IN THE COMPETITION APPEAL COURT

CAC case no: 32/cac/sept/03

Tribunal case no: 69/am/dec01

In the matter between:

MIKE'S CHICKEN (PTY) LTD	First Appellant
DAYBREAK FARMS (PTY) LTD	Second Appellant
MIDWAY CHIX (PTY) LTD	Third Appellant
and	
ASTRAL FOODS LIMITED	First Respondent
THE COMPETITION COMMISSION	Second Respondent

JUDGMENT

Malan AJA:

1. The Appellants appeal against a decision of the Competition Tribunal handed down on 18 July 2003 ("the 2003 Tribunal Order"). The decision of the Tribunal concerns two applications brought in terms of s 66(1) of the Competition Act 89 of 1998 which allows the Tribunal to "vary or rescind" a decision or an order

> "(a) erroneously sought or granted in the absence of a party affected by it;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission; or
>
> (c) made or granted as a result of a mistake common to all the parties to the proceeding."

The issue concerns primarily paragraph (b) of s 66(1).

2. The 2003 Tribunal Order relates to an application by Astral (the First Respondent) for the variation and or clarification of the order given by the Tribunal on 16 April 2002 ("the 2002 Tribunal Order") approving conditionally the intermediate merger between Astral (the "First Respondent") and National Chick Limited ("Natchix").

In December 2001 Astral notified the Second Respondent (the "Commission") of its intention to merge with Natchix. The merger was dealt with as an intermediate merger by the Commission and was prohibited. The merging parties then requested the Competition Tribunal to consider the merger. The Tribunal did so and approved the merger subject to certain conditions relating to the "broiler industry" and the "animal feeds industry" (the "2002 Tribunal Order"). Subsequent to the merger and in November 2002 Astral approached the Tribunal seeking an order as a matter of urgency clarifying, alternatively, varying the conditions imposed in respect of the "broiler industry" (the "variation application"). It did so because the First Appellant ("Mike's Chicken") and the Second Appellant ("Daybreak") had in the immediately preceding months asserted that the 2002 Tribunal Order rendered their long-term supply contracts, concluded with Natchix prior to the merger, null and void. This assertion arose in the context of the failure of Mike's Chicken and Daybreak to

adhere to those contracts in the second half of 2002 and to purchase the agreed number of day-old chicks from Natchix (by that stage a division of Astral).

The Appellants applied for leave to intervene in this application (the "intervention application") in December 2002 and were given leave to do so in February 2003. In addition, the appellants brought their own counter-application to clarify, alternatively, vary the Tribunal's Order.

In the 2003 Tribunal Order the Tribunal declined to grant the variation sought by Astral. However, it clarified its order because it found that the conditions imposed on the merger were ambiguous as to how the those conditions were to impact on existing contracts between Natchix and its customers. Two declaratory orders were granted. The first was to the effect that existing contracts were not affected by the order. The second was that any inconsistency between the conditions and any provision in an existing contract would not invalidate that contract but that non-compliance with any condition by Astral would constitute a breach of the conditions to which the merger was subject. Moreover, the Tribunal *mero motu* amended its original order by the deletion of a sentence in paragraph 1.4 (Record at 423:6-29).

3. In the variation application Astral disputed that the 2002 Tribunal Order had the effect that Mike's Chicken and Daybreak claimed and asserted that it was never contemplated by any of the participants in the intermediate merger proceedings that Natchix's existing customer base would be placed in jeopardy immediately after the conditional approval of the merger by the Tribunal. Astral was, so they asserted, unable to attempt to enforce its contractual remedies against Mike's Chicken and Daybreak in a civil forum. Any attempt to do so would have been met by the defence that, in terms of s 65 of the Competition Act, 89 of 1998 ("the Act"), a civil court or arbitration tribunal is precluded from considering the issue on its merits, unless any competition issue was resolved.

4. The variation application was not opposed by the only other party to the intermediate merger proceedings, the Commission. The Commission has also advised that it does not intend participating in this appeal and will abide the decision of this Court.

The Appellants contend on appeal that the Tribunal was wrong when construing and clarifying the 2002 Tribunal Order. They argue that the Order was not ambiguous and thus not susceptible of alteration either by way of alteration or variation. Alternatively, and in so far as the Order might have been ambiguous, the Tribunal should have made it clear that

all existing contracts were terminated.

