IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

(REPORTABLE)

CASE NO: 16/CAC/Apr02

In the matter between:

PATENSIE SITRUS BEHEREND BEPERK

Appellant

and

THE COMPETITION COMMISSION

1st Respondent

JAKOBUS JOHANNES PIETRUS BEZUIDENHOUT

2nd Respondent

JAN DANIEL DU PREEZ

3rd Respondent

JUDGMENT DELIVERED ON 7 JULY 2003

SELIKOWITZ J:

This is an appeal against the decision and order handed down by the Competition Tribunal (hereinafter "the Tribunal") on 8 April 2002 following a remittal hearing held in terms of the provisions of Part D of chapter 5 of the Competitions Act, No. 89 of 1998 (hereinafter "the Act").

Appellant is Patensie Sitrus Beherend Beperk, a public company duly registered and incorporated during 1999 in accordance with the company laws of the Republic of South Africa.

First Respondent is the Competition Commission of South Africa, (hereinafter "the Commission") a juristic person established in terms of section 19 of the Act

Second Respondent is Jacobus Johannes Petrus Bezuidenhout, a citrus farmer and the owner of the farm "Fairview" situated in the Gamtoos River Valley (hereinafter "the GRV") in the Eastern Cape. At

all material times Second Respondent was a shareholder in Appellant.

Third Respondent is Jan Daniel Du Preez, a citrus farmer who owns the farm "Hardleigh" in the Gamtoos River Valley. Third Respondent was also a shareholder in Appellant.

The hearing before the Competition Tribunal concerned a consolidation of two referrals to the Tribunal. The one referral related to complaints made by the Second and Third Respondents which raised

the issue of conduct prohibited by the Act. The complaint was referred by the Honourable Mr Justice Horn from the South Eastern Cape Local Division of the High Court of South Africa in terms of

section 65 2 (b) of the Act. The other referral was by the Commission in terms of section 50 of the Act pursuant to a complaint. It is unnecessary to set out the rather complex history of the disputes which

en route to the remittal hearing before the Tribunal first came before the High Court both in the Eastern Cape and in Gauteng and also before the Tribunal for interim relief. Suffice to say that at a pre

hearing conference the parties agreed to consolidate the two referrals before the Tribunal.

Background to and History of Appellant

The history of the citrus industry in South Africa as also the genesis of Appellant were concisely described by the Tribunal as follows:

"**The South African citrus industry accounts for approximately 2% of the total citrus production in the world market. Approximately 65% of the citrus produced in South Africa is exported, the balance either being sold in local markets or to a local processor to be made into juice.**

In 1939 citrus co-operatives – many of which had been established in the 'twenties - belonged to the South African Citrus Exchange, a central co-operative which handled more than 81% of the fruit produced in South Africa. At about this time, the government established a statutory control board which brought the single channel marketing system into being. In

terms of this system, all packers (co-operative and independent) had to channel the packed fruit to the co-operative Citrus Exchange, later replaced by Outspan International. Prior to the repeal, in 1996, of the Marketing Act of 1968, the citrus industry had deregulated the selling of fruit on the South African market.

[Appellant is the successor of an entity] originally registered as Patensie Citrus Co-operative Limited in terms of the Co-operative Societies Act 29 of 1939. Until July 1998 it conducted its packing and distribution operations as a co-operative under

the Co-operative Societies' Act. On 3rd July 1998 the co-operative was converted into a limited liability company. All former members of the co-operative became shareholders in (or 'members' of) a restructured company, Patensie Sitrus Beperk ('PSB'). The company's Articles of Association purported to eliminate any distinction between producers and members. However a producer was a specific type of member because certain members were not producers, but only made use of the trading department which supplied farm equipment.

In March 1999, a second company, namely Patensie Sitrus Beherend Beperk, the [Appellant] in the present matter, was incorporated. The directors of PSB became the directors of, and sole shareholders in, the respondent. In September 1999 a special resolution was passed bringing the respondent's Articles into line with those of PSB. Members of PSB, including [Second and Third Respondents], exchanged their shares in PSB for shares in the [Appellant]. It appears that most of these transfers were affected in late 1999.

The respondent is a public company. It is the holding company of, and the majority shareholder in, PSB. It is envisaged that, once the restructuring process is complete, Patensie will be the sole shareholder in PSB. The respondent's shareholders are all citrus farmers. It provides packing and marketing facilities through its subsidiary, PSB, which it refers to as its operational arm."

Appellant's Articles of Association

Appellant submits that, in contrast with other companies, it does not operate as 'an ordinary company or independently from its members'. It contends that its Articles reflect the long path that has been trodden. The Articles prescribe specific rights and obligations relating to *inter alia* membership; the servicing of the Appellant's long-term loans; the transfer of its shares; the termination of membership, and the utilisation of its packing and marketing services.

The origin of these provisions is to be found by reference to the provisions which existed under the old co-operative and which were relocated in Appellant's

Articles of Association.

Under the co-operative members held pack rights ("*pakregte*") which entitled them to an annual

quota fruit which could be packed at the co-operative's pack shed. The individual pack rights were determined through a complex formula based on the individual members' financial contribution to redeeming the packing facilities capital liability in relation to the total available packing capacity of the pack house and not the volume of fruit actually delivered.

The pack rights were used to calculate the "*pack right levy*" ("*pakregheffing*") which was the capital contribution that members were liable to pay to the co-operative on resignation. This capital contribution represented the *pro rata* obligation of each member for the long-term debt of the co-operative. This system was carried over from the co-operative to PSB, the predecessor of the Appellant.

With the conversion from PSB to Appellant, a revised system for the calculation of the shareholders' capital levies was introduced after consultation with the members. Henceforth the levies would be determined by the number of crates of fruit delivered across the Appellant's weighbridge by each of the members. It appears that the size of a member's shareholding in Appellant is approximately proportionate such member's output. The size of a member's shareholding correlates with the capacity of the resources of the pack house used by that shareholder. Accordingly, the capital levy refers to a member's *pro rata* share of the capital obligation incurred by the company in investing in infrastructure and equipment. The capital levy (member's *pro rata* share of the debt) is directly proportional to the current shareholding of that member. Thus, if a member holds one *per cent* of the issued shares in Appellant, such member is liable for one *per cent* of the gross debt of the company.

The packing cost payable by each farmer using Appellant's facilities is calculated by reference to the quantity and the quality of fruit delivered by that particular member.

Otherwise, members' rights remained the same as they had been under both the former co-operative and under PSB.

In Appellant's answering affidavit, its secretary Mr Jacobus Stephan Du Toit states:

"I have already mentioned hereinbefore that the Respondent's Articles of Association are the standard ones found in Schedule 1, Table A of the Companies Act 61 of 1973, with certain additions thereto

in a document termed '***Toevoeging tot Statuut van Patensie Sitrus Beherend Beperk om Voorsiening te Maak vir Speciale Kontraktuele Voorwaardes Tussen Lede en die Maatskappy'*** **to**

cater for the *sui generis* nature of the Respondent and the purposes for which it was established."

It is the addendum, which forms part of the Articles which contains the provisions that were the subject of the enquiry undertaken by the Tribunal and are - save in respect of Article 110 which the Tribunal declined to strike down - the provisions relevant in this

appeal.

