominant firm, in that, it sought to induce its customers not to deal with rivals in contravention of section 8(d)(i), which provides that it is an abuse of dominance for a dominant firm to engage in an exclusionary act, the effect of which is to require or induce a supplier or customer not to deal with the competitor. In the alternative, the Commission contended that the same facts gave rise to a case in

terms of section 8(d)(iii) which provides that it is prohibited for a dominant to sell goods or services on condition that the buyer purchases separate goods or services unrelated to the object of the contract or forces a buyer to accept the condition unrelated to the object of the contract. In this instance, the case was premised on the fact that appellant forced farmers, who are buyers of storage services, to sell to it as a trader in order to benefit from the capped storage.

[18] The Commission also contended that appellant is a vertically integrated firm, dominant in the upstream market, that supplies an essential input, storage, to its downstream rivals who are traders in the physical market for grain, at prices that prevent the latter from earning a viable price/cost margin in the post 100 day storage period.

[19] The Tribunal was thus confronted with a case argued in terms of both section 8(c) and section 8(d).

The relevant portions of section 8 read thus:

> "*It is prohibited for a dominant firm to –*
>
> *(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or*

> *(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-*
>
> *(i) requiring or inducing a supplier or customer to not deal with a competitor;*
>
> *(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*
>
> *(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*
>
> *(iv) selling goods to services below their marginal or average variable cost; or*
>
> (v) *buying-up a scarce supply of intermediate goods or resources required by a competitor."*

[20] The Tribunal first considered the requirement of 'induce' as contained in section 8(d)(i). The Tribunal held that, in the case of inducement, where it was alleged that the appellant had sought to entice or persuade customers that they should deal with appellant rather than another trader,

the Commission had established that appellant had committed an exclusionary act which constituted an inducement for the purposes for section 8(d)(i).

[21] Turning to the case of margin squeeze and whether it fell within section 8(d), the Tribunal concluded:

> "*Raising rivals costs is one matter but there is nothing in this conduct to suggest that it persuades or entices customers not to deal with Senwes' rivals. Indeed customers may not even be aware of what traders' terms with Senwes are. The mere fact that rivals cost are raised and that consequently they may have to make less competitive offerings to customers does not constitute inducement for the purpose of section 8(d)(i).*"

[22] By contrast, the Tribunal found that the margin squeeze was an exclusionary act which fell to be considered in terms of section 8(c) of the Act.

[23] After evaluating the evidence, the Tribunal concluded with regard to the margin squeeze abuse, that the evidence revealed that, in the post cap period, the market was foreclosed to rivals, consumer welfare was harmed, both in respect of prices paid to farmers and selling prices to processors.

[24] Having found that appellant had induced customers to deal with it, the Tribunal was required to consider whether section 8(d) of the Act was now applicable. It held:

> "*The evidence of foreclosure in the earlier period i.e. the period when the daily tariff applies to all, farmers and traders is not that marked. Both the data offered by the Commission and the evidence of the traders seems to suggest that the exclusionary effect is felt post cap. Indeed this is the express evidence of traders such as Keyser who seems to concede that pre-cap they can compete effectively with Senwes both for purchases from farmers and traders. It seems here that the smaller traders have been affected, but not the larger firms. This is perhaps because the inducement abuse, certainly on the incidents we are aware of, has been targeted at smaller traders or been perceived to be more credible when directed against them. However because this evidence is weaker than that of the post cap period, which shows a marked and consistent pattern, we cannot find sufficient evidence of anti-competitive effects in the pre-cap period. This has important implications for this case. It means that we find that the inducement abuse is not proven – although there is an exclusionary act, we cannot find on the balance of probabilities*

evidence of a sufficient anti-competitive effect. This means that the Commission's case in terms of section 8(d) fails."

[25] It is within this context that both the appeal and the cross-appeal must be evaluated.

The Appeal

[26] Mr Brassey, who appeared together with Ms Engelbrecht on behalf of the appellant, summarised the essence of appellant's case as follows:

1. The margin squeeze case had not been pleaded. Further, appellant, far from tacitly accepting an extension of the issues which had been raised in the complaint, had repeatedly objected to their extension. Appellant could not have expected nor required, given the legal and factual complexity of a case based on a margin squeeze, to submit to such an informal enlargement of the issues.
2. On the evidence presented by the Commission, no case had been made out for a margin squeeze.
3. There is no basis in South African law for the importation of the doctrine of a margin squeeze.