5. As appears from the decision and reasons handed down by the Tribunal on 18 July 2003, when granting the 2003 Tribunal Order, the Tribunal stated that it had not intended to invalidate existing long-term supply contracts between Natchix and its customers, and that the 2002 Tribunal Order did not have that effect. The Tribunal formulated the issues it had to deal with thus:

> "Two issues arise from these applications. Firstly, is the Tribunal's order ambiguous with regard to the meaning of independent customers and, secondly, is the order ambiguous because the Tribunal's intention regarding the status of Astral's existing long-term supply agreements with independent customers, post the merger, is not clear? In regard to the second question an issue of law also arises, namely what is the juristic effect of conditions imposed upon parties to a merger?" (§ 13 at Record 415:21-9).

Under the heading, *Conditions in relation to the Broiler Industry*, there are definitions of "Astral" and "Independent customer", and thereafter three clauses, the first of which has four parts. Clause 1 provides that:

> "Astral must supply any independent customer on the following basis:
>
> 1.1 Subject to sub-paragraphs 1.3 and 1.4 below, in terms of a

standard form contract approved by the Competition Commission.

1.2 In the case of any disease or any other form of force majeure, Astral must reduce its supply to all customers, including entities within the Astral group, pro rata to their ordinary volumes purchased.

1.3 In the event that an independent customer does not wish to enter into the standard contract with Astral, Astral must supply that customer in accordance with the principles set out in sub-paragraph 1.4 below, except for those that relate to notice periods.

1.4 Astral may not discriminate in its conditions of supply between entities in its own group and its independent customers for equivalent transactions. In particular it may not discriminate between them in relation to price, discounts or rebates offered. The determination of prices remains in the discretion of Astral. Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral. The parties to the agreement must each be required to give notice to the other if they do not wish to renew the contract. The length of this period must be the same for both parties and must be reasonable having regard to the nature of the industry. The contracts must be of a five-year duration."

Clause 2 stipulates that the "conditions set out in clause 1 above shall apply for five years from date of this order".

Clause 3 provides that: "The Commission's discretion in approving the standard form contract is limited to ensuring that it complies with the principles set out in sub-paragraph 1.4 above".

"Astral" is defined "unless the context indicates otherwise" as "Astral Foods Limited or any firm controlled by Astral Foods Ltd within the meaning of section 12(2) of the Act". "Independent customer" is "any firm which, at the date of this order was a customer of National Chick Limited ('Natchix') and/or Ross Poultry Breeders (Pty) Ltd and that is not controlled by Astral" (see Record at 216). It is not disputed that the first two appellants are "independent customers" as defined in the order.

The *Conditions* do not specifically refer to existing long-term contracts between independent customers and Natchix; nor are such contracts mentioned elsewhere in the 2002 Tribunal Order

The Tribunal itself commented on this at paragraphs 20 and 23 of its decision and reasons of 18 July 2003 ("*the Decision and Reasons*"). In the first sentence of the former paragraph, the Tribunal noted:

"The order does not specifically address long-term supply agreements that existed before the merger" (Record at 416).

In paragraph 23 it recorded that:

"The order does not shed any light on the status of long-term supply agreements post the

merger, nor is the language of the order clear on what the Tribunal's intentions were. To find clarity we will consider the Tribunal's reasons. If no clear answer can be found, we'll step back further in history, to search the record of the hearing (Record at 418)."

7 In the variation application Astral sought clarity as to the meaning of the 2002 Tribunal Order vis-à-vis long-term supply contracts in existence at the time of the merger (Record at 13; § 2 of the Notice of Motion). The variation proposed was the insertion of a clause 1.5 under the *Conditions*, which *inter alia*stated that existing contracts were unaffected by the 2002 Tribunal Order. Astral submitted that a variation of this nature was permitted in terms of s 66(1)(b) of the Act. Secondly, Astral sought declaratory relief of a similar nature (Record at 13-14; § 3 Notice of Motion). The precise relief sought in this regard was that:

"3.1 Existing contracts with independent customers are unaffected by this Order, subject to amendments required to ensure consistency with sub-paragraph 1.4 of the Tribunal Order, such amendments pertaining to price, discounts or rebates, exclusive purchasing obligations, notice periods and the length of the contract;

3.2 Independent customers who have concluded supply contracts are to be afforded an opportunity to enter into the standard form contract approved by the Competition Commission;

3.3 In the event of any independent customer with an existing contract concluding a standard form contract, neither the volume of chicks ordered in terms of the existing contract, nor the notice periods specified therein, can be varied in the standard contract; and

3.4 In the event of an independent customer with an existing contract not

concluding the standard contract, the existing contract remains of full force and effect as per paragraph (a) above."

Astral submitted that relief of this nature was competent in terms of s 27(1)(d) of the Act, a subsection which provides that the Competition Tribunal may

"make any ruling or order necessary or incidental to the performance of its functions in terms of this Act".

Astral contended that this provision gives the Tribunal the power to explain its own rulings, *inter alia*, by means of a declarator. The declaratory relief, while not stated in the annexure to the notice of motion as being in the alternative, was dispensable in the event of the variation sought by Astral in paragraph 2 of its notice of motion being granted. Conversely, were the declaratory orders (or any other declarators affirming the continued validity of the pre-April 2002 supply contracts) to be given, then any variation of the Tribunal Order would not be required. Furthermore, neither the declarators nor the variations were necessarily required in the event of the Tribunal finding that no amendment to the 2002 Tribunal Order was

needed because the 2002 Tribunal Order did not purport to cancel existing supply contracts, nor actually have such an effect. The Tribunal was also informed at the hearing that Astral would not be persisting in seeking a variation: in essence what it wanted was declaratory relief to the effect that its long-term supply contracts were of full force and effect. (See Record at 413 fn 6). In any event, the Appellants did not contend on appeal that any of the long-term contracts were in fact invalidated by the order given by the Tribunal.

8 The Appellants opposed the variation application, after having been permitted by the Tribunal to intervene and to file an answering affidavit and any counter-application in those proceedings (Record at 401-409). The Appellants also filed their own counter-application in terms of s 66(1) of the Act (Record at 187-194). In their counter-application, they contended that the Tribunal clearly intended to cancel existing contracts between Natchix and its customers (Record at 193 § 10, read with 128 §§ 23 and 24). They also alleged that, after the merger, any Agreements for the supply of day-old chicks could not oblige customers to purchase minimum or fixed quantities (Record at 193 § 10, read with 128-129 § 24).

Accordingly, the Appellants requested the following declarations/variations in relation to the 2002 Tribunal Order (Record at 189-190):

"1. Declaring that the phrase "*independent customer*" in the order granted by the Tribunal on 2 April 2002 in this matter includes a customer who prior to the merger between Astral Foods Limited ("Astral") and National Chicks Limited ("Natchix") was party to a minimum-quantity or fixed-quantity supply agreement with Natchix.

2. Alternatively, varying the order of the Tribunal to include within the definition of the phrase "independent customer" in the order granted by the Tribunal on 2 April 2002 in this matter a customer who prior to the merger was party to a minimum-quantity or fixed-quantity supply agreement with Natchix.

3. Declaring that in terms of the order issued by the Tribunal on 2 April 2002 all contracts between independent customers and Natchix were cancelled as at the date of merger.

4. Alternatively, varying the order of the Tribunal by the insertion of a paragraph 1 stating: "All existing contracts between Natchix and independent customers are hereby cancelled."

5. Varying paragraph 1.4 of the conditions imposed by the Tribunal on 2 April 2002 by the insertion of the phrase "or that requires them to purchase specified minimum or fixed quantities from Natchix" after the sentence "Astral may not impose any condition on an independent customer that requires them to purchase exclusively from Astral."

9 The relief sought by the Appellants in the counter-application was that the

2002 Tribunal Order voided, or cancelled, all existing contracts between Natchix and independent customers as of 2 April 2002 – the date of the 2002 Tribunal Order.

10 The Tribunal's order in the variation application (the 2003 Tribunal Order) against which this appeal is brought reads as follows (Record at §§ 49-50):

"49. In view of the fact that the reference to the five years period in paragraph 1.4 is confusing we are persuaded that the Order is ambiguous and that the ambiguity will be cured by its deletion. In order to make the status of contracts that were in existence at the time of the Order clear, we do not need to amend the Order, but it will suffice to add two declaratory orders as well, given the dispute between the parties.