Article 112 of the Articles of Association provides in its introduction that Appellant has a 'first right and option' to acquire the whole of the citrus crop of each member or such portion of the crop as Appellant decides upon. The actual text which is in Afrikaans reads:

"112. **Eerste reg en opsie op sitrusoes ten gunste van Maatskappy Vanaf datum van verkryging van lidmaatskap, verleen elke lid afsonderlik, 'n eerste reg en opsie aan die Maatskappy om jaarliks 'n lid se gehele sitrusoes of sodanige gedeelte daarvan as wat die Maatskappy mag besluit, te koop teen 'n prysbepaling soos in Artikel 114 uiteengesit en onderneem die lid on sodanige oes of sodanige gedeelte ten opsigte waarvan die Maatskappy die opsie uitoefen, te lewer onderhewig aan die volgende voorwaardes"**

The words "*koop*" and also "*koopprys*" appear in the Articles in the provisions which regulate the relationship between Appellant and its member/producers. This led to debate and some confusion before both the Tribunal when considering interim relief and thereafter before the Commission. The Commission ultimately concluded that the literal meaning "*koop*" ('purchase') and "*koopprys*" ('purchase price') were inappropriate and that on a proper construction of the *modus operandi* and the relationship there was no sale of fruit to Appellant. The fruit is handed over to Appellant which then pack and marketed it. Thereafter the proceeds of the sale of the fruit on the market are divided between the member/producers in accordance with a formula which allowes for the deduction of Appellant's expenses including the cost of servicing its debt.

Sub - Articles 112.1 to 112.6 provide:

> for an individual member to submit details of the size and quality of the crop he anticipates that will be delivered to Appellant. In certain instances the management can intervene to establish the facts. (112.1);
> for the members to make application for exemption from the requirement to deliver all of their crop and the procedure therefor (112.2);
> for Appellant to refuse to exercise its option (112.3 -112.4);

for compliance with a harvesting and delivery schedule specified by the Appellant (112.6.1 - 112.6.2);

and for the levying of fines in the event of a member's non-compliance (112.6.3).

Sub-article 109.2 provides that, in the event of a member no longer complying with his obligations to deliver his crop, such member may be required by Appellant to sell his shares failing which Appellant may itself make arrangements for the sale of the dissident member's shares.

Article 110 - which, as noted, was not struck down by the Tribunal - specifies the limitations imposed on the transfer of shares in Appellant. Shares may be transferred to an heir of a deceased member (110.1) and to the purchaser of a member citrus farm (110.2); However, transfer to any other person is governed by Article 110.3 which provides that:

"**enige ander persoon of regspersoon wat met die toestemming van die Raad van Direkteure kwalifiseer vir lidmaatskap kragtens die vereistes gestel deur die Raad van Direkteure van tyd to tyd."**

Article 114.3 of Appellant's Articles of Association provides for remedies which are available to Appellant in the event that any member fails to meet his obligations to Appellant. *Inter alia* Article 114.3.1 entitles the respondent to apply for an urgent interdict to prevent a member from selling or delivering his citrus crop to anyone other than Appellant. Article 114.3.2 entitles Appellant to issue summons for specific

performance and/or to recover the fines provided for in the Articles for in the Articles of Association.

In terms of section 65(2) of the Companies Act (Act No. 61 of 1973) the Articles of Association bind the company and the members, as if the Articles had been signed by every member. One effect is that the Articles of Association have contractual force both between the company and all its members.

It was common cause before the Tribunal that the Articles alleged by the Commission to be in contravention of the Competition Act are to be found in the '*Toevoeging tot Statuut van Patensie Sitrus Beherend Beperk om Voorsiening te Maak vir Speciale Kontraktuele Voorwaardes Tussen Lede en die Maatskappy'*. Furthermore, that Article 112 - which contains the obligation imposed on the members to deliver their citrus crop to Appellant's pack house - is at the centre of the dispute. The other Articles in contention are those which are allegedly ancillary to Article 112 in that they are designed to give effect to the obligation contained in the Article.

After considering the record, hearing *viva voce* evidence and argument, the Tribunal concluded that Appellant's Articles of Association contained provisions which contravened section 8(d)(i) of the Act. It found further, that no defence by way of technological, efficiency or other pro-competitive gains which outweigh the anti-competitive consequences of the offending Articles had been demonstrated. The Tribunal, acting in terms of section 58(1)(a)(v) of the Act declared Articles 112, 109.2, 114.3.1 and 114.3.2 to be practices prohibited in terms of section 8(d)(i) of the Act and accordingly void. No order was made in respect of costs.

Grounds of Appeal

Appellant's grounds of appeal are that the Tribunal erred:

> By finding that the relevant product market as the market for the provision of packing and marketing services to citrus farmers;
>
> By finding that Appellant is a seller and its members purchaser of packing and marketing services;
>
> By finding that the relevant geographic market as the market for the packing and marketing of citrus fruit in the Gamtoos River Valley;
>
> By finding that Appellant is dominant in the relevant market;
>
> By finding that Appellant's members are its customers;
>
> By finding that aspects of Appellant's Articles of Association constitute "exclusionary acts" as defined in section 1 of the Act;
>
> By finding that Appellant did not show technological, efficiency or other competitive gains which outweigh any alleged anti-competitive effects of its acts;
>
> By declaring Article 122 of Appellant Articles of Association void in its entirety;

By not striking out certain portions of and annexures to the affidavits filed on behalf of the Commission, alternatively by attaching too much weight to them;

By not awarding costs to Appellant.

The Process: From Citrus Farm to Consumer

It is useful to consider the processes followed from the point where the citrus fruit is produced on the producers farm until it reaches the shelves of retail outlets. The explanation will also note Appellant's practices.

Production Stage:

The farmers grow the fruit on their farms utilising various resources including the land, labour, equipment, water, fertilisers and pesticides. When harvested the fruit has to go through further preparatory and handling processes before it is marketable for consumption.

Market Preparation:

The citrus fruit is washed, disinfected and sometimes waxed. It is graded for quality and size before being packed in suitable containers. These containers are palletised and the fruit is inspected to ensure

compliance with official regulations. These functions are normally performed in a specially equipped packhouse. Farmers who do not have their own packhouses will normally deliver the fruit to a

packhouse for processing as aforesaid. In Appellant's case it has a modern packhouse. Its facilities were updated and improved some four years ago at a cost of R21 million. There are in excess of two

hundred packhouses in South Africa and Appellant packs and arranges to market approximately five per cent of the country's total citrus production. Appellant packs and arranges to market

approximately seventy per cent of the citrus fruit produced in the Gamtoos River Valley. Farmers do not sell their fruit to Appellant - neither money nor risk passes when the fruit is delivered to Appellant's

packhouse.

Transportation to point of intake:

After preparation and packaging, the fruit is transported to the next "*station*". Where the fruit is not destined for export, the "*station*" could be a municipal market, a local wholesaler or retailer or a processing facility which might process extract the juice or manufacture a citrus preserve or similar product. Some sixty five per cent of the citrus fruit produced in South Africa is marketed overseas. Where the fruit is exported, the next "*station*" is a seaport or an airport. The fruit which travels by

road or rail is received at the port by a marketing agent. Appellant appoints a number of marketing agents on a per season basis to attend to the citrus fruit which it markets on behalf of its members. The fruit is not sold to the marketing agent and the producer continues to carry the risk.

Port Handling:

The citrus fruit is inspected and then placed into cold storage to bring the temperature down to required standards for shipment. The fruit is then loaded into a ship or aeroplane.

