1 COMPETITION TRIBUNAL OF SOUTH AFRICA

1.1.1

(ba) Case No: 103/CR/Dec06

In re points in limine:

Clover Industries Limited	First Applicant
Clover SA (Pty) Ltd	Second Applicant
Ladismith Cheese (Pty) Ltd	Third Applicant

And

The Competition Commission	Respondent

In the matter between:

Competition Commission	Applicant

And

Clover Industries Limited	First Respondent
Clover SA (Pty) Ltd	Second Respondent
Parmalat (Pty) Ltd	Third Respondent
Ladismith Cheese (Pty) Ltd	Fourth Respondent
Woodlands Dairy (Pty) Ltd	Fifth Respondent
Lancewood (Pty) Ltd	Sixth Respondent
Nestle SA (Pty) Ltd	Seventh Respondent
Milkwood Dairy (Pty) Ltd	Eighth Respondent

Panel : D Lewis (Presiding Member), N Manoim (Tribunal Member),

and Y Carrim (Tribunal Member)

Heard on : 2 June 2008

Order Issued : 23 June 2008

1.2 Reasons Issued: 23 June 2008

1.3

1.4 REASONS FOR DECISION

1.5

Introduction

1] On 7 December 2006 the Competition Commission ("the Commission"), filed a complaint referral with the Competition Tribunal against seven respondents, including Clover Industries Limited, Clover SA (Pty) Ltd (herein collectively referred to as "Clover") and Ladismith Cheese (Pty) Ltd (herein referred to as "Ladismith"). However in their answering affidavits in the complaint, three of the respondents, Clover and Ladismith, raised points *in limine* to the Commission's referral. Clover and Ladismith, respectively the first, second and fourth respondents in the complaint, are the applicants in the matter presently before us.

2] There are three points *in limine* raised by Clover, while Ladismith has raised only one point *in limine*. These *in limine* points were heard by a panel of the Tribunal on 2 June 2008.

3] The first point *in limine*, raised by both Clover and Ladismith, is that the Commission referred the complaint outside of the time frames provided for in the Competition Act, 1998, as amended ("the Act") and, as a result, the matter has prescribed.

4] The second and third points *in limine* raised by Clover relate to the corporate leniency agreement signed between Clover and the Commission. Clover contends that certain of the charges proferred by the Commission in the complaint are the subject matter of

leniency extended to it by the Commission and so should not have formed part of the subject matter of the complaint. We will consider each of the three points *in limine* in detail below.

5] On 28 May 2008, the Commission filed a supplementary affidavit to which was attached an affidavit deposed to by the so called "small milk producer", Mrs Malherbe. This is pertinent to the first *in limine* point because the applicants allege that the complaint was initiated by way of a letter from Mrs Malherbe. The Commission asked the Tribunal to admit the supplementary affidavit into evidence in the hearing of the points *in limine*. Clover filed an affidavit on 30 May 2008 objecting to the Commission's affidavit being admitted into evidence. Although we note that counsel for Ladismith referred extensively to this affidavit in her oral submissions to the Tribunal, we are able to decide the first *in limine* point without relying upon the affidavit and so do not find it necessary to decide whether or not to admit the affidavit in question.

First point *in limine*

6] On or about 10 June 2004, Mrs Louise Malherbe, a 'small milk producer' from the southern Cape, wrote a letter addressed to the Commission in which she highlighted certain anticompetitive practices allegedly perpetrated by certain milk processors in the region of the country in which she conducted her business. This letter forms the basis of the first point *in limine* raised by Clover and Ladismith, namely the claim that the Commission's referral has prescribed. On or about 11 June 2004, she forwarded this letter to the Deputy Minister of Agriculture. The Commission avers that, even though the letter in question is clearly addressed to the Commission and marked for the attention of one 'William', it did not in fact receive the letter directly from Mrs Malherbe, but rather received it from the Deputy Minister of Agriculture. It appears that, after receiving the letter from the Deputy Minister of Agriculture, the Commission contacted a range of industry players in order to gather information concerning the milk industry.[1]

1 See Annexure HBS 2 to the founding affidavit.

7] On 10 February 2005, the Commissioner initiated "a full investigation into the milk industry", and more particularly against Clover, Parmalat (Pty) Ltd and Ladismith for alleged breaches of sections 4 (1)(b) and 8(d)(i) of the Act.[2] The allegations related to collusion and/or price fixing in the procurement of milk as well as certain alleged abusive practices relating to inducements to suppliers not to deal with competitors. The investigations undertaken by the Commission led it to investigate similar conduct allegedly perpetrated by Woodlands Dairy (Pty) Ltd, Lancewood (Pty) Ltd and Nestle SA (Pty) Ltd – these were consolidated with the initial complaint.