50. We make the following order:

1) Varying the Order of the Tribunal dated 2 April 2002, (the "Order") by deleting in paragraph 1.4 the words:*" The contracts must be of a five year duration."*

2) Declaring that the validity of any contract that was in existence with an independent customer, at the time of the Order, remains unaffected by the Order.

3) Declaring that to the extent that any provision in any existing contract with an independent customer, is inconsistent with the principles in paragraph 1.4 of the Order, as amended by this order, that such inconsistency does not invalidate those terms of the contract, but will if enforced by Astral Foods Limited and/or National Chick Limited constitute a breach of the conditions attached to the approval of the merger."

11 In coming to these conclusions the Tribunal obviously accepted that it had the power to vary an order in the circumstances set out in s 66(1) of the Act, but that its powers in this regard are circumscribed (Record at 415 § 9-11). The Tribunal stated, in this regard, in § 11:

> "It is a limited inquiry and the basic rule that the court follows is to ascertain the court's intention, primarily, from the language of the order. If the meaning of the order is clear and unambiguous, no extrinsic fact or evidence is admiss[i]ble to contradict, vary, qualify or supplement it. It is decisive and cannot be restricted or extended by anything else in the judgement. But, if any uncertainty in its meaning emerges, the extrinsic circumstances surrounding or leading up to the court's granting of the order may be investigated and taken into account in order to clarify it. In doing so the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. Only if it still leaves the matter unclear and ambiguous would the court go to the record to cure the ambiguity."

The Tribunal considered whether the words "independent customers" were ambiguous and whether a variation of the 2003 Tribunal Order was needed in that regard. It concluded that this phrase was not ambiguous. It applied to all customers of Natchix that were not controlled by Astral, whether or not they were parties to a long-term agreement (Record at 415-6 §§ 14-9). The word "any", the Tribunal said (§ 15), is "extremely wide".

The Tribunal next addressed the effect of the conditional approval of the intermediate merger on existing long-term supply contracts and said (Record at 418-419 §§ 23-26):

"23. The order does not shed any light on the status of long-term supply agreements post the merger, nor is the language of the order clear on what the Tribunal's intentions were. To find clarity we will consider the Tribunal's reasons. If no clear answer can be found, we'll step back further in history, to search the record of the hearing.

24. The Tribunal concluded in its reasons that the merger raised competition concerns and that it needed to impose conditions specifically in order to lower the risk of foreclosure, which was very real in the short term because of structural problems in the upstream market. The concern of those participants at the hearing who represented the industry was not that they would be held to an oppressive contract by the merged firm but that, on the contrary, the merged firm with its own broiler outlets would self deal and not supply them. It was told that Cobb, Ross' main rival in the upstream market needed at least 5 years to fully enter the South African market. However, nowhere in its reasons does it specifically mention or address the status of existing long-term contracts post the merger or is it possible to derive what the Tribunal had in mind. There was simply no necessity to do this.

25. Existing customers who were supplied in terms of valid contracts were, per definition, not foreclosed. In the event that their contract expired or was terminated and they were then faced with the threat of foreclosure, they could then have availed themselves, in the same way that any other ad hoc customer would avail itself, of the protection extended by the conditions imposed by the Tribunal on Astral. But until they were denied supply by Astral the existing contract holders had no need of the protection of the conditions – they were protected by the terms of their existing supply contracts. At no stage during the merger proceedings was it ever suggested that the existing contracts were anti-competitive

and should thus be vitiated by the insertion of an appropriate condition. It was rather suggested that the structural changes wrought by the merger would permit Astral to favour downstream customers within its own stable over 'independent' customers, that is customers outside of the Astral stable. This was the purpose of the conditions that were imposed.

26. In the record of the merger proceedings we find a passage where the presiding member briefly referred to the status of existing customers at page 65 of the transcript of 20 March 2002:

'It's just to say that our reach does not extend beyond ensuring that you have a supplier of day-old chicks and that the transaction does not foreclose that. … I presume that they (referring to Astral*) have arrangements with existing customers and it would simply be some sort of alteration in that arrangement to ensure that those customers did not have any reason to fear that their supply would be foreclosed*.'