I turn to deal with each of these objections.

The Pleadings

[27] Mr Brassey submitted that the Tribunal ought to have found that no complaint, based on an allegation that it had engaged in a practice of "a margin squeeze", had been investigated by the Commission or referred to the Tribunal for adjudication. Accordingly, the Tribunal was not empowered jurisdictionally to adjudicate upon the complaint. Furthermore, the Tribunal should have limited the Commission to a case based specifically on the complaint referral affidavit. In this context, appellant had expressly indicated an objection to the exercise of jurisdiction over a matter which was not included in the complaint referral.

[28] Mr Brassey submitted that a reading of the complaint referral did not justify a conclusion that the case brought by the Commission encompassed a margin squeeze. He further submitted that, on the basis of the Tribunal's finding, a respondent would be expected to read a complaint referral not merely in the terms directly pleaded but as if it encompassed almost all of the contraventions of the Act that could potentially be prosecuted on the basis of the allegations made. In his view, even on a generous reading of the complaint, the allegations did not lead to an axiomatic inference that the Commission could rely on a complaint about a margin squeeze in the particular prosecution of appellant.

[29] Mr Brassey conceded that the Commission had stated in the complaint, in respect of section 8(d)(i), that appellant's failure to offer to traders the

same benefit as the producers had made storage for traders 'more expensive' than for producers. However, he submitted that this allegation, without more, simply involved a complaint about a difference in treatment between traders and producers and never indicated that the true complaint was that the margins of rivals had been inappropriately placed under pressure.

[30] Mr Brassey also referred to a schedule which had been placed before the Tribunal by appellant's legal representatives which recited the issues pleaded and identified those parts of the witness statements that it regarded as objectionable. In this Schedule, appellant recorded:

> "*The only alleged practices of Senwes that require consideration by the Tribunal were … differentiation in silo costs depending on whether the producers sells it produce to Senwes or not; and differentiations in silo costs depending on whether the party storing grain is a trader or a producer*".

Appellant also objected to the introduction of evidence relating to the difference between how it treated itself and other parties. In the Schedule, it objected to Dr Theron's expert witness statement on the ground that it 'relied on evidence of alleged abuses that had not been referred'.

[31] To the extent that respondent contended that the issues had also received further attention in the witness statements, Mr Brassey submitted that witness summaries are not pleadings. Only pleadings define the issues between the parties.

The Commissions argument

[32] Mr Bhana, who appeared together with Mr Dalrymple on behalf of respondent, submitted that the issues relevant to the determination of the complaint, which were contained in the form duly filed, were the same as those which were relevant for demonstrating a margin squeeze. The conduct relied upon was the same: that is a price differentiation between appellant and rival traders. Accordingly, appellant did not have to conduct its case in any materially different fashion. Furthermore, it did not object to the evidence of Dr Theron which was led on the margin squeeze abuse. It allowed the proceedings to continue but took the view that it did not have to deal with this issue. It refrained from seeking a ruling at the commencement of the hearing as to whether the margin squeeze case was properly referred and it not did seek a ruling that evidence concerning this issue was inadmissible.

[33] At the very latest, from the time that respondent's expert Dr Theron had filed her summary, it was clear that her expert evidence was based upon a theory of harm relied upon by the Commission in the form of a margin squeeze. From then on, appellant had been placed on the alert that this

was the particular case which it was required to meet. Appellant did not expressly object to this evidence, notwithstanding that under cross-examination, some attempt was made to argue its relevance with Dr Theron although, again, this line of enquiry was not pursued.

[34] In the complaint, the allegation was made of an abuse of dominance in the handling and storage of grain market by charging effectively a lower storage price to a producer who agreed to sell to appellant the grain stored in the latter's silos. Furthermore, the allegation was made that producers who sell products to a third party which competes with appellant downstream pay a higher fee for the storage of their grain. This makes it 'virtually impossible for it to compete with Senwes in the trading market within the relevant geographic area'. As an alternative, the following appears in the complaint:

> "*Senwes's practice of charging deferential tariff fees for storage is exclusionary and has an anti-competitive effect, as it impedes or prevents CTH and other grain traders who would compete with Senwes from expanding within the downstream market for grain trading and is thus in contravention of section 8(c) of the Act*."