8] On 7 December 2008, the Commission referred the consolidated complaint to the Tribunal against seven respondents namely Clover, Ladismith, Parmalat (Pty) Ltd, Woodlands Dairy (Pty) Ltd, Lancewood (Pty) Ltd and Nestle SA (Pty) Ltd.

9] The first point *in limine* raised by Clover, which is also Ladismith's *point in limine*, is that the Commission's referral has prescribed as the Commission did not refer it within the one year period contemplated in section 50(2) of the Act, and/or in the alternative, the Commission did not get the necessary extensions from the initial complainant after the investigation period had ended in terms of section 50(4). However, in its founding affidavit in the complaint, the Commission averred that it had initiated all the investigations under section 49B(1) and referred the complaint in terms of section 50(1) of the Act, thus implying that the complaints were "timeously referred".[3] Section 49B of the Act provides as follows:

> 1.6 "*(1) The Commissioner may initiate a complaint against an alleged prohibited practice.*
>
> *(ii) Any person may –*
>
> *1.7 (a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or*

2 See Annexure HBS 2 to the founding affidavit.
3 See page 10 of the founding affidavit.

1.8 (b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.

(iii) Upon initiating or receiving a complaint in terms of this section, the Commission must direct an inspector to investigate the complaint as quickly as practicable.

(iv) *At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.*"

10] However section 50 of the Act provides clearly that the time periods within which a complaint must be referred by the Commission to the Tribunal are determined by whether the complaint is initiated by the 'Commissioner' (Section 49B(1)) or by 'any person', that is, by a private complainant (Section 49B(2)(b)). Section 50 provides that:

1.9 "*(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*

b. Within one year after a complaint was submitted to it, the Commission must –

1.10 (a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or

1.11 (b) in any other case, issue a notice of non-referral to the complainant in the prescribed forms.

c. When the Competition Commission refers a complaint to the Competition Tribunal in terms of sub-section (2)(a), it –

1.12 (a) may -

1.13 (i) refer all the particulars of its complaint as

submitted by the complainant;

1.14 (ii) refer only some of the particulars of the complaint as submitted by the complainant; or

1.15 (iii) add particulars to the complaint as submitted by the complainant; and

1.16 (b) must issue a notice of non-referral as contemplated in sub-section (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal."

1.17 (4) In a particular case –

(a) (a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or

(b) (b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period".

11] It is indeed common cause among the parties that there are two routes by which the Commission can initiate an investigation in terms of section 49B of the Act and that the route selected impacts upon the time period within which the complaint must be referred. Firstly, the Commissioner can 'self initiate' an investigation in terms of section 49B(1) and in that instance, the Commission can refer the matter at 'any time' as stated in section 50(1) of the Act. Secondly, 'any person' - a 'complainant' - may lodge a complaint with the Commission as envisaged in section 49B(2)(b). We observe – and will return to this point later – that when a 'a person' lodges a complaint in terms of Section 49B(2)(b) it must be done 'in the prescribed form'. In the latter instance the Commission has one year within which to conclude its investigation and refer the matter to the Tribunal. If the Commission intends to extend the investigation

period beyond a year, it has to obtain the consent of the complainant to extend the investigation period, or to approach the Tribunal for an extension. Should the Commission fail to refer the matter to the Tribunal within the requisite time period or to obtain the necessary extension, then it is be deemed to have issued a certificate of non-referral. It is also noteworthy – and this point will also be examined later – that Section 49B(2) distinguishes between the submission to the Commission of '*information'* concerning an alleged prohibited practice which may be submitted *'in any manner or form'* and a '*complaint'* which must be submitted *'in the prescribed form'.*

12] Clover and Ladismith claim that the letter from Mrs Malherbe dated 10 June 2004 was a complaint in terms of section 49B(2)(b) and as a result, the Commission had one year within which to submit the complaint to the Tribunal. Alternatively, the Commission should have obtained Malherbe's consent to extend the period of investigation. Since, as is common cause, the Commission failed to do either, it is, allege the applicants, deemed to have issued a certificate of non-referral in terms of section 50(5). However, the Commission contends that Mrs Malherbe's letter is not a complaint in terms of the Act, but constitutes a mere submission of information to various authorities and/or people, including the Commission itself.