27. From the above it is clear that the Tribunal did not think that it had the power to render void any pre-merger supply contracts, nor did it intend for its conditions to have such far-reaching consequences because it refers to its "reach" as not extending beyond the prevention of foreclosure. It merely envisaged that those clauses in existing contracts that did not comply with the Tribunal's intention to prevent foreclosure should not be enforced or exercised in a manner contrary to the principles set out in paragraph 1.4."

The Tribunal then considered the "juristic nature of the condition attached to a merger" and concluded (Record at 421 § 40):

"In the present case there was indeed no express requirement in the order that the merged firm cancel its existing contracts. But to the extent that there may be an implied one, which we do not concede, it still would not have invalidated the existing contracts for

the reasons we have outlined."

With regard to the other issues (ie the duration of long-term supply agreements and whether the 2002 Tribunal Order forbade any contract to provide for minimum or fixed quantities of supply) the Tribunal found (Record at p 422 § 47):

"The Tribunal order is clear and no ambiguity exists with regard to minimum or fixed quantities of supply. We find no reference to minimum quantity or fixed quantity of supply in the Tribunal order. In fact the interven[e]rs acknowledge this in their answering affidavit by saying that it is 'implicit' in the conditions that Astral may not include in the new contract a clause which has the effect of requiring customers to purchase minimum or fixed quantities."

With regard to the duration of the contracts (clause 1.4 of the order) the Tribunal found (Record 422 at §§ 44-6):

"43 Paragraph 1.4 addresses specific antitrust concerns, which the Tribunal identified may potentially flow from the merger. These relate to discrimination on conditions of supply, price, discounts or rebates, exclusivity and renewal of contracts. The Tribunal sought to address these concerns by requiring that standard agreements be drawn up that comply with the principles set out in 4.1 and which standard agreements had to be effective for 5 years.

44 Paragraph 2 relates to the five years which Cobb, a competitor of Ross, indicated it will need to become an alternative source for independent breeders in the South African market. The Tribunal mentioned in its reasons that the merger only poses short-term structural problems and that if, in five years, a new entrant has established itself in the market, the order would be superfluous because the foreclosure concerns would be cured. No other reason was put forward

for imposing the 5 year period.
45 However, one gets conflicting results when one applies both conditions. For example, if a standard agreement is entered into in 2005, 3 years after the date of the order, it must, according to paragraph 1.4, run for 5 years until 2010. This will mean that the parties will be tied to an agreement three years after the conditions of the Tribunal order have expired in 2007, as set out in par 2. Clearly this was not the intention of the Tribunal. It wanted to facilitate the entry of Cobb into the market, not prescribe the length of standard supply agreements, a term of the contract which is usually negotiated between parties and which takes into account the specific needs and future plans of each customer.
46 We must, therefore, conclude that the Tribunal made an obvious drafting error when it included the last sentence in par 1.4. We find that to cure this ambiguity, the order must be varied by the deletion of the last sentence of paragraph 1.4."

12 The Appellants appeal against the declaration by the Tribunal that the validity of any contract between Natchix and its customers at the time of the merger was unaffected by the 2002 Tribunal Order submitting that Astral was obliged to replace these contracts with new ones in standard form (Appellants' Heads at 3 § 4).

The Appellants' grounds of appeal are the following:

"1. The finding that the order originally issued by the Tribunal was ambiguous as to the effect of the conditions in the order on existing supply agreements between Astral and its customers;

2. The finding that the Tribunal's intention as to the effect of the conditions on existing supply agreements could not be ascertained from its reasons for the order;

3. The finding that on a proper reading of the record of proceedings the Tribunal's intention as to the effect of the conditions on existing agreements was that the Tribunal did not require Astral to replace its existing supply contracts with new contracts."

There appears to be no appeal against the last sentence in paragraph 1.4 of the Tribunal Order. In this respect the Tribunal found that that an "obvious drafting error was made" (§ 46 at Record 422) and gave an order varying the 2002 Tribunal Order by deleting the words "The contracts must be of a five year duration" in paragraph 1.4.