[35] Various witness statements amplified on this complaint. In particular, Dr Theron stated the following in her report:

> "*Senwes is dominant in the upstream market and controls the majority of the upstream facilities in the relevant market. Its*

downstream competitors need access to these facilities and there is an incentive for Senwes to engage in a strategy of 'raising rivals' costs or 'margin squeeze'. It will be explained below how Senwes acts in order to raise the costs of rivals (in the current case, other traders and buyers of grain storage services)…

A margin squeeze generally prevents rivals also active in the downstream market from making a profit. The dominant firm uses its power over supply of the downstream input to distort competition in this way. This can be done by raising input prices to a level where the rival firms cannot survive or compete. Generally, there should not be a discriminating difference between prices charged to the downstream rivals and its own integrated business (although a margin squeeze might be accompanied by price discrimination). In the current case, this is the alleged practice that Senwes is guilty of. If a producer sells its produce to Senwes Grain Marketing (Senwes' downstream integrated business/trading arm), then the price of grain storage is different from that charged to other downstream competitors."

Evaluation

[36] These competing submissions need to be evaluated in terms of the role which the Act envisaged for the Tribunal in the adjudication of competition disputes.

[37] Section 52(1) and (2) of the Act provide as follows:

> "*52. (1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act.*
>
> *(2) Subject to subsection (3) and (4), the Competition Tribunal-*
>
> *(a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and*
>
> *(b) may conduct its hearings informally or in an inquisitorial manner."*
>
> *(my emphasis)*

[38] Section 55 of the Act goes on to provide:

> "*55. (1) Subject to the Competition tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).*
>
> *(2) The Tribunal may condone any technical irregularities arising in any of its proceedings.*
>
> *(3) The Tribunal may-*

(a) *accept as evidence <u>any relevant oral testimony</u> document or other thing whether or not-*

(i) *it is given or proven under oath or affirmation ; or*

(ii) *<u>would be admissible as evidence in court</u>;*

(c) *refuse to accept any oral testimony, document or other thing that is unduly repetitious.*"

(my emphasis)

[39] These sections indicate that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings in the same way as would a civil court during a trial. The Tribunal is entitled to conduct its hearing 'as expeditiously as possible' and 'in accordance with the principles of natural justice'. Thus, it is empowered, if it so decides, to conduct its hearings in an informal manner or choose an inquisitorial model.

[40] The Act does not view the Tribunal as functioning in the same way as would an ordinary court, inflexibly constrained by an adversarial model of adjudication. While a party, against whom a complaint has been lodged, is clearly entitled to sufficient information to determine the nature of the prohibited practice, in terms of which the complaint has been lodged, the

enquiry as to the requisite level of understanding should not be sourced in principles which apply to the nature of adversarial proceedings employed in a civil case.

[41] In this case, the facts revealed that appellant knew, prior to the commencement of the hearing, of the nature of the evidence which would be led as a result of the production of various witness statements. Furthermore, although the respondent did not employ the phrase 'margin squeeze', it set out sufficient facts to indicate to a reasonable reader of the referral affidavit, possessed of a reasonable level of knowledge of competition law, that the nature of the alleged practice was predicated upon conduct which was alleged to have been pursued by the appellant.

[42] It is also significant that the appellant, notwithstanding an awareness of the allegations advanced on behalf of the respondent pertaining to the margin squeeze, as was evident from a number of witness statements, did not object at the time this evidence was led nor did it bring any application challenging this aspect of the case.

[43] For all of these reasons, the case was set out with sufficient specificity to allow the appellant to prepare therefore. There is accordingly no merit in the argument that the issue had not been pleaded with sufficient particularity to justify the conclusions that the Tribunal did not lawfully make its finding.

[44] This finding seeks to achieve a balance between a party such as complainant being placed in the position of knowing the case it is called to meet and not imposing unnecessary procedural rigidly upon the Tribunal. In this connection, the following statement of the law by Brassey *et al* Competition Law at 319 is very apposite:

> "*The Tribunal must conduct its hearing 'as expeditiously as possible' and 'in accordance with the principles of natural justice'. It may also conduct its hearings 'informally' or 'in an inquisitorial manner.' The trend towards inquisitorial proceedings arises from the concern that adversarial proceedings are unnecessarily drawn out and may lead to injustice where one party is able, for social and financial reasons, to secure more competent legal representation than another.*
>
> *The hallmark of inquisitorial, as opposed to adversarial, proceedings is that the judicial officer plays an active role in the presentation of evidence and the questioning of witnesses and does not rely exclusively on the parties' legal representatives to make their respective clients' cases. Thus, Tribunal members are empowered to summon persons to appear or to produce books, documents or other items necessary for the purpose of the hearing, to question any person, to accept oral submissions from any participant, to accept any other information submitted by a*

participant, and to determine any matter of procedure for the hearing."