13] It is worth citing Mrs. Malherbe's letter in its entirety:

> *"Geagte William*
>
> *i.s. Ondersoek na melkprys vir produsent en verbruiker*
>
> *Onlangs was daar n ondersoek gelas van owerheids kant na die motorbedryf- waarom motorpryse nie gedaal het toe die Rand versterk het nie. Nou wonder ons of daar nie n ondersoek kan kom na die melkprys van die produsent vergeleke met die prys wat die verbruiker moet betaal nie.*
>
> *Ons het n melkplaas net buite Riversdal in die Suid-Kaap waar ons reeds meer as 35 jaar in die melkbedryf is en ons melk aan Nestle lewer.*
>
> *Ongeveer 10 to 15 jaar gelede was die aankoopprys van melk om en by 50%*

van sy rakprys in n winkel. Huidiglik kry ons as boere, met n Friesland-kudde, n skamele R1.62 per liter. n Sakkie melk kos tans R5.49 by die supermark. Ons kry dus ongeveer 25% van sy rakwaarde, Sedert verlede jaar September het ons prys van melk met 30c per liter afgekom. Dit is wat ons reeds drie jaar gelede gekry het.

Die Suidkaap se melkprys is die heel laagste in die land. Waarom verskil die prys van streek tot streek? Mielies en ander stowwe kos vir ons presies dieselfde! Inteendeel. Ons het nog vervoerkoste van ongeveer R250.00 per ton om mielies hier gelewer te kry.

Sedert die begin van die jaar was daar by twee geleenthede grafieke van verbruikerspryse, deur Prof Johan Kirsten verskaf, in die media. Melk is die enigste een wat n konstante opwaartse kurwe toon. Die verbruiker betaal al hoe meer en die produsent kry al hoe minder. Waarom kan ons nie deel in die duidelik groter wins wat gemaak word nie OF waarom kan die armes nie die voordeel trek van ons lae pryse nie.

Teen hierdie pryse (daar is gerugte van n verdere verlaging teen September!) sal ons nie verder kan boer nie, maar saam met ons sal 12 gesinne ook sonder inkomste wees Dit kom neer op absolute uitbuiting van produsente en hul personeel.

In hierdie area bestaan die melkkopers hoofsaaklik uit Nestle, Parmalat en Ladismith Kaas. Dit is nie meer soos vroeer toe hulle nog opposisie vir mekaar was nie, hulle kom elke paar maande by mekaar en bespreek hulle behoeftes. Waar daar tekorte of oorskotte mag bestaan, voorsien hulle mekaar- Kartel vorming. Daar is dus nie onderlinge kompetisie nie en hulle kom ooreen oor n prys wat hulle almal pas. As jy enigsins te veel na n koper se sin kla of antwoorde soek, se hulle eenvoudig vir jou dat hulle nie verder jou melk gaan koop nie. EN die ander kopers stel nie belang om jou oor te neem nle. Wat moet jy dan met jou melk maak? Jy word dus eenvoudig gedwing om na hulle pype te dans. Jy het geen bedingingsmag nie. EN jy is

afhanklik van die inkomste om te oorleef.

Indien jy wel navraag doen, is een en almal se antwoord dat Pick en Pay en Shoprite Checkers die melkprys beheer. Hulle dikteer die prys. Ek het vanoggend weer na Prof Johan Kirsten se kantoor geskakel, maar aangesien hy nie beskikbaar was nie, met Prof. Chris Blighnaut gepraat. Hy se dat die melkkopers ook saamspeel met hierdie genoemde groepe.

As die heffings wat op melkprodukte is, verhoog kan word, kan hierdie groepe staak om die enorme hoeveelhede suiwelprodukte in te voer. Nieuseeland vireers, subsidieer hul suiwelprodukte met 50% en word dus spotgoedkoop ingevoer deur groot kettinggroepe,

Die M.P.O. is veronderstel om na die melkboere se belange om te sien. Anngesien hulle van die melkkopers afhanklik is om hul premies in te vorder, kan hulle ook nie teen hulle optree nie!

Hiermee n klomp inligting kortiks saamgevat, maar ons is bereid om alle verdere inligting tot ons beskikking te verskaf indien julle ons kan help.

Nogmaals dankie dat jy geluister het na ons probleme en bereid is om daaraan aandag te gee. Hoekom moet ons, boere en verbruikers, geboelie word deur die groot geldmagte?

Met dank

N.S. die saak is vir ons so belangrik dat ons bereid is na Pretoria te kom en inligting tot ons beskikking beskikbaar te stel."

Translation:[4]

"*Dear William*

4 See Annexure A2 to the Commission's Heads of Argument.

RE: Investigation into milk prices for producers and consumers

As discussed telephonically, herewith our problem with the milk buyers.

There was an investigation launched recently by government in the motor industry: why car prices did not come down when the Rand has become stronger. We are now wondering if a similar investigation could not be launched into the milk prices of producers in comparison to what consumers have to pay.