The Appellants advance two main arguments in support of their appeal: first, that 2002 Tribunal Order was not ambiguous and therefore not susceptible to alteration, either by clarification or variation; secondly, and in the alternative, that insofar as the 2002 Tribunal Order was ambiguous, the Tribunal did not properly clarify that order (or, in other words, that the Tribunal misunderstood, or has misstated, the nature and intent of the 2002 Tribunal Order (Appellants' Heads at 3-4 §§ 6-7).

13 Section 66 has been modelled on Uniform Rule 42(1), with the counterpart to s 66(1)(b) being Rule 42(1)(b). The principles developed in regard to Rule 42 accordingly provide guidance in the interpretation of s 66(1) of the Act. The Tribunal, like a court, may thus:

"clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order."

(Erasmus *Superior Court Practice*at B1-309). , too: *West Rand Estates Ltd v New Zealand Insurance Co Ltd*1926 AD 173 176,

186-7; *Firestone SA (Pty) Ltd v Gentiruco AG*1977 4 SA 298 (A) 306; *African National Congress v United Democratic Movement Movement and Others (Krog and Others Intervening)*2003 1 SA 533 (CC) §§ 14-6; *Administrator Cape and Another v Ntshwaqela and Others* 1 SA 705 (A) 715F-716B.

In *Firestone South Africa (Pty) Ltd v Genticuro AGsupra at* DH Trollip JA said:

"First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order

can be asked to state what its subjective intention was in giving it … Of course, different considerations apply, if not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise … But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefore, can be used to elucidate it. if, despite that, the uncertainty still persists, other relevant facts or evidence are admissible to resolve it." (My underlining and see *Postmasburg Motors (Edms) Bpk v Peens an Andere* 1970 2 SA 35 (NC) 39FH where Van den Heever J, as he then was, said: "In 'n geval soos die onderhawige, dan, moet die betekenis van die landdros se bevel gesoek word in die eerste plek in die betrokke dokumente. Die hof wat die bevel uitvaardig kan miskien genader word om 'n dubbelsinnigheid op te klaar … maar dit is duidelik … dat geen getuienis toelaatbaar is om die inhoud van die hofbevel te weerspreek, wysig, of daaraan by te voeg nie … allermins 'n verklaring van die landdros self dat hy iets anders bedoel het as wat hy gesê het … Hierdie is 'n regsreël, nie slegs 'n reël van die bewysleer waarvan die partye kan afstand doen nie … wat geen krag verloor as gevolg van die feit dat in bepaalde omstandighede die hof sy bevel kan 'wysig' deur byvoorbeeld 'n kostebevel daaraan toe te voeg nie ...(my underlining)."

The reason for this rule that "once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it" is that the court thereafter becomes *functus officio* "its jurisdiction in the case having been fully and

finally exercised, its authority over the subject-matter has ceased" *(Firestone SA (Pty) Ltd v Gentiruco AG supra* 306FG; *West Rand Estates Ltd v New Zealand Insurance Co Ltd supra* 176 and 187 and cf *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: in re First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 1 SA 677 (T) 681EG). The exceptions to this rule are few and concern accessory or consequential matters such as costs or interest; cases where the judgment or order is obscure, ambiguous or otherwise uncertain such as is alleged in this instance; the correction of clerical, arithmetical or other errors and questions relating to costs (see *FirestoneSA (Pty) Ltd v Gentiruco AG supra* 306H-307H; *West Rand Estates Ltd v New Zealand Insurance Co Ltd supra* 176 and 187).

It follows from the primary rule of construction that the words used must be given their ordinary and grammatical meaning unless this would result in "some absurdity, some repugnancy or inconsistency with" the rest of the text (*Coopers*

& Lybrandt and Others v Bryant 3 SA 761 (A) 767EF). As it was said in *Total South Africa (Pty) Ltd v Bekker NO* 1 SA 617 (A) 624I-625B after referring to the admissibility of "background" and "surrounding" circumstances as a guide to interpretation:

"What is clear, however, is that where sufficient certainty as to the meaning of a contract can be gathered from the language alone it is impermissible to reach a different result by drawing inferences from surrounding circumstances … The underlying reason for this approach is that where words in a contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention …". (My underlining. See also *Delmas Milling Company Limited v Du Plessis* 1955 3 SA 447 (A) at 454G-455A; *Sun Packaging v Vreulink* 1996 4 SA 176 (A) at 184CD); *Coopers & Lybrand supra* at 768AE); *Plaaslike Oorgangsraad Bronkhorstspruit v Senekal* 2001 3 SA 9 (A) 18G-19A); *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others* 1996 3 SA 355 (A) 363 B).