The Nature of a Margin Squeeze

[45] Mr Brassey submitted that South African law would be ill advised, save if there was an express provision to the contrary, to develop the concept of a margin squeeze. In this connection Mr Brassey relied on an argument developed by JG Sidak 2006 (4) Journal of Competition Law and Economics 279 in which the learned author argued thus:

> *"The price-squeeze theory of antitrust liability should be abolished in American antitrust law. The theory is incompatible with contemporary anti-trust jurisprudence, and on economic grounds the threat of such liability discourages investment, retail price competition, and the voluntary provision of inputs on negotiated terms by vertically integrated monopolist to current and potential rivals otherwise unable to obtain or self-provide them. If a vertically integrated monopolist willing to provide inputs to rivals at a negotiated price exposes itself to a potential price-squeeze claim when it lowers its retail prices, it faces a strong disincentive to deal at all."*

[46] Mr Brassey sought to buttress this argument with reference to a recent decision of the Supreme Court of the United States in Pacific Bell

Telephone Company v Linkline Communications Inc. *et al*. (decision of the United States Supreme Court 25 February 2009). In this case, Roberts CJ held that, where there is no duty to deal in the wholesale market and there is no predatory pricing at the retail level, a firm has no obligation to deal under terms and conditions favourable to its competitors. Recognising price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. Chief Justice Roberts held that courts would then be aiming at a moving target, since it is the interaction between these two prices that may result in a squeeze. Moreover, firms seeking to avoid price-squeeze liability will have no safe harbor for their pricing practices. Accordingly, the court held that there was no basis under section 2 of the Sherman Act to bring a price-squeeze case.

[47] In Mr Brassey's view, as was made clear from the decision of the Tribunal, the existence of a margin squeeze abuse does not emerge from the clear language of the Act. Further, on the strength of the authorities he cited, there were grave doubts as to whether a margin squeeze is compatible with contemporary competition law. Hence, in his view, the Tribunal should have eschewed the acceptance of the doctrine and refused to read it in by implication.

[48] The Tribunal found legislative justification for a margin squeeze in terms of section 8(c). To recapitulate, this section provides that it is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that Act outweighs a technological, efficiency or other pro-competitive gain.

[49] This court has warned on a number of occasions against the tendency of the Tribunal initially to determine a result of a case which it considers to be compatible with the objectives of the Act and then to rewrite the relevant legislative provision to justify its initial finding. It is important to emphasise that this approach cannot, on any basis, be justified. A court or tribunal cannot draft legislation. If it does, it breaches the doctrine of separation of powers for it is the legislature's role to introduce and pass legislation. It is trite to note that a court is required to interpret this legislation.

[50] Much is made, and correctly so, of the interpretive scope available to courts as a result of a relatively recent adoption of a purposive approach to legal interpretation. But a purposive interpretation is designed to determine the purpose of the legislation through engagement with the text. The interpreter cannot simply read a purpose or object into a provision in an arbitrary manner, shorn of any plausible interpretative justification as to why the relevant statutory provision has been given this designated

meaning, other than to arrive at a result for which the Tribunal or court considers the legislature should have provided.

[51] Fortunately this is not such a case. The Tribunal correctly read an open ended provision, section 8(c), to include the concept of margin squeeze, in the light of the definition of exclusionary act which means an act that impedes or prevents a firm entering or expanding within a market. As Dr Theron noted, a margin squeeze generally will prevent a rival which is also active in the downstream market from making a profit. This is effected by a dominant firm employing its power over the supply of the downstream input to distort competition by raising input prices to a level where the rival firm cannot survive or compete. Restated, a margin squeeze exists where a dominant vertically integrated network operator sets its wholesale and/or retail prices at levels that do not give a reasonable margin to its downstream competitors.