Shipping:

The fruit is shipped - less frequently, flown - to its overseas destination.

Overseas Port of Entry;

On arrival at the destination port the fruit is cleared for entry, stored and then forwarded by clearing agents to the wholesale markets, interim service providers or customers who can be fruit importers or retail suppliers. It is only at this point that the citrus fruit is sold and where the price which the producer will receive is determined. Until this point of sale the producer continues to carry the risk. Even at this point of sale the risk includes a need to destroy fruit that has deteriorated or fails to comply with local regulations.

End consumer:

The fruit is thereafter sold to the retailer and, in turn to the consumer.

Price received by the producers

South African citrus fruit farmers have no influence upon the market and the price received for their fruit. They are "price takers" on the international market. Because of the fact that the overwhelming majority of the citrus fruit handled by Appellant in the Gamtoos River Valley is destined for export and because that market accounts for approximately ninety three per cent of the income of Appellant's members, the parties before the Tribunal focussed almost exclusively on the export market. Nothing turns on the ommission to analyse the local citrus market. The determinations made in respect of the export market apply with equal force to the local marketing of citrus fruit. Certain costs are deducted from the market price received before the producer receives payment for his citrus crop. Those include the following costs directly related to the packing and marketing process.

Production costs:

These are the costs of preparing the fruit for the market.

DIP costs:

These include transport costs and statutory levies which are incurred when the fruit reaches the point of intake.

FOB costs:

The costs of shipping, handling, storage, loading and insurance from the point of intake until the fruit is loaded into the ship or aeroplane.

Sea or air freight:

These costs are significant as they are US dollar related and a fluctuating exchange rate can have an effect.

Import duty:

Also a significant cost, it can vary from market to market and over time.

Overseas costs:

The cost of clearing, storage in cooling facilities and transport to the point of sale.

Appellant's heads of argument filed before this court, it is stated that:

"**The essence of the Appellant's case is that, with reference to its co-operative origins and background; its peculiar relationship with its members, who are all citrus producers, and the exigencies and demands of the highly competitive citrus market in which it operates, the Articles of Association had been formulated and agreed to in precisely the disputed form in order to enable its members to compete effectively in that market, to the benefit of all its members, the end-consumer and the national economy. It was argued that, in the light of the proven facts, the Articles of Association of the Appellant constitute no more and no less than an ordinary contractual arrangement which does not fall foul of the Act and which should not have enjoyed the attention of the Commission in the first place."**

It is also submitted that:

"Since 1928 to the present day, and even after the former co-op had changed into a company, the relationship between the entity itself (currently the Appellant) and its members has not changed: for pro-competitive, sound economic, cost-effective and efficiency reasons, a number of farmers have come together to pool their resources for the purposes of packing and marketing, thereby ultimately ensuring a higher net return to themselves" and further that:

"The whole purpose of the joint packing and marketing arrangement is to manage the packing and marketing facilities on a more economical basis. **The second paragraph of the pre-amble to the**

Additions to the Appellant's Articles of Association makes special reference to the pro-competitive gains expected to flow from the said arrangement."

A considerable amount of evidence was advanced to establish that the joint packing and marketing of citrus fruit by a number of farmers was beneficial. That it benefits the producers who utilise the services would appear to be clear. What is in issue, however, is whether the means chosen by Appellant and its members to achieve their stated goals contravenes the Act. More particularly, whether the "arrangement" between Appellant and its members who are the producers amounts, in the circumstances, to an unjustified abuse of dominance as is prohibited by section 8 of the Act. It is useful at this stage to set out out a number of matters which bear upon the decision in this matter. Firstly, Appellant is no longer a co-operative. Since March 1999 Appellant is a public company. It remains, however, possible to view the company as the vehicle through which its shareholders jointly undertake the packing and marketing of their citrus produce. So viewed, Appellant is a public company which exhibits many of the characteristics of an agricultural co-operative.

Secondly, a co-operative is an enterprise linking assets, business activities, financial obligations and people in a distinctive way. Care must constantly be taken to recognise and in some cases to distinguish the dual status of people who are both its customers and the owners of the co-operative, *in casu*, the members to whom earnings will be distributed according to customer patronage. Thirdly, large agricultural co-operatives are very different from what they were a century, or even half a century ago. South African citrus farmers have seen major changes in the citrus industry and, in particular, in the packing, processing and marketing of citrus fruit. The industry has undergone important institutional changes over the past eight decades. As noted the legal form of the entity undertaking the packing and marketing of citrus fruit in the Gamtoos River Valley has changed from that of a co-operative (of which the farmers were members) to that of a limited liability company of which the farmers are now shareholders. A further important change concerns the marketing of the crop. The international marketing of agricultural produce was, until recently, the exclusive preserve of a number of statutory 'control boards' established in terms of The Marketing Act No. 59 of 1968. This statute was repealed by the Marketing of Agricultural Products Act, No. 47 of 1996. The upshot is that the packing companies and others who desire to offer fruit on the international market will market the fruit through the agency of one of the many market agents who undertake the marketing function.

The advantages gained by farmers and producers of food forming co-operatives has long been recognised in foreign jurisdictions. The special treatment usually affords limited exemption from the reach of competition law. Wherever such special treatment has been given it is to be found in statutory enactments. In the United States since 1914, section 6 of the *Clayton Act* (36 Stat. 730

[1914]) partially exempted agricultural organisations from the competition laws. The *Capper-Volstead Act* (42 Stat. 388 [1922]) extended the exemption to capital stock agricultural co-operatives.

Articles 32 to 38 of the *European Community Treaty* establish a special regime for agriculture and allow the Council to limit the application of the rules of competition law in regards to the production

and trade in agricultural products.

Indeed, the fact that the Act does not exempt agricultural activities from its reach ought to sound a note of caution in the approach to the issues raised in this matter. It should be noted that the Act does

allow for agreements and practices to be granted exemption from the provisions of Chapter 2 which deals with prohibited practices including abuse of dominance. (Section 10). In seeking to determine

the relevant market, the analysis advanced by Warren CJ in the United States Supreme Court in *Brown Shoe v United States*, 370 U.S. 294 (1962) at 325 provides a useful analysis and insight into the

appropriate methodology.

"**The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.**

However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket

may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses,

unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

And, at 336-337:

"The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . .

Moreover, just as a product submarket may have significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." . . . . Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically [370 US 294, 337] significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area."

The *United Kingdom Office of Fair Trading Market Definition Guideline* also provides useful

guidance in the approach to be taken when defining the relevant product market from the demand side which is appropriate here.

"**3.1 The process usually starts by looking at a relatively narrow potential definition. This would normally be the products which the parties to an agreement both produce or the products which are the subject of a complaint. Common sense will normally indicate the narrowest potential market definition. The Director General then considers how customers would react if prices were raised a small but significant amount above competitive levels.**

3.2 Common practice in both Europe and the US is to consider a price 5-10 per cent above competitive levels. This will normally be the Director General's approach, although, in practice, it is often difficult to quantify a potential price rise. The 5-10 per cent test is a rough guide rather than a rule."

The *European Commission* notice on *The Definition of the Relevant Market for the Purposes of Community Competition Law* (Published in the Official Journal: OJ C 372 on 9/12/1997) after describing market definition as a tool to identify and define the boundaries of competition between firms goes on to record that:

"**The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of an effective competitive pressure. It is from this perspective, that the market definition makes it possible, inter alia, to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.**

It follows from the above, that the concept of relevant market is different from other concepts of market often used in other contexts. For instance, companies often use the term market to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."