We own a milk farm outside Riversdale in the Southern Cape whereby we have been in the milk industry for 35 years. We deliver milk to Netsle.

> *Around 10 to 15 years ago the purchase price of milk was +-50% of the shelf price in a shop. Currently, we as farmers, with Friesland cattle receive a mere R1.62 per litre. A sachet of milk's price is R5.49 in the supermarket. We receive +-25% of the shelf value. And it is the same as what we used to get 3 years ago.*

Milk prices in the Southern Cape are the lowest in the country. Why does the price differ from region to region? We pay the same prices for mealies and other resources as other regions! In fact, we also have transport costs of around R250.00 per ton to get mealies delivered here.

The media published graphs of consumer prices on two different occasions since the beginning of the year, done by Prof. Kirsten. Milk is the only graph that shows a constant rise. Consumers pay more and more and producers get less and less. Why can we not

share in the obviously bigger profit OR why can the poor not benefit from our low prices?

At these prices (and there are rumours of a further price cut in September!) we will not be able to farm anymore and there will be 12 families altogether without an income. This boils down to an absolute exploitation of the producers and their personnel.

Milk buyers in this area are basically Nestle, Paarmalat and Ladismith Cheese. And it is not like in the past when they were competitors. They now meet once a month to discuss their needs and interests. Where there are losses or excess they provide to each other – forming a cartel. Thus there is no competition between each other and they agree on a price that suits them all. If someone complains too much or look for answers they plain and simple make you understand that they will not buy milk from you anymore. And what are you supposed to do with the milk then? We are forced to dance to their tune and have no bargaining power. AND we are dependent on the income.

> *If we do make enquiries the answer is that Pick 'n' Pay and Shoprite Checkers control the milk prices. They dictate the prices. I tried to contact Prof. Johan Kirsten again this morning but, as he was not available. I spoke to Prof. Chris Blighnaut. According to him the buyers are playing along named groups.*

If the levies on milk products can be raised these groups can stop importing the enormous amount of dairy products. New Zealand subsidises their dairy products with 50% therefore it is imported by big chain groups at a very cheap price.

The M.P.O. (Milk Producers Organisation?) is supposed to look after the milk farmers' interests but because they are also not in the position to act against them.

This is a whole lot of information summarised but we are prepared to submit any further information at our disposal if you are in the position to help us.

Thank you for listening to our problem and that you are prepared to give attention to it. why must we as farmers and consumers be abused by the big money powers?

With thanks.

PS: This case is of such importance to us that we are prepared to go tp Pretoria and make the information at our disposal available.

14] Central to this case then is whether Mrs Malherbe's letter is a complaint for the purposes of the Act. This being so, all the parties went to great lengths in their efforts to define what constitutes a complaint in terms of the Act. The Commission immediately pointed out that the 'complaint' in the Malherbe letter had not, contrary to the requirements of the Act, been submitted in the prescribed form. In addition the Commission argued that it had initiated the investigation against other respondents who, like Clover itself, were not even mentioned in Mrs Malherbe's letter. This, the Commission submits, demonstrates that the investigation went beyond the scope of the Malherbe letter. This, the Commission argued, demonstrated that Mrs Malherbe was merely submitting information in terms of section 49(B)(2)(a) rather than a complaint in terms of section 49B(2)(b).

15] Clover and Ladismith sought to answer the first of the Commission's argument – the failure to adhere to 'the prescribed form' – by citing the decision of the Tribunal in the case of *National Pharmaceutical Wholesalers*[5]:

5 45/CR/Jul01

> *Significantly, there is no requirement that a complaint specify, the sections of the Act that have been contravened or to classify the conduct in any way as a particular prohibited practice. It is clear that the form of the complaint is intended to be "user friendly" and to be "fact-driven". A complainant is not expected to be able to classify the conduct complained of into a particular prohibited practice in terms of the Act. What it must do however, is to specify what conduct has been complained of." (Our emphasis)*

16] This conclusion, the applicants aver, is supported by the Competition Appeal Court in the *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others*,[6] where the court stated that:

> *"Section 49B provides for the initiating of a complaint. This may be done in any manner or form or in the prescribed form. The wording of section 49B is worth noting in that it is not prescriptive as to how a complaint may be initiated. This theme runs throughout the complaint procedures, the object being to enable complaints to be lodged without the need for procedures that are too technical or formalistic."*

In paragraph 15 the court stated that:

"*Section 49B focuses on a 'prohibited practice' and does not require a complainant to identify prohibited conduct with reference to various sections of the Act. A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act. What is required is a statement or description of prohibited conduct. In this regard, Form CC1, prescribed in terms of sections 21(4) and 49B of the Act is instructive. The former requires a complainant to 'provide a concise statement of the conduct' that is*