[52] From this definition, the conditions for a margin squeeze can be set out thus:

1. one firm is dominant in the upstream market but also supplies an essential input to rivals in the downstream market within which it is also active;
2. the input provided by the dominant firm must be essential for the downstream firm to compete;

3. the input supplied must form a substantial part of the downstream firm's fixed expenditure. If it only constituted a small part of the firm's costs, it would be difficult to ascribe losses to the margin squeeze.

[53] The definition of an 'exclusionary act' in the Act is extremely wide. If properly proved, a margin squeeze, which would impede or prevent a firm from expanding or indeed entering into a market, would fall within its scope and therefore could be considered to be a prohibited abuse of dominance in terms of section 8(c) of the Act.

[54] This conclusion does not constitute judicial legislation, of the kind described above. Rather, it is a result which flows from a justifiable interpretation of a widely couched provision. Further, margin squeezes are recognised in a jurisdiction whose competition underpinnings are more congruent with the Act; that is the EU. See for example Deutsche Telekon AG v Commission (Case T – 271/03: 208); see also the decision of the UK Competition Appeal Tribunal in Genzyne LTD v Office of Fair Trading (Case No 1016/1/1/03: 11 March 2004) where a margin squeeze was recognised as a form of abuse to prevent competition on the merits:

> "*A further particular example of the same general principle may occur where an undertaking that is dominant in an upstream market supplies an essential input to its competitors in a*

downstream market, on which the dominant company is also active, at a price which does not enable its competitors on the downstream market to remain competitive. Such a practice is called a "margin squeeze" or "price squeeze"." at para 491

[55] For these reasons, there is no merit in relying upon US jurisprudence which is incompatible with the purposes of the Act, as can be determined from an engagement with the wording thereof in order to trump the argument for the inclusion of a margin squeeze into our law. Accordingly, there is no justification to reject the finding of the Tribunal, namely that a margin squeeze falls within the scope of section 8(c), read together with the definition of exclusionary act in section 1.

The Evidence in Relation to a Margin Squeeze

[56] Mr Brassey attacked the manner in which the Tribunal had justified its adverse finding against appellant on the basis of the evidence presented to it. Relying on the decision in Wanadoo Espana v Telefonica (decision of European Commission (4/7/2007)), Mr Brassey submitted that a complex methodology was required to assess the existence of a margin squeeze; in particular the Tribunal was required to consider five important issues:

> "*1. The level of efficiency of the competitor: profitability should be assessed on the basis of the dominant company's downstream costs ("the equally competitor test")';*
>
> *2. the appropriate cost standard, which is long run average incremental costs ("LRAIC");*
>
> *3. the profitability analysis to be made: the Commission has analysed profitability on the basis of two methods: namely the period-by-period method and the discounted cashflow ("DCF") method;*
>
> *4. the level of aggregation to be used in the margin squeeze test: the margin squeeze has been conducted on the basis of the mix of the retail services marketed by Telefonica';*
>
> *5. the upstream input when testing the replicability of the downstream prices: Telefonica's retail prices must be replicable by an equally efficient operator on the basis of at least one Telefonica product in each relevant wholesale market."*

[57] In Mr Brassey's view, the Tribunal had made no attempt to assess the full range of costs faced by the downstream competitors of appellant. No cost standard was adopted, no profitability analysis, in any detail, was conducted, aggregation was not undertaken and replicability was not tested. In his view, the reason that the Tribunal could not test these

questions was that no evidence had been led by the Commission to meet the stringent test for finding that a margin squeeze abuse had been implemented by the appellant.

[58] Mr Brassey also criticised the implication that the storage input must have been essential, in the sense of constituting an essential facility for the downstream firm to compete. In his view, appellant's rival traders were able to compete without access to storage in appellant's silos. For example, Freestate Mielies had decided to diversify outside of the area of appellant. Whatever the limitations of the use of silos bags for storage, some traders, on the evidence available, had invested in silo bags.

[59] Mr Brassey contended that, while it might have been preferable for a trader to have access to a long term storage in the area which appellant was dominant, it could not be said that it was essential for a national trader which competes with appellant to have such access in that limited period and that limited area to remain competitively relevant.