This last observation finds resonance - albeit by way of a failure to recognise the distinction - in Appellant's submissions as to the appropriate product market definition.

In their text *Economics Of E.C. Competition Law Concepts, Application And Measurement* (1999) at p.49), S Bishop and W Walker state that:

"**The relevant market contains all those substitute products and regions which provide a significant competitive constraint on the products and regions of interest . The relevant**

market can be defined as a collection of products such that a (hypothetical) single supplier of that collection would be able to increase price profitably. Defining the relevant market in this way ensures that all products which pose a significant competitive constraint on the parties under investigation are taken into consideration. In this section, the application of these principles in practice is discussed and the following guiding principle proposed: a relevant market is something worth monopolising. A market is worth monopolising if monopolisation permits prices to be profitably increased. This will be the case if the collection of products contained in this "market" are not subject to significant competitive constraints by products outside the market."

For the assessment of demand substitution the so-called "5% test" or "SSNIP test" (SSNIP is the popular acronym for "*small but significant non-transitory increase in price*") is useful. This test which was first used by the *United States Federal Trade Commission* and is now the test proposed in paragraph 14 of the *European Commission* Notice referred to above. The SSNIP test is increasingly being made use of by competition authorities throughout the world.

Application Of the legal and economic principles to the facts

It is, in my view, apparent from the evidence that the undertaking of packing and arranging for the marketing of citrus fruit is a service offered and rendered by Appellant to citrus producers. It is trite that a product market can include goods or services of this kind.

Although notionally the market for the sale of citrus on international markets can be described as a "*market*" it is not the market that is at all relevant for purposes of the present enquiry. Common sense dictates that the "*narrowest potential market definition"* in this instance is not the sale of citrus on some distant international market but the rendering of the services in question within the GRV. It is in this market that the services which are the "*subject of the complaint"* are rendered. The evidence is that there are other parties engaged in offering the relevant services in the GRV.

The fact that Appellant would have itself viewed for present purposes as the sum of its members and that it does not perceive itself as competing with like services offered and undertaken by other fruit packers in the region is not a determinative factor for purposes of defining the parameters of the relevant market.

In defining the relevant market Appellant and its expert witnesses have failed to have regard to the *hypothetical monopolist* undertaking the relevant services. They advance a business model that is constrained by and reliant upon the characteristics peculiar to Appellant, including the anti-competitive structures and practices that are the very subject matter of the complaint.

In its grounds of appeal, Appellant asserts, in relation to the Tribunal's finding that the relevant product market is the market for packing and marketing service in the GRV, that: "*On all the evidence the Tribunal should have found that, by their own volition and choice, the members/shareholders of the Appellant are not competing in the notional "packing and marketing services market", whether in the Gamtoos River Valley or anywhere else"*.

As noted, it is not competition engaged in by Appellant's members that is in issue. In issue, is competition by Appellant itself in the market in which it is engaged.

In any event, a voluntary withdrawal from competition whether contractually confirmed or not is not a decisive factor in defining the relevant market. *Per contra*, it is irrelevant. Significantly, the ground of appeal acknowledges a "notional" packing and marketing services market in which Appellant submits that its members do not compete.

Appellant also emphasised that it did not seek to profit from its services to its members and that the amount deducted by Appellant from the selling price of the fruit was limited to Appellant's costs including the cost of servicing its capital loan debts.

Be that as it may, the producers are required to compensate Appellant for the services they utilise. The fact that the amount is limited to Appellant's costs does not make it any less a *quid pro quo*. In fact, Appellant's costs as deducted may exceed the charges - including a profit margin - at other packhouses which offer equivalent services.

A region the size of the GRV can comprise a relevant market. The valley is approximately some one hundred kilometres long and there are approximately one hundred and ten citrus farmers in the GRV.

In regard to the actual current position, Appellant's affidavits demonstrate that the establishment of pack-houses is extremely capital intensive and beyond the reach of most citrus producers in the GRV. Appellant spent R21 million on its packhouse some four years ago. Furthermore, although there are other packing facilities in the GRV and the neighbouring Sundays River Valley "*there is no, or very little flow of packing services between these areas*". This factor is of marginal significance when the producers of in excess of 70 per cent of the citrus fruit produced in the GRV are bound to deliver their crop to Appellant.

The real issue is whether a hypothetical monopolist engaged in the business of rendering packing and marketing services in the GRV would be in a position to raise the price associated with the rendering of those services "*a small but significant amount above competitive levels"* (the SSNIP test). Based on quotations obtained by Appellant the additional transport cost to transport citrus from the GRV to the Sundays River Valley packhouses will be R1.90 per carton. This sum represents a percentage increase of 12.67 per cent to the cost of packaging based on the amount charged by Appellant for the services rendered to its members in the GRV. I do not agree with the Appellant which seeks to compare the additional transport costs as a percentage of the total price of the citrus products received on the international market and then argues that transport costs comprise a relatively insignificant part of those costs so that in given circumstances a citrus producer would convey his products past the nearest packing facility to one located further a field. That argument is premised upon the relevant product market being the sale of citrus fruit on the international market rather than the market for the provision of packing and arranging marketing services. It is clear that a hypothetical monopolist who renders the services that are provided by Appellant would be in a position to raise the price of those services appreciably - certainly above the five or even ten per cent commonly used by the SSNIP and other tests - without losing a significant number of its customers.

A small but significant increase of five to ten per cent by Appellant for the services it renders to its members would not, in my opinion, result in a significant number of members transporting their products
out of the GRV.

Accordingly, the market for the provision of packing and marketing of citrus fruit in the GRV is a market worth monopolising.

Appellant asserts that the relevant geographic market is the international market for the sale of citrus products.

Appellant's premise is an incorrect assumption that a sale of goods must take place in order for a market to exist and a failure to recognise that there can be markets within markets. Indeed, the processing and handling chain which Appellant contends ends with the sale of the fruit on the international market would appear, *prima facie*, to involve a number of markets which can be "relevant markets" for the enforcement of competition law . Possible markets include a market for the provision of market agency services. Appellant is itself a customer in that market. It appoints three marketing agents each year from the available market which comprises in excess of two hundred competitors. There would also appear to be a market, perhaps even, separate markets, for

the transport of the citrus fruit by road, by sea and by air. In the premises, the Tribunal correctly held that the Gamtoos River Valley constitutes the geographic area of the relevant market and that the relevant market is the "*market for the packing and marketing of citrus fruit in the Gamtoos River Valley"*.