6 Case 15/CAC/Feb02 para 14.

the subject of the complaint. A complainant need only identify the conduct of which it complained"

17] Based on the above case, Clover and Ladismith submit that Malherbe's letter complied with the requirements of section 49(B)(2)(b) as the conduct complained of – 'kartel vorming' - and the parties are identified. As to the Commission's contention that the fact that the ultimate referral went beyond the ambit of Mrs Malherbe's letter, the applicants point out that a referral by the Commission that departs even in important aspects from the complaint submitted is expressly contemplated in Section 50(3)(a). In addition they argue that certain of the Commission's language (for example statements in its founding affidavit in the complaint referral to the effect that the milk investigation was "prompted" by a letter from "a small milk producer") and certain of its actions (for example, the fact that soon after receipt of Malherbe's letter the Commission appointed two of its investigators to further examine the broad market) is indicative of its treatment of the letter as the initiating act in a complaint proceeding.

18] However there are several factors that militate against the interpretation of Malherbe's intervention that is urged upon us by Clover and Ladismith. We should clarify at once that, for the purposes of the Act, a 'complaint' is a juristic act necessary to bring alleged anti-competitive conduct within the ambit of the statute's formal procedures with Sections 49 and 50 being the first steps in the process. In this specific context we are little availed by confining our interpretation of 'to complain' or 'complaint' to the ordinary English meaning because the Act gives meaning to the concept of a 'complaint' and serious consequences, not least the possibility of prescription, flow from the precise manner of its initiation, or, expressed otherwise, the precise form in which it is submitted.[7] Certainly then in the ordinary meaning of the verb 'to complain', Mrs Malherbe 'complained' of what she construed as misconduct on the part of certain of those who were ultimately cited as respondents in the main complaint referral. However, this does not necessarily support a conclusion that she had submitted a 'complaint' which meets the requirements of Section 49B(2)(b) as

7 A complainant is a person who enjoys certain rights under the Act not granted to the public generally. For instance the right to bring a an application for interim relief, (section 49 C), the right to bring proceedings in terms of section 49D(4) after a consent order has been granted, and the right to *locus standi* in certain circumstances, (section 53(1)(a)(ii).

opposed to the mere submission of 'information' as contemplated by Section 49(2)(a).

19] Indeed 'complaints', in the colloquial sense, of anti-competitive conduct – whether well-founded or not – are the stuff of everyday commerce and thus of everyday life in South Africa and, certainly, elsewhere. Moreover, these 'complaints' are routinely, in one form or another, brought to the attention of the competition authorities. They are the subject of regular 'letters to the editor' and of newspaper editorials, callers to radio chat shows frequently wax lyrical regarding the parlous state of competition in South Africa and just as frequently cite in their complaint their pet alleged perpetrator. An employee of the competition authorities seldom attends a social gathering, public or private, at which he/she is not assailed by a citizen who believes that he/she has been poorly treated by some or other provider of goods or services and who believes fervently that his complaint merits the attention of the competition authorities. And, as with Mrs. Malherbe, there are conscientious or particularly aggrieved citizens who regularly commit their grievances to writing for submission to those deemed able to assist in their resolution. Indeed, it would not be possible for the Commission or any competition enforcement agency anywhere, to do its work were it not the direct or indirect recipient of this market intelligence. And it certainly would not be able to do its work were it compelled to file a referral to the Tribunal within 12 months of the date on which a particular issue had been 'complained' of. Certainly the Act envisages that all of this airing of grievances or 'complaining' may lead to the Commissioner to utilise his formal powers under Section 49B(1) to initiate a formal complaint – section 49B is after all entitled 'initiating a complaint' – but this does not eliminate the distinction which the Act explicitly draws between, on the one hand, the 'submission of 'information', and, on the other, the submission of a 'complaint'. [8]

20] So where then does one draw the line between the submission of 'information' and

8 Although counsel for Clover had sought to argue that section 49B(2)(a) operates to allow persons to give information during the course of investigation and hence should not be seen in contradistinction to section 49B(2)(b) which provides for the lodging of a complaint, the context of the provision suggests otherwise. The section is headed "initiating a complainant" and is located chronologically in Part C, in the portion that deals with the manner in which a complaint is triggered. It is quite clear contextually that what the legislature had in mind here was the submission of information prior to the commencement of an investigation. It is therefore legitimate to interpret the section as providing two sources of pre-investigation submissions from the public, those that constitute complaints and those that constitute the mere furnishing of information.