[60] In order to evaluate these criticisms, it is important to emphasise the nature of respondent's case: appellant was a vertically integrated firm that supplies an essential input by way of storage, in a market in which it is dominant, to downstream rivals, that is to traders which trade in the physical market for grain. The supply is at a price that prevents the latter

from earning a viable price/cost margin in the market for long term storage (more than 100 days) in the area in which appellant is dominant.

[61] In her evidence, Dr Theron stated that, as the lower tariff was no longer available to all clients of appellant, that is to anyone who do not sell grain to appellant, including producers and other traders, this group had to pay a higher storage charge. Accordingly, they had to offer the farmer more for the farm to realise the same nett price.

[62] As Dr Theron said:

> "*This clearly raises the costs of doing business of Senwes's downstream competitors. As the downstream competitors still have to find ways to compete, they will have to absorb these costs by reducing their margins, i.e margin squeeze. Senwes can do this because they are dominant, and also because the vertically integrated nature of its upstream and downstream units means that they can absorb some losses in one market by increasing volumes and profits in a related market*."

This evidence from Dr Theron reveals that, unlike the cases cited by Mr Brassey, the present dispute did not involve a complex industry, but an industry in which the key three elements are storage, transport and finance. The transport differential was determined by the standard SAFEX calculation. Finance costs, on the evidence, appeared to be of a fairly standard nature. The only cost component that was in significant dispute comprised the cost of storage. As Dr Konrad Keyser testified, since appellant introduced, what he termed a discriminated tariff structure, the firm, of which he was a director, Brisen Commodities (Pty) Ltd, had virtually stopped its long term storage of grain with appellant, which prevented it from being competitive as a trader as compared to appellant. In Dr Keyser's view, Brisen's business, in the area in which appellant was dominant and in respect of the trading in grain which was stored over a long period of time, had deteriorated significantly.

[63] Significantly, in his evidence, Mr Wikus Grobler, the assistant general manager of the grain division of appellant, confirmed that, in calculating whether appellant internal trading division made a profit, storage charges were not taken into account. Thus, competitors were mulcted with storage charges while appellant's competing business was free of this additional cost.

[64] Dr Keyser testified that, as a result of the differential tariff imposed by appellant on rival traders, an increase of costs of 3.31% was experienced which was particularly onerous, when as he testified, "we work on a profit margin, gross profit margin of around 1% if lucky".

[65] On the basis of this evidence, the Tribunal correctly found that appellant was dominant in the grain storage market, that it was vertically integrated and traded significantly in the trading market. This conclusion elicited little by way of a plausible dispute. Mr Anton Lubbe, general manager of grain of appellant conceded, in his answering affidavit, that appellant accepted that the storage of grain was highly localised. He then stated:

> "*Senwes is also willing to accept, for the same purposes that within these local markets for the storage of grain, it is dominant within the contemplation of the statute*."

Furthermore, the evidence revealed that, in the trading market, appellant had a market share of 16% in the white maize trading market, 19% in yellow rice, 24% in sunflower and 13% in wheat. It is not an insignificant player in these trading markets. There was no opposition to the conclusion that storage and grain silos constitute an essential input to traders in the trading market, notwithstanding that, to a very small extent, silo bags appear to have been in use.

[66] The evidence, regarding the only contested requirement, that the dominant firm's prices would render the activities of an equally efficient rival uncompetitive was not refuted. As the Tribunal correctly noted, absent a refutation which it was incumbent upon Senwes to adduce, the Tribunal was entitled to assume that these storage costs were not passed on to appellant's trading arm. By extension of this argument, it can be

inferred that, if the trading arm was faced with similar costs for storage, it would not have been possible for it to offer its downstream prices and maintain a profitable margin.

[67] Taken together, this evidence justified the conclusion that appellant conducted an exclusionary act which had the effect of impeding or preventing rival traders downstream from competing with appellant's own downstream trading enterprise.

[68] Once this conclusion is reached, section 8(c) places an onus on the complainant, in this case, to demonstrate that the anti-competitive effect outweighs the gains which may emanate from the justifications contained in the provision. However, some justification is required from the dominant firm in order to engage in this process. In other words, there is, at least, an evidential burden placed upon the dominant firm to provide some evidence of technological, efficiency or other pro-competitive gains which flow from this exclusionary act.