A Single Economic Entity

The concept of a "single economic entity" seems to have found its way into the matter in an affidavit filed by Appellant and deposed to by one, Calvyn Michael Du Toit who describes himself as "a part-time Professor of Business Economics, lecturing to and guiding students in their post graduates studies on a free-lance basis at various higher education institutions." In the heads of argument filed on behalf of Appellant , it is submitted that Professor Du Toit is correct when he says "*that the Articles of Association of the Respondent essentially constitute a voluntary agreement between farmers or producers of citrus to jointly pack and market their fruit through the Respondent as a vehicle in order to manage the packing and marketing facilities on a more economical basis. The members accordingly form a single economic entity insofar as the packing and marketing of their fruit are concerned. The members of the Respondent are not competitors in respect of the packing and marketing of their fruit. They are in effect partners.*" The issue of Appellant and its members constituting a single economic entity is introduced into the Tribunals reasons for its decision where it discusses the relevant market definition. Noting that there is a "yawning gap" between the definitions advanced by the respective parties, the Tribunal continues:

" **... The respondent does not merely argue that the 'market for the packing and marketing of citrus products of the GRV' is not the relevant market. Its attack on the Commission's contention goes significantly deeper than this – it insists that there is no such market at all, or, at least, that the respondent and its members do not participate in this market. The respondent avers that it, Patensie, is simply the sum of its members who are citrus fruit producers of the GRV, and that accordingly it cannot enter into a market exchange with itself, much less inflict 'abuse' upon itself in the conduct of that exchange. On this version the provision of packing services by the respondent to its members is in the nature of a transaction internal to a firm. It is, to be sure, an activity that adds value to the product – the fruit – when it ultimately enters the market but it is no more a market transaction than would be the rendering of services by the IT department of a bank to, let us say, the Human Resources department of the self-same institution. On this version the charge levied by the respondent on 'its' farmers/owners for rendering a packing service reflects nothing more than the cost of providing the service, an internal bookkeeping charge, useful for costing and budgeting purposes but not indicative of the existence of a market.**

In order then to test the validity of these contending views we have first to decide whether the relationship between the individual farmers and the respondent is, indeed, in the

nature of a non-market, internal exchange. Expressed otherwise, do the respondent and the farmers who are its members constitute a single economic entity by virtue of the latters'

shareholding in the former?"

In its grounds of appeal, Appellant contends that:

"**The Tribunal in any event erred in its evaluation of the "single economic entity," argument and in ignoring the clear evidence that it is wholly artificial, for packing and marketing**

purposes, to distinguish between the Respondent and its members/shareholders"

The characterisation of Appellant's relationship with its farmer members as a single economic entity is problematic. The concept of a single economic entity is only to be found in Section 4 of the Act, the

section dealing with horizontal restrictive practices. Section 4(5) provides:

The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by,-

(1) a company, its wholly owned subsidiary as contemplated in Section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or

(2) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

The Tribunal states further that:

"**Sub-section 4(5) ensures that agreements between firms that are related to each other in the fashion described will not be hit by the prohibition of the horizontal agreements described**

in sub-section 4(1). Implicit in the reasoning underlying Section 4(5) is the notion that firms cannot conspire with 'themselves'. In insisting that the respondent and its members do not

have a separate existence, the respondent is effectively proposing that we import the reasoning underlying Sub-section 4(5) to a consideration under Section 8 – it employs this section

in order to argue that a firm cannot abuse 'itself' and, hence, if related to the target of its alleged abuse in the manner described in Sub-section 4(5), its conduct will fall outside of the

provisions of Section 8. We note, and we will imminently return to this, the only matter in which the 'single economic entity' concept has thus far been considered by the Tribunal was in

respect of a claim that a merger of two firms, allegedly part of a single economic entity, was not subject to the scrutiny of the Act – in other words, the Tribunal on that occasion

permitted the 'importation' of the concept underlying Section 4(5) into a procedure under Section 12. In our view this concept is equally pertinent for enquiries under Sections 5 or 8 –

just as a party cannot merge with itself or conspire with itself, so can it not abuse itself or conclude a vertical agreement with itself."

The Tribunal rejected the argument that Appellant could, on the facts, claim to be in a single economic entity relationship with its members. I agree with that finding and it is accordingly unnecessary to

consider whether the "importation" of the concept "single economic entity" into a case to be decided in terms of section 8 is either appropriate or permissible by law. I am, however, of the *prima facie*

opinion that the concept of a "single economic entity" may well be, inappropriate here. As I understand the evidence and the arguments Appellant appears to, more accurately, be claiming to be a joint

venture of citrus farmers who chose to carry on their joint venture through the medium of a public company. I make no finding on this characterisation.There is considerable and conflicting learning in the

field of joint ventures in foreign jurisdictions. The concept arises in respect of prohibited practices particularly prohibited horizontal practices, more particularly intra-enterprise conspiracy. (See for e.g

indices *sub*"joint venture" in: *Competition Law*- Brassey et al (2002); *Competition Law*4thed 2001 - Richard Wish; *Competition Law of the United Kingdom and European Community*, M Furse

(1999); *Bellamy & Child, European Community Law of Competition*, 5thed P M Roth (ed)). It has also been embraced by the Tribunal in South Africa to the analysis of control issues in merger

proceedings. (See: *Bulmer SA (Pty) Ltd and Distillers Corporation SA Ltd, SWF Group (Pty) Ltd*, 94/FN/Nov00).

It is necessary to record that our competition law is to be sought in the Act. The policies, reach and regulatory method applicable in South Africa are defined by the Act. The Act must be interpreted in a manner consistent with the Constitution and give effect to the express purposes set out in Chapter 2. Interpretation should also be in compliance with the international law obligations of the Republic. Whenever foreign law is considered in interpreting or applying the provisions of the Act it is essential to ensure that the foreign law is appropriate before adopting the foreign methodology or solutions. There is no warrant in the Act for the institutions entrusted with the task of enforcing its provisions to amend or extend the policy and reach which is set out therein. That is the sole domain of the legislature. Care must be taken not to impose solutions which are not founded upon a proper interpretation of the Act. Where a *lacuna*may be detected, it cannot simply be filled by having regard to imported solutions; no matter how attractive and suitable such solutions may appear to be.

For present purposes I note that the Tribunal assumed (in Appellant's favour) that "a section 8 charge cannot be sustained if the farmers -*qua*victims of the abuse - and [Appellant] are related in a manner described in section 4(5)" of the Act. The assumption does appear to me to confuse the

question of whether section 8 is intended to protect a victim or to prevent anti-competitive activities whether or not there is an identified victim. As I understand the law it is competition itself which is the victim. Indeed, that very distinction may be a decisive factor in deciding whether the concept of a "single economic entity" or of a "joint venture" can properly be transposed to section 8 charges without legislative intervention. We were not referred to any authority - foreign or local - for the proposition that a joint venture which is organised and operates in the manner in which Appellant is organised and operates, and which undertakes "prohibited practices" - such as abuse of dominance - is exempt from the reach of the Act. The tribunal went on to reject the notion that Appellant and its members were, on the facts, properly regarded as a "single economic entity". Appellant relied upon its history, its 'not for profit' character and its structure and "ownership" to support its claim to be a single economic entity with its members. I agree with the Tribunal that Appellant's history takes its claim no further. Whatever the historic position may have been it is now subject to scrutiny in terms of the Act. The farming, packing and marketing of citrus fruit has changed considerably over time. I have earlier noted some of the changes. Having chosen to incorporate, the Appellant is now to be viewed for what it is, a public company whose shares are held by farmers and their heirs.

The 'not for profit' practice does not establish that a single economic entity exists. Profit does not determine the reach of competition law. Profit is not a necessary factor in determining anti-competitive

behaviour. Nor does the idea that the supplier does not recoup more that its costs from its customers indicate that the supplier and customer constitute to a single economic entity. The ownership and control factors is advanced on the basis that the members are all citrus farmers; that Appellant's Board of Directors are all farmer-members and that there is close contact between Appellant's management and its members.