It follows that where the language of the order is unambiguous, no reference to extrinsic evidence may be made to ascertain its proper meaning. Only when the order is ambiguous, in the sense that it cannot be properly construed, may a court vary it in terms of s 66. The power given by s 66 is substantially similar to the one given by Rule 42 of the Uniform Rules of Court: it follows that the court may not alter the "sense and substance" of the order or correct an order.

14 The order of the Tribunal is unambiguous. It states that Astral "must supply any independent customer" … in terms of a standard form contract approved by the Competition Commission". Only one exception is provided for in paragraph 1.3 of the order, viz that if "an independent customer does not wish to enter into the standard contract with Astral, then Astral must supply that customer in accordance with the principles set out … below". It is clear from the terms of the order that there are only two ways in which customers can be supplied: either in terms of the supply contract or on an *ad hoc* basis where the customer does not wish to enter into the standard term contract. Both methods are regulated by the order. The word "any" is clear and unambiguous and leaves no room to differentiate between classes of customer. The obligation on Astral is unequivocal and applies to all customers. Indeed, the order seeks to remove all discrimination between customers since it calls upon Astral not to "discriminate in its conditions of supply between entities in its own group and its independent

customers for equivalent transactions". The order sets out specific conditions of supply applicable to all customers, for example, those relating to price, discounts or rebates (Order 1.4 at Record 217:6-15). "Independent customers" are not to be worse off than entities in the Astral group. A uniform regime is introduced by the order available to all customers whether they have long-term contracts with Astral or not. Astral "must" supply in accordance with this new set of rules. There is nothing ambiguous in the order. It is perfectly clear and contains neither an obvious error nor an omission. The 2002 Tribunal Order did not make any reference to long-term supply contracts. This, however, does not render the order ambiguous and subject to correction or interpretation by the Tribunal despite the fact that the Tribunal was aware of their existence. There is nothing absurd, repugnant or inconsistent in the order.

In so far as reference to the reasons or context of the order is permissible, a word of warning should be expressed. The record of the proceedings before the Tribunal reflects an on-going debate between the Tribunal and the parties and their

representatives. It does not necessarily reflect the considered reasoning of the Tribunal but rather shows an exploration of the issues to be determined. It would be erroneous to elevate remarks made by the members of the Tribunal during proceedings before it to reasons given for the order. However, the letter written on behalf of the Respondents dated 28 February 2002 (Record at 427 ff) shows beyond doubt that the conditions imposed were intended by Astral to alleviate the concerns of the Commission that Astral will pursuant to the merger "foreclose" the market for day old chicks. It was intended that Astral would, for this purpose, conclude with allits customers fixed term contacts on certain terms. This offer, made on behalf of Astral, was confirmed several times during the proceedings before the Tribunal (see Record at 294:6-17; 369:20-370:3; 381-2; 386:23-387:19 ("It applies across the board"); 391:4-11; 398:12-18 and compare the other remarks at 344:19-23; 349-50; 379:16-21.) It follows that, read with the reasons, the order of the Tribunal is not ambiguous. The Tribunal itself is not empowered to state what it subjectively had

meant with the order or to correct a perceived error. Section 27(1)(d) was obviously not intended to provide for an eventuality covered specifically by s 66.

15 As the Tribunal has recognized in its *Reasons and Decisions*, it would have been beyond the power of the Tribunal to "void" or cancel the existing long-term contracts of the Appellants (§ 29ff at Record 419). Section 16(2) of the Competition Act gives the Tribunal the power to (a) approve a merger, (b) approve a merger "subject to any conditions", or (c) prohibit implementation of a merger. There is no restriction in the Act on the kind of conditions that may be imposed, but they must be conditions, to which the merger by law is subject. The Tribunal could not have interfered with an existing and on-going contractual relationship between Natchix and its customers. It was for Natchix to find a way of complying with the merger conditions imposed if it wished to proceed with the merger. If Natchix finds that it cannot comply with the conditions then it has the option of not continuing with the merger or of seeking to

appeal against the Tribunal's decision on the grounds that the conditions are unreasonable. But the Tribunal could not, and did not, declare, when approving the merger, that all such long-term contracts were "voided" (see s 65(1)).