the submission of a 'complaint'? As we have just pointed out, the Act certainly envisages a possible link between the provision of information and the ultimate referral of a complaint by the Commissioner. However, we cannot ignore the inescapable fact that the Act explicitly provides that 'information' may be submitted in 'any manner or form' while a complaint is to be submitted in 'the prescribed form'. This does not mean that we fetish the precise form that a complaint should take. Indeed our flexibility with respect to the way in which a section 49B(2)(b) complaint may be formulated in our decision in *National Pharmaceutical Wholesalers* has been cited by the applicants. That decision makes it perfectly clear that we have adopted this flexible stance precisely to permit a layperson – as opposed to a competition law practitioner - to submit a complaint, an approach entirely consistent with our statutory requirement to conduct ourselves in as informal a manner as possible. However, our tolerance of informality as to the manner in which a particular complaint is articulated does not extend to interpreting every articulation of a grievance, every submission of information, as tantamount to the initiation of a complaint as contemplated by Section 49B(2)(b). And there is good reason for this: there can be no tolerance of informality in the submission of a Section 49B(2)(b) complaint if the *form* of the submission leaves the Commission uncertain as to whether a complaint has been submitted or information has been submitted and this because important consequences – notably prescription - flow from the Commission's understanding of what precisely has been submitted, a complaint or mere information.

21] This view is bolstered when one concedes – and this too is common cause and specifically conceded by the applicants – that the purpose of the prescription provision imposed on privately initiated complaints is precisely to protect the 'complainant' who may have her rights impaired by a dilatory or otherwise uncooperative Commission and who then may wish ultimately herself to stand in the place of the Commission and bring a private prosecution before the Tribunal. To uphold the application would be to achieve precisely the opposite of what the legislature manifestly intended in those circumstances when the aggrieved individual clearly has neither the intention nor the resources to proceed herself – it would deprive the Commission of the ability to address her grievance without effectively enabling her to seek redress herself.[9]

9 We have been urged by Counsel for Clover to eschew a 'consequentialist' interpretation of the statute. That is, to ignore the hard fact that by upholding the application neither Mrs Malherbe's nor the public's rights to have an alleged cartel

22] Our answer then to the question 'where does one draw the line between the submission of a 'complaint' and the submission 'of information'', is that the articulation of a grievance becomes a 'complaint' for the purposes of the Act, when there is some realistic basis for apprehending that the aggrieved person intends, absent a referral by the Commission, to assume the role of the complainant herself. It is this intention that has to be signalled and it is for this reason that the Act distinguished the submission of information (in any manner or form) from the submission of a complaint (in the *prescribed* form). The best evidence of such a signal would of course be the submission of a completed form CC1.[10] Absent that, such intention can only be inferred by the content and context of the person's submission as well as the nature of the ongoing interaction between that person and the Commission.

23] Mrs Malherbe's letter is devoid of any form whatsoever much less a prescribed form – it is addressed to the 'Chairman of the Competition Board' and directed at someone named 'William' who has never been identified by either the applicants or the Commission; it constantly refers to 'we' as the aggrieved persons and so it is not clear whether this 'complaint' is submitted in Mrs Malherbe's personal capacity or on behalf

investigated and possibly prosecuted will be vindicated. However there are strong grounds for rejecting this argument. A maxim of Roman-Dutch law holds that where there is doubt as to the meaning of a law it is presumed that the legislature did not intend an inequitable or unjust or unreasonable result. See Donellas *De Jure Civili* 1.13.12.The South African Courts have long accepted this presumption and Kellaway, quoting various cases, argues that "where two meanings may be given to a provision of a statute and one meaning leads to harshness and injustice whilst the other does not, a court should hold the legislature intended the milder rather than the harsher meaning". (See Kellaway *Principles of Interpretation of Statutes, Contracts and Wills* page 158*).*Du Plessis echoes the same sentiments that "where enactments centre around the status and protection of citizens of a country, the presumption is that such enactments promote rather frustrate justice". (See Du Plessis *The interpretation of Statutes* page 46*).* Devenish states that "where more than one interpretation is possible, or where doubt arises from the consideration of another relevant part of the same statute, then the courts should give expression to the presumption that the legislature must have intended a meaning that will avoid harshness and injustice". (See GE Devenish *Interpretation of Statutes* page162). this instance it clear – and is indeed conceded by the applicants - that a finding that Mrs. Malherbe is a complainant has serious consequences for the case as a whole as the matter will have prescribed. Thus, no party can ever bring the case before the Tribunal again, including Mrs Malherbe herself. While we are aware of this danger, the document that Clover and Ladismith rely on is an inchoate document that provides a murky picture of the status we should accord to Mrs Malherbe. On the other hand, there is little or no prejudice that Clover and Ladismith will suffer as they will have their day in court where they can defend themselves. As a result it is better to interpret the provisions of section 49(B)(2) for the benefit of the public as a whole, including Mrs Malherbe

10 The prescribed form.

of a collective of farmers; while she avers that the she owns a milk farm 'outside Riversdale in the Southern Cape', no business is named; a physical address is not even furnished. It is little wonder then that the Commission – when it received a copy of the correspondence from the Deputy Minister of Agriculture - construed this letter as the submission of information rather than the submission of a complaint from someone who, upon non-referral or prescription, would stand in the place of the Commission.