Adopting the approach advocated in the *United States in Copperweld Corporation v Independent Tube Corporation*, 467 US 752 (1984) and in *Fishman v Estate of Wirtz* F. 2d 520 (Seventh Circuit - 1986), the Tribunal sought in vain for evidence of an individual or small group which exercised control over the parties to the single economic entity' independently of the wishes of investors. The lack of a 'complete unity of action' militates against a positive finding in favour of a single economic entity. Here the farmer-members are independent farmers who each owns his or her farm and operates it without any participation from Appellant or from any of his co-shareholders. Pointing out that each farmer-member owns a relatively insignificant share in Appellant - individual members hold between one and six per cent - the Tribunal were unable to find a basis upon which to conclude that there was a 'complete unity of action' between all the entities. They have nothing in common except their participation in Appellant. While the members' control over their farms as economic entities is absolute, they have no significant control over Appellant. I agree with the

reasoning of the Tribunal and with its rejection of the concept of a single economic entity between Appellant and its members.

It is of interest to note, *en passant*, that the result of upholding Appellant's contention would be to allow a company such as Appellant which is clearly dominant to evade the reach of the Act without seeking or obtaining an exemption nor reliant upon any other discernable statutory basis for avoiding prohibitions in section 8 of the Act. It would effectively afford, *inter alia,* the agricultural sector the benefits of special treatment for which in other jurisdictions there has had to be legislative approval. Our Act evidences no such special regime.

Dominance

Section 7(a) of the Act provides that: "**A firm is dominant in a market if-**

(1) it has at least 45% of that market;
(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power, or
(3) it has less than 35% of that market, but has market power."

At least seventy per cent of the citrus fruit grown in the GRV is packed by and marketed through the Appellant.

Section 7 of the Act distinguishes between various market share thresholds for the purposes of establishing the dominance of a firm. Appellant's market share in the relevant market exceeds the highest threshold of 45% and is at least double the threshold of 35% at which a firm can show that it does not have market power.

Appellant is irrebutably presumed to be a dominant firm.

Prohibited Practice in terms of section 8(d)(i)

Section 8(d)(i) of the Act provides that:

"**Abuse of Dominance Prohibited**

It is prohibited for a dominant firm to:

(a) ...

(b) ...

(c) ...

(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 effects of its act –

(i) requiring or inducing a supplier or customer to not deal with a competitor;"

The question to be decided is whether or not the provisions in Appellant's Articles of Association have the effect of "*requiring or inducing a supplier or customer to not deal with a competitor*" in contravention of section 8(d)(i) of the Act. If the answer is in the affirmative, Appellant can avoid the prohibition by showing "*technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act."*

Requiring or inducing a supplier or customer to not deal with a competitor is an exclusionary act which is defined in section 1(1) of the Act as follows:

"**'*exclusionary act*' means an act that impedes or prevents a firm from entering into, or expanding within, a market."**

Are Appellant's members who are the farmers who utilise Appellant's packaging and marketing services also its customers? The *Concise Oxford Dictionary*defines "*customer*" as:

"**customer n.**

a person who buys goods or services from a shop or business.
a person one has to deal with"

Applying the ordinary meaning of the word "*customer*" to the facts of the instant case, it is clear that the members both "*deal with*" and for all intents and purposes "*buy*" packing and marketing "*services*" from Appellant.

The Tribunal was correct when it found that "*the products exchanged are services for the packing and marketing of citrus fruit - the [Appellant] is the seller of these services and the farmers are the purchasers*"

Appellant's conduct that is complained of amounts to what is know as "*an exclusivity agreement*". It is an agreement awarding Appellant the exclusive right to pack and market the citrus crop of its members. Exclusivity agreements are an abuse because they distort competition between producers by depriving customers of the undertaking in a dominant position of the opportunity to choose their source of supply. In the instant case Appellant's Articles have the effect of depriving members from choosing the source of supply of the packaging and marketing services they require. The abuse is reinforced by the provisions which permit Appellant's Board of Directors to impose sanctions and by the barriers to exiting membership.

It appears from the Articles of Association and from the *viva voce*evidence given by Appellant's secretary before the Tribunal that there are significant exit barriers, not least, because termination of membership is very costly.

Appellant's conduct that is complained of is in clear violation of Section 8(d)(i). Appellant's Articles of Association - specifically Article 112 - clearly provide that the members of Appellant, who are farmers, are obliged to deliver their entire output or such portion as Appellant's Board of Directors decides upon, to Appellant for the purposes of packing and marketing should the respondent exercise its '*eerste reg en opsie*'.

Expressed in the language of Section 8(d)(i), Appellant requires its customers - who are also its members - to deal exclusively with it, or, conversely, '*to not deal with a competitor*'."

Appreciating the distinction between members *qua* and *qua*farmers who produce citrus fruit, the Tribunal correctly approached its analysis by focussing upon the *nexus*which Appellant's Articles of Association creates between the respective functions of the farmers and their duties as shareholders.

Consequently the Tribunal did:
" **... not take issue with the restrictions imposed on the alienation of shares in the respondent.**

Nor do we oppose the view that insists that,

having guaranteed the respondent's capital liability, it is the duty of the guarantor, and one by no means inconsistent with competition law, to honour that commitment. These are contractual matters between the individual shareholders and the respondent and, as such, are not the concern of the Competition Act. However, we do not accept the form in which this particular guarantee is effectively cast – this does constitute a violation of the Competition Act. It is, in effect, what US anti-trust jurisprudence would refer to as a '*naked restraint of trade*'. It is certainly in flagrant violation of Section 8(d)(i)'s injunction against a dominant firm 'requiring or inducing a supplier or customer to not deal with a competitor' and, a such constitutes a prohibited 'exclusionary act', and act that, in the words of the statute, 'impedes or prevents a firm entering into, or expanding within, a market'".

The concept of abuse is an objective one and it is therefore irrelevant whether or not the members agreed or even requested the exclusivity provisions in Appellant's Articles of Association. The abuse is outlawed because it hinders the maintenance of the competition that exists in the market or the growth of that competition.

As was stated in *Hoffmann-La Roche and Co AG v Commission of the European Communities*, case 85/76 [1979] ECR 461 - para 89:

"**An undertaking which is in a dominant position on a market and ties purchasers - even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [82] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."**

In paragraph 91 the court held that:

"**The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."**

There can be no doubt that the restraint provisions, with or without the reinforcement by the penalty

provisions in Appellant's Articles of Association enable Appellant to prevent all its members from offering their produce to other packing houses indefinitely and for so long as they are members of the Respondent. Conversely, the members are deprived of the opportunity to select a competitor to pack and market their citrus fruit. Furthermore by tying more than 70 per cent of the farmers to the exclusivity agreement, other potential competitors who may wish to compete in the relevant market are effectively excluded. The effect of the offending Articles of Association is to hinder the maintenance of the degree of competition which exists and to hinder the growth of competition.

The Tribunals finding that Appellant's "conduct that is complained of is in clear violation of section 8(d)(i)" is, in my view unassailable.

The Efficiency Defence

Section 8(d) entitles a dominant firm to "*show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act*". The efficiency defence requires Appellant to show that the efficiencies relied upon are directly related to and dependant upon its "act" that has been found to be the practice which is prohibited. In other words that the anti-competitive behaviour is a *sine qua non*of the efficiencies and that the gains could not be otherwise achieved..

Appellant has raised a number of factors which it submits serve to show "pro-competitive gains "*flowing from its Articles of Association"*.