The only power that the Tribunal has to "void" contracts is derived from s 58(1)(a)(vi) of the Act, which permits the Tribunal to make an appropriate order in relation to a *prohibited practice*, including "declaring the whole or any part of an agreement to be void". The Tribunal can thus only "void" a contract if it relates to a practice prohibited in terms of Chapter 2 of the Act (which concerns restrictive practices and the abuse of a dominant position). A contract that does not offend the Act (and more particularly Chapter 2 thereof) is beyond the scope of the Tribunal to terminate. The conditions, in this case, relate to the merger, not to any long-term or other contract between the Appellants and any other person. Should the conditions not be fulfilled and the merger nonetheless be proceeded with, the sanctions provided for in the Act (ss 59(1)(d), 15(1) and 16(3)) may result. This eventuality, however, does not affect the

validity of any of the long-term supply contracts.

16 It follows that the Appellants are substantially successful in their appeal: the order is not "obscure, ambiguous or uncertain" and requires no declaration explaining its meaning. Although there is no basis for the third ground of appeal relating to the effect of the conditions on existing contracts the Appellants were substantially successful and should be awarded the costs of the appeal. As I have said, there is no appeal against paragraph 1 of the order and, consequently, no reason to set that part of the order aside.

17 The 2003 Tribunal Order was made on 18 July 2003. The Appellants' notice of appeal was served and filed on 17 September 2003. The notice of appeal was, in terms of Competition Appeal Court Rule 16(1), required to be filed within 15 business days of the 2003 Tribunal Order: in other words, by Friday 8 August 2003. The appellants' notice of appeal was delivered 28 or 29 court days late, and 40 calendar days out of time. The Appellants are thus required to apply for condonation in terms of Competition Appeal Court Rule 4(4), which permits this Court to condone late performance of an act in respect of which those rules prescribe a time limit "on good cause shown".

The Appellants' explanation for non-compliance with the applicable

rules relates primarily senior counsel's being out of the country from 15 July 2003 to 1 August 2003 and his being unavailable immediately thereafter for consultations. The Appellants' attorney was also out of office around 8 September 2003. The Appellants' senior counsel returned to Johannesburg a week before the time expired for lodging the notice of appeal. It is correct, as was argued on behalf of the Respondents, that not all the delays have been adequately explained. It is also correct that there is no suggestion that the Appellants approached Astral, or its attorneys, before, on, or immediately after 8 August 2003 to inform them that an appeal would be lodged and to request an indulgence in respect of the late filing of the notice of appeal.

Condonation is not, and should not be, granted as a matter of course (*Darries v Sheriff, Magistrate's Court, Wynberg*1998 3 SA 34 (SCA) at 40G-41E). In this matter the Appellants have explained their delay, albeit in a cursory fashion. The reason advanced is acceptable: it cannot be said that they were flagrantly or grossly acting in breach of the rules albeit that their failure to inform the Respondents of their intention to lodge an appeal deserves censure. However, in view of the obvious

merit of the appeal the application for condonation should be granted.

17 I would therefore

(a) grant the application for condonation for the late filing of the Appellants' notice of appeal;

(b) uphold the appeal with costs including the costs of two counsel; and

(c) set aside paragraphs 2 and 3 of the order of the Tribunal dated 18 July 2003.

Malan AJA

I agree and it is so ordered

Selikowitz JA

I agree

Mailula AJA

Counsel for Appellants: David Unterhalter SC with Mark Wesley
Attorneys for Appellants: Espag Hattingh Attorneys
Counsel for First Respondent: PB Hodes SC and PBJ Farlam
Attorneys for First Respondent: Sonnenberg Hoffman Galombik
No appearance for Second Respondent
Date of hearing: 5 December 2003
Date of judgment: 28 January 2004