24] There is much else that suggests that Mrs Malherbe intended her letter to be the submission of information rather than a complaint in the meaning of the Act and that it was reasonable for the Commission to interpret it as such.

25] First, we note that Mrs Malherbe wrote and spoke to anyone in a position of some authority who may have been of some assistance in addressing her grievance. She spoke and forwarded her letter to the Deputy Minister of Agriculture, she spoke to Professor Chris Blignaut, she attempted to contact Professor Johan Kirsten who at that time was conducting research into the high food prices, and she wrote to "William" at the Commission. These are the actions of someone wishing to publicise her plight rather than those of a potential litigant in a major law suit.

26] Second, this conclusion is powerfully bolstered by Mrs Malherbe's express wish to remain anonymous *vis- a- vis* the alleged perpetrators of the conduct that aggrieved her. In an e-mail dated 4 December 2004, to Mr. Liebenberg, Mrs. Malherbe stated that she wanted her identity not to be revealed.[11] In that e-mail she stated that:

> "Ek en Wilhelm het die saak bespreek en ons voel dat dit beter sal wees as ons identiteit nie openbaar gemaak sal word nie. Indien ons enigsins kan help met verdere ondersoek is ons altyd beskikbaar".[12]

Translation*:*

"*... we feel it would be better if our identity was not made public. However if we can assist in*

11 See Annex A3 to Commission's Heads of Arguments.
12 Ibid para 1

the further investigation we will always be available."

27] This requirement of anonymity is clearly not consistent with someone intent upon prosecuting a complaint. Indeed the practice of the Commission has been that when a complainant lodges a complaint with the Commission, then her identity is revealed. However, when information is supplied in terms of section 49B(2)(a), Commission Rule 14(1) specifically makes provision for a request for anonymity. Commission Rule 14(1) (b) states that:

> *"Identity of a complainant, in the following circumstances:*
>
> *i) A person who provides information in terms of section 49(B)(2)(a) may request that the Commission treat their identity as restricted information; but that the person may be a complainant in the relevant matter only if they subsequently waive the request in writing.*
>
> *ii) If a person requests in terms of sub-paragraph (i) that the Commission treat their identity as restricted information –*
>
> *aa) The Commission must accept that request;*
>
> *bb) That information is restricted unless the person subsequently waives the request in writing".*

28] Counsel for Clover, citing the reasoning of the Competition Appeal Court in *Anglo South African Capital*,[13] correctly cautioned against using rules for interpreting a statute. However, it is difficult to deny that this provides further content to the essential difference between an informant and a complainant.

13See *Anglo South Africa Capital (Pty) Ltd and Others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC) par 17F where it was stated that "Rules which have not been drafted by the legislature cannot be treated together with the Act as a single piece of legislation nor can these regulations be employed as an aid to the interpretation of the Act".

29] Thirdly, it should be appreciated that we are dealing here with an allegation of cartel conduct. While it is not uncommon for private parties to prosecute abuse of dominance allegations which often turn on complex legal and economic argument, it is exceedingly rare for a private party to prosecute cartel conduct. The reasons are obvious: the successful prosecution of a cartel turns on an ability to prove clandestine conduct which requires the utilisation of considerable investigative resources and, above all, the utilisation of major investigatory powers which even a well-resourced private litigant does not possess. There can be no serious suggestion that Mrs Malherbe's letter to the Commission was intended as a prelude to a possible private prosecution. It was the provision of information intended for the Commission's edification and provided in order to persuade it to investigate further and prosecute if possible.

30] Fourthly, account must be taken of the broader context within which the Commission gathered its information. While the Commission's initiating statement clearly indicates that Mrs Malherbe's letter did assist in focusing its enquiries, it also clearly establishes that the path along which it encountered the alleged milk cartel was illuminated by a variety of sources, some of which pre-dated the letter from Mrs Malherbe. The Commission's initiating statement explains that:

> *"1. Over the past two months, the Commissioner's office has been in contact with various players in the milk producing industry. The purpose of this contact has been to establish whether there has been anticompetitive behaviour at any level in the industry. This contact was prompted by a letter from a "small" milk producer in the Southern Cape complaining about factors in the industry affecting milk producers. This letter was sent to the Deputy Minister of Agriculture who then forwarded it to the Commissioner for his attention.*
>
> *2. On receipt of the letter referred to above, I instructed Mr Johan Liebenberg and Mr. Jacobus Theron to make contact with the writer of the letter to establish the factual position in the industry. Further, that they also speak to any other player in the industry whom the information obtained indicates has knowledge about any possible or alleged anticompetitive behaviour in the industry.*

3. Pursuant to this instruction contact has been made with various industry players and as a result of which, a memorandum has been prepared detailing the progress made to date. The memorandum also mentions factual information suggesting the existence of anticompetitive behaviour in the market for the supply of milk. The memorandum is attached.

4. As a result of the factual findings recorded in the memorandum, the letter received from the Deputy Minister of Agriculture and numerous public comments about the alleged high prices of various food products, including milk, made by the Minister of Agriculture in 2003, I believe that there exists anticompetitive behaviour in the milk industry. This anticompetitive behaviour may exist at both the supply and demand side of the market.

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

6. In light of the above and in terms of section 49B(1) of the Competition Act, as amended, I initiate a full investigation into the milk industry".

31] In summary, all of the above suggests that Mrs Malherbe had no intention to be a complainant in terms of section 49B(2)(b) and we accept the Commission's contention that this complaint was initiated by the Commission in terms of Section 49B(1). The Malherbe letter constituted nothing more than the submission of information. Accordingly the time frames referred to in section 50(2) do not apply. Clover's first point *in limine* which is also Ladismith's *point in limine* are dismissed.

Second and third points *in limine*

32] The second and third points *in limine* relate to the conditional leniency granted to Clover on 20 December 2006.[14] The Commission granted immunity to Clover for its involvement in the milk balancing scheme, which is the basis of complaint six, and did not grant it immunity for the surplus removal scheme, which is the basis of complaint three.

33] In dealing with Clover's arguments on the second and third points *in limine*, the Commission treats them together. In these reasons we will deal with them together, not because we assume that they are the same, but because Clover's arguments in both points *in limine* boil down to the question of the unfairness or prejudice that Clover would suffer should the Tribunal hear the case against Clover, together with complaint three.

34] Counsel for Clover submitted that when the conditional immunity was granted only two charges had been brought against Clover by the Commission, being complaints three and six. Since then, the Commission has levelled additional charges against it as contained in the referral.

35] The essence of Clover's arguments relate to the surplus milk removal scheme. Clover submits that the Commission has alleged that both Parmalat and Clover have committed an abuse of dominance in contravention of section 8 of the Act, alternatively that they are parties to restrictive vertical practices in contravention of section 5 of the Act by concluding exclusive supply agreements with producers. Clover had introduced the C-milk in 2003, which constituted that portion of the producer's production which exceeds its "A" (premium priced) and "B" quota (priced between premium and the lesser C-quota). In terms of the producer agreements, producers were obliged to supply all their production, including the C-milk, to Clover, notwithstanding the fact that such C-milk was remunerated at a substantially lower price level than the "A" and "B" quota.

14 See founding affidavit para 16.1.1

36] Clover claims that the C-milk system is an integral and indivisible part of the surplus removal scheme. The surplus milk removal scheme, which forms the basis of complaint three, in turn forms an integral part of the milk balancing scheme, designed by Clover and other processors to remove surplus milk from the South African market, and which forms the basis of the sixth complaint. The Commission granted Clover Conditional Immunity on 20 December 2006 in respect of the milk balancing scheme but not the surplus removal scheme.[15] Consequently, the formulation of the third complaint in addition to the sixth complaint constitutes a duplication of the sixth complaint and is fundamentally unfair to Clover. To support its argument, Clover states that the basis of the third and sixth complaints is the "Clover presentation documents" and the continual reference in that presentation and subsequent presentations that linked the surplus removal scheme to the C-milk scheme.[16]

37] In relation to the third point *in limine,* Clover contends that complaint six relates to claims of fixing selling prices and trading conditions of milk and other processed products, or agreeing on a coordinated control of volumes in the market, in contravention of section 4(1)(b)(i), alternatively section 4(1)(a) of the Act. A condition of the Corporate Immunity is that Clover must provide its full and candid co-operation with the Commission in respect of the prosecution of complaint six against other relevant Respondents. This entails, inter alia, providing evidence through testimony of Clover officials. At the same time, however, Clover stands accused by the Commission of prohibited conduct in terms of complaints one, two, three and five of the complaint referral