Appellant points out that "*the whole purpose of the conversion from a co-operative to a company to become more competitive and efficient in an increasingly competitive citrus industry ...*"

In the appeal, Appellant submitted that the Tribunal "*erred in ignoring the fact that the said requirement was inserted in the Articles for precisely the reason that members of the Appellant were desirous of achieving a fairer system of recovering the capital debts incurred by them via the Appellant.*"

Appellant also relied upon the following alleged technological, efficiency and other pro-competitive gains and advantages :

a significant cost saving to its members;

enabling present farmers and, perhaps even more importantly in the light of the objects of the Act, potential new farmers, to enjoy facilities which they could not normally afford;

achieving huge discounts because of the ability of the Appellant to engage in bulk buying of packing materials;

the volume of fruit handled by the Appellant's packshed enables it to contract on better terms with overseas distributors and agents;

the Appellant's packshed has technologically very advanced equipment and processes, especially with regard to the handling and packing of soft citrus;

the efficiency of the Appellant's packshed is superior, to the benefit of all its members;

the aforesaid relationship between the Appellant and its members, as well as the aforesaid technically superior processes and equipment, increase its global competitiveness and avoid the weakness inherent in a fragmented supply by numerous small marketers of citrus fruit;

the Appellant, as the largest employer in the Gamtoos River Valley, contributes actively to the socio-economic upliftment of numerous people, including formerly disadvantaged persons, in the Gamtoos River Valley, thus satisfying one of the aims of the Act.

Appellant focusses upon benefits to its members and fails to establish that the Articles which are prohibited are necessary to achieve the alleged efficiencies or that they outweigh the anti-competitive effect of its acts. Indeed, the efficiencies are, except, in the case of the two last mentioned, solely and directly beneficial to the members themselves.

Appellant also submits that the Tribunal ignored the fact that the requirement that members of the Appellant deliver their fruit to the packshed, had been voluntarily agreed to by its members. As noted above, this is irrelevant.

The Tribunal also examined and rejected Appellant's contentions that the exclusivity provisions were necessary for the raising of capital. The Tribunal found that the method and financial model employed by Appellant to procure finance and to secure its loans has unacceptable anti-competitive effects and that alternatives exist which do not infringe our competition law.

I am not persuaded that the Tribunal erred in rejecting the efficiency defence, it was, in my view, the correct decision.

Application to strike out

On the date of the complaint referral hearing Appellant applied to the Tribunal for an order striking out certain passages from affidavits filed by the Commission and deposed to by Jan Daniel Du Preez - the Third Respondent, Volschenk Bernard Verwey a farmer from Patensie and Jakobus Johannes Petrus Bezuidenhout, Second Respondent as also the expert report compiled by Geoff Parr, Head of Policy and Projects at the Commission. The report was filed as an independent document, not confirmed under oath nor attached to any affidavit .

Appellant's application was not upheld. In its decision the Tribunal stated:

"**We are reluctant to grant the application to strike out. Section 55 of the Act explicitly takes an expansive view of the admissibility of evidence in proceedings before the Tribunal and this, in our view, dictates that an application to strike out will only be granted in rare circumstances. We are however prepared to accord a relatively low weighting to evidence that is hearsay and, in particular, to evidence which the respondent has not had to opportunity to rebut. In this particular case, we are comforted by the fact that, albeit inconvenienced by the timing and character of certain of the submissions of the Commission, [Appellant] has, for the most part, taken the trouble to respond. Indeed certain of the allegations made in the belated expert's report are pre-emptively dealt with in earlier submissions by [Appellant].**"

In a footnote to the decision the Tribunal noted that:

"**We do not in any event need to decide the striking out application since, as will be seen later, on [Appellant's] own evidence, transport costs still exceed the SSNIP test. Nor do we need to decide this striking out application in respect of the affidavits of Du Preez, Verwey and Bezuidenhout, since we have not relied on the material sought to be struck out in our decision.**"

In its Notice of Appeal, Appellant appeals against:

"**The Order relating to the Appellant's application to strike out certain portions of and annexures to the affidavits filed on behalf of the [Commission]"**

In setting out the detailed grounds of appeal Appellant contends that:

"**The Tribunal should have allowed the Appellant's application for the striking out of certain portions of affidavits and annexures to affidavits filed at a late stage by the [Commission] on the basis that such evidence was inadmissible and highly prejudicial to the Appellant's case and that allowing such evidence constituted both procedural and substantial unfairness vis-à-vis the Appellant."**

It bears emphasis that Appellant has not given notice of an appeal against the Tribunal's decision not to strike out the passages from Parr's expert report. The Respondent's Notice of Appeal and grounds for appeal deal only with the Tribunal's decision not to strike out "certain portions of and annexures to the affidavits filed on behalf of the Commission".

Even though the terms of the Notice of Appeal could *per se* held to be decisive, the parties argued the refusal of the application to strike out Mr Parr's expert opinion and it will, in the interests of justice, be considered.

Section 55(3) of the Act provides that:

The Tribunal may-

(14) accept as evidence any relevant oral testimony, document or other thing, whether or not -

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

(ii) would be admissible as evidence in court; but

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

Pursuant to section 52(1)(b) of the Act the Tribunal to "*may conduct its hearings informally or in an inquisitorial manner*".

Our Courts have repeatedly stated that where proceedings are conducted informally or in an

inquisitorial manner the decision maker is placed in an active role to get at the truth and that the ordinary rules of evidence do not apply. Subject at all times to the requirements of fairness, the Tribunal is not precluded from having regard to hearsay evidence. (See: *Smit v Seleka*, 1989 (4) SA 157 (O) at 164; *Benjamin v Sobac South African Building And Construction (Pty) Ltd*, 1989 (4) SA 940 (C) at 964-5; *Ross v South Peninsula Municipality*, 2000 (1) SA 589 (C) at 595)

Indeed, it seems to me that expert evidence in disciplines such as economics and socially related sciences will inevitably be based upon hearsay evidence. Given that the expert has to rely upon reported statistics, surveys and other factors and can hardly be expected to glean every basic fact personally, the value of the expert testimony and the conclusions drawn will always be dependant upon the reliability of the raw data. The sources upon which such experts rely are often themselves a product of hearsay data. An obvious example being the statistical data issued by official State departments of statistics.

Applications to strike out are not granted where the applicant will suffer no prejudice were the alleged offensive material remain on the record. (See: *Beinash v Wixley*, 1997 (3) SA 721 (SCA) at 733-4; *Steyn v Schabort en Andere NNO,*1979 (1) SA 694 (O); *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa,*1987 (1) SA 614 (SWA) at 621F--G; *Vaatz v Law Society of Namibia,*1991 (3) SA 563 (Nm) at 566B;);*Inkatha Freedom Party And Another v Truth And Reconciliation Commission And Others,*2000 (3) SA 119 (C) at 126)

Appellant has not suffered any prejudice as a result of the Tribunal's decision not to strike out the passages from the affidavits filed by Du Preez, Verwey, and Bezuidenhout because, in reaching its decision, the Tribunal did not rely on the material sought to be struck out.

Similarly, no reliance was placed on the expert report of Mr Parr. I am unable to find support for Appellant's submission that Parr's evidence was - despite the Tribunal's disavowal, nonetheless, relied upon. At the hearing of the appeal, the Commission expressly abandoned reliance upon Parr's evidence. The evidence which the Tribunal relied upon to analyse the transport costs for the purpose of defining the relevant market is all to be found in the affidavits filed by Appellant.