[69] Appellant tentatively suggested that the differential pricing was designed to prevent what was referred to as "selecting against". This explanation was hardly developed before the Tribunal with any measure of coherence. To the extent that it was proffered, it emerged from the testimony of Mr Hodge, appellant's expert economist. He suggested that the point could

be illustrated thus: A held grain in terms of a silo certificate which is required to trade on SAFEX, A could decide which quantity of grain held under this certificate that he wished to trade. On the basis that A bought grain steadily throughout the relevant period and that he wished to sell some grain in the short term and some in the long term, he could minimise storage costs by retaining grain stored first and then sell it last (first and last out system). If A knew that he would sell late in the season, that is post 100 days, he could benefit from the cap because the grain would have been stored for more than a 100 days. Hence, A could obtain the benefit of the cap. If however, A wished to sell grain in the short term and was liable for the daily tariff during the first 100 days, he would sell grain acquired later, thereby operating a sell last in first out system.

[70] This example sought to confirm the testimony of Mr Booysen that, “we always hold the short end of the stick in terms of storage, so we decided to remove the cap.” Unfortunately, none of this evidence was ever put to the Commission’s expert, Dr Theron nor was any documentation provided which substantiated the version that this argument constituted appellant’s reason for the introduction of the differential. In short, on the basis of this dubious quality of evidence which stood to be rejected, the Tribunal was entitled to conclude that it did not need to engage in the balancing test required by section 8(c). There was no pro-competitive set of considerations which could be taken into account and accordingly section

8(c) of the Act was applicable to appellant's act; that is the margin squeeze.

The Cross Appeal

[71] The Commission has cross appealed that part of the decision and order in which the Tribunal found that the margin squeeze conduct was not an exclusionary act which fell to be determined within the scope of section 8(d) of the Act.

[72] In summary, the Commission submitted that the Tribunal ought to have found that the margin squeeze was recognised in international competition jurisprudence as a form of price discrimination and that it thus stood to be determined in terms of section 8(d) and/or 9(1) of the Act as opposed to section 8(c) thereof.

[73] The Commission thus contends that the margin squeeze constituted conduct which was prohibited in terms of section 8(d) because appellant's conduct raised the costs of its rivals and constituted an inducement for the purposes of section 8(d)(i). This act could also be prohibited under section 8(d)(iii) of the Act.

[74] In this connection, the referral complaint specifically referred to section 8(d) (i) of the Act namely, that a dominant firm may not require or induce a supplier or customer not to deal with a competitor:

> *"The storage fee differentials also depend on whether a producer would ultimately sell his/her grain to Senwes or not. The capped fee … i.e. the ceding amount only applies in situations where the farmer concerned intends to sell his grain to Senwes. However, if the farmer wishes to sell the grain to a third party, like CTH, the capped storage tariff does not apply, and is not available… Senwes has contravened this section of the Act section 8(d)(i)) by inducing producers not to deal with a competitor viz.CTH amongst others.*"

[75] Insofar as this aspect of the complaint was concerned, the Tribunal found:

> "*We thus find that on the balance of probabilities Senwes had a practice of through its traders of making farmers and other traders believe that farmers would have an advantage by selling to Senwes because it could make them a better offer because it did not apply its storage policy to own trading division as it did to third parties. This practice seems to have existed independently of the issue of the cap. Indeed it is more probable that it operated before farmers were sent their annual cap invoice – the only invoice they seem to get for storage except when they apply for a silo certificate in which case they are selling to a third party and storage would be charged*

> *on the daily tariff from the date of delivery of the grain to the silo. Thus the inducement representations on the probabilities were at their most effective in the pre-cap period when farmers who had enquired about wanting to sell grain were induced to sell to Senwes on the basis of representations accompanying the boer prys offer, which appeared to be and more than likely probably was more favourable than the price offered by rival traders for an equivalent period.* "

[76] However, in the pre-cap period, the Tribunal found that there was insufficient evidence of an anti-competitive effect. While the Commission's notice of a cross appeal challenged this part of the Tribunal's decision, it did not provide any evidence to gainsay the conclusion adopted by the Tribunal.

[77] This failure is not surprising because there was a factual dispute regarding whether appellant offered a cap to producers only if they sold their grain to it. Some of the traders, whose evidence was led by the Commission, accepted that producers obtained the cap, irrespective of the identity of the purchaser of the grain. Mr Bester, a trader who operated in the area, acknowledged that producers received the benefit of the cap, of whether or not they sold their grain to Senwes and that the daily rate only started to apply once the trader become the owner of the grain. Another witness,

Mr Johannes Davel appeared to have no knowledge of whether the cap was a conditional one. In his evidence, he expressly eschewed knowledge of a conditional tariff and referred only to the differential tariff between producers and traders.

[78] In my view, the Tribunal may have been generous to the Commission in its treatment of the available evidence of the conditional tariff, by assuming that the markets generally believed that a conditional tariff existed, notwithstanding the absence of undisputed any factual foundation for such a conclusion.

[79] The Commission also contended that the Tribunal had erred by not finding that there was price discrimination in terms of section 9 of Act, namely that the traders suffered a substantial relative disadvantage on the basis of the differential prices charged. In the referral complaint, the case on price discrimination is set out thus:

> "*The service of provision of commercial handling and storage facilities of grain by Senwes to producers and traders constitutes a sale, in equivalent transactions, of services of like grade and quality to different purchasers.*

Senwes' differentiated pricing policy for grain storage between producers and traders is such that it involves discriminating between those purchasers in terms of:

1. The price charged for the service: or

2. The discount or rebate given or allowed in relation to the supply of the service.

The aforegoing conduct further has the effect of substantially preventing or lessening competition within the contemplation of section 9(1) and is therefore prohibited price discrimination in terms of the Act."

[80] In its cross appeal, the Commission contends that appellant engaged in prohibited price discrimination because of the effect on the structure of the market which been found pursuant to the exclusionary act.

[81] Mr Bhana submitted that this act had lessened competition, and was thus contextually linked with its potential effect on the structure and degree of concentration in the relevant market. The lessening of competition through price discrimination was not limited to an examination of what happens to competition between farmers and traders.

[82] Mr Brassey observed correctly, that to bring a case under section 9, the Commission was required to show an equivalence between the

transactions concerned. Thus, on the assumption that the Commission was not limited, by virtue of the pleadings, to an assessment of the differentiation between producers and traders, and the differentiation between appellant and third party traders, the Commission had to show, in the present case, that the transaction, in which a dominant firm provides a service or product to its own vertically integrated division, is equivalent to an arms' length transaction with a third party. Alternatively, if it continues to rely on the difference between traders and producers, it must show equivalence in respect of these transactions.

[83] On the evidence, it is difficult to see how the Commission's case can pass muster. The producers and traders were competitors. Producers sell to traders who sell to other traders or third parties. Furthermore, as already noted, there was no evidence that farmers were actually denied the cap because they sold to a third party trader as opposed to appellant nor was there evidence of appellant systematically waiving the daily fee when farmers sold to appellant. In addition, the evidence indicated that the true harm created by the price differential was upon the relationship between appellant and the traders in the trading market and not between traders and producers or farmers.

[84] For these reasons therefore, the Tribunal was correct to conclude that the case was best characterised as an exclusionary abuse under section 8(c)

rather than one of price discrimination in terms of section 9(1), as this part of the case was specifically pleaded. The Commission also contended that it had a case based upon a contravention of section 8(d)(iii); that is the facts supported the conclusion for a case of mixed bundling, where the dominant firm makes its two services available in combination for a lower combined price than the sum of the prices for the two services if they been offered separately.

[85] There is, in my view, no need to traverse the arguments raised with regard to a mixed bundling case. The notice of cross appeal provides no indication that the Commission's intended to mount a case based on "mixed bundling". Not even the most generous interpretation of the notice of cross-appeal supports such a conclusion. It appears to have been only the conditional tariff on which the Commission relied in its notice of cross appeal when it sought to argue for a finding based upon the provisions of section 8(d)(iii). If it wished to have based its case on a mixed bundling argument, the least it could have done was to have set out the basis of its case in its notice of cross appeal.

[86] This court is reluctant to permit further arguments of substance to be raised when they were not specifically contained in the notice of the cross appeal which forms the basis of the case brought before this court, let alone where there is no benefit of the Tribunal's view on a point, which

appears to have been thought of at the proverbial eleventh hour. The cross appeal on this issue does not get out of the starting blocks.

[83] For all these reasons therefore, the following order is made.

1. The appeal is dismissed with costs, including the costs of two counsel.
2. The cross appeal is dismissed, including the costs of two counsel.
3. The order of the Tribunal of 3 February 2009, is confirmed.

DAVIS J P

MAILULA and MALAN JJA concurred.