Fair hearing and procedural fairness

In addition to attacking the Tribunal's refusal to strike out the alleged offending evidence on the grounds of hearsay, Appellant also contends "that allowing such evidence constituted both procedural and substantial unfairness vis-à-vis the Appellant."

The parties have a Constitutional right to have their dispute decided in a fair public hearing before the Tribunal. Section 33(1) of the Constitution provides that "*everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*"

Section 34 of the Constitution states that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and

impartial tribunal or forum."

The Constitutional right is given effect to by the *Promotion of Administrative Justice Act*, No. 3 of 2000.

Section 3(1) of that Act provides that:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." In terms of section 3(2)(b)(b) the right to

procedurally fair administrative action includes "a reasonable opportunity to make representations".

The decisions of the Tribunal are administrative decisions and fall within the definition of 'administrative action' in the Promotion of Administrative Justice Act.

In *Janse Van Rensburg NO And Another v Minister Of Trade And Industry And Another NNO,* (1) SA 29 (CC), paragraph [24], Goldstone J stated:

"These features must be weighed against the requirements of administrative justice. In doing so it must be appreciated that one of the enduring characteristics of procedural fairness is its flexibility. The

application of procedural fairness must be considered with regard to the facts and circumstances of each case. **. . . "**

(See also: *Permanent Secretary, Department Of Education And Welfare, Eastern Cape, And Another v Ed-U-College (PE) (Section 21) Inc*, 2001 (2) SA 1 (CC), para [19]; *Minister Of Public Works And Others v Kyalami Ridge Environmental Association And Another (Mukhwevho Intervening)*, 2001 (3) SA 1151 (CC), paragraph [101]); *Bel Porto School Governing Body And Others v Premier, Western Cape, And Another*, 2002 (3) SA 265 (CC)

Relevant facts and circumstances of this case

An examination of the facts and circumstances of this case reveals that the Tribunal issued directions at a pre-hearing conference held with the parties on 13 December 2001. The following specific provision was made for the filing of expert and discovery documents:

"**The Commission will file:**

a. A summary of the nature of the expert evidence it will bring by 15 January 2002;

2. Its expert summaries before 25 January 2002 ;

3. Its witnesses affidavits by 25 January 2002;

4. Its discovery affidavit by 15 January 2001.

The [Appellant] will file:

1. Its reply, if any, to the Commission's expert witnesses by 13 February 2002;

2. Affidavits of any further witnesses it intends to bring by 13 February 2001;

3. Its discovery affidavit by 15 January 2002.

On 30 January 2002 and at a further pre-hearing conference was attended by the parties. The timetable for the filing of documents was revised as follows:

4(c) The Commission will file its expert affidavit by Monday 4 February 2002 at 10h00

4(d) The [Appellant] will file its reply, if any, to the Commission's expert witnesses by 20 February 2002, as well as the affidavits of any further witnesses it intends to bring also by this date. The [Appellant] will approach the Tribunal should it have a difficulty with this date."

Paragraph 4(c) of the direction was part of what was described as "*the revised timetable*" and the use of the phrase "*expert affidavit*" must be considered to have been a drafting error. The stated intention was to revise the timetable not to alter the format of the expert report.

The Tribunal also directed that witnesses who had filed affidavits should be available throughout the hearing for questioning *in the event that either the opposing party or the Tribunal wishes to*

question them".

A summary of the expert economic opinion of Mr Geoff Parr, was filed his on 15 January 2002 and his economic opinion was filed on 4 February 2002.

Appellant filed a lengthy reply to the affidavits of the further witnesses that had been filed during the last week of January 2002 and the report of Mr Parr. The reply was deposed to by deposed to by Appellant's secretary and was filed on 21 February 2002. On the following day, Appellant filed a supplementary expert affidavit deposed to by its managing director in which he too responded to Mr Parr's expert opinion.

Appellant did not avail itself of the opportunity, expressly reserved to it by the Tribunal on 30 January 2002, to approach the Tribunal should it require further time within which to respond to the expert opinion and the further affidavits filed on behalf of the Commission in accordance with the revised timetable.

At the commencement of the referral hearing Appellant filed a formal notice of its application to strike out the evidence that it had already responded to.

At no stage did the Respondent apply for more time or for a postponement of the hearing in order to deal further with any particular aspect of the Commission's expert report or further affidavits. Nor did Appellant apply at the referral hearing for Mr Parr to be called to testify and be cross-examined.

Considering all the circumstances I am satisfied that the appeal against the refusal to strike out portions of the affidavits and Mr Parr's expert opinion cannot succeed and that the Tribunal afforded Appellant a hearing that was both procedurally and substantially fair.

Costs

In its grounds of appeal, Appellant contends that:

"**In all the circumstances of the case, the Tribunal erred in not awarding costs against all the Respondents, particularly having regard to the numerous instances of objectionable, unreasonable and mala fide conduct by them."**

In Appellant's heads of argument criticism is levelled against the Commission for the manner in which it conducted its enquiry in this matter. That issue was not argued before us. Suffice it to record that the judgment of the *Supreme Court of Appeal in Simelane NO and others v Seven-Eleven Corporation SA (Pty) Ltd and another,*[2003] 1 All SA 82 (SCA) which analysed the role of

the Commission and the ambit of its enquiry would appear to deal adequately with and answer the complaints raised.

Appellant submitted that the Tribunal ought to have awarded costs against Second and Third Respondents who lodged the original complaints against Appellant. As regards the alleged "objectionable,

unreasonable and *mala fide" conduct* the original complainants there appears to be no doubt that vacillated in their attitude and their analysis of the issues. However, when regard is had to the history of

the dispute it is apparent that the issues gave all the parties and the Commission considerable difficulty. For example, questions as to the legal nature of the transactions between the members and

Appellant were complicated by the use of the word *koop*" in the Articles of Association. In addition, the very divergent views taken by the respective parties in relation to the relevant market considerably

expanded the scope of the dispute. There was also the Appellant's focus upon the benefits that its structure afforded its members to enable them to compete in the international citrus market, an approach

that failed to appreciate that the true enquiry related to competition in the market for the services offered by Appellant itself. Given all these facts and circumstances I cannot fault the Tribunal for exercising

its discretion against making any order as to costs.

Section 57 of the Act provides that:

"**(1) subject to subsection (2) and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.**

(2) the Competition Tribunal -

(1) has not made a finding against a respondent, the Tribunal member presiding at a hearing may award costs to the respondent, and against a complainant who referred the complaint in terms of section
51 (1); or

(1) has made a finding against a respondent, the Tribunal member presiding at a hearing may award costs against the respondent, and to a complainant who referred the complaint in terms of section 51(1)."

The Tribunal decided to make no order as to costs. In the light of section 57 and the finding made by the Tribunal against Appellant there is no basis upon which we can set aside the Tribunal's order and replace it with an order of costs in Appellant's favour.

In these proceedings Appellant asks for an order for costs against all three Respondents. Second and Third Respondents did not participate as parties to the appeal though both deposed to affidavits

filed on the record.

As for the costs of appeal there is no reason why they should not follow the result. Appellant will be ordered to pay the costs of appeal.

The Result

For the reasons stated the appeal is dismissed and Appellant is to pay the costs of the appeal.

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SELIKOWITZ JA

Concur:

Hussain JA

Malan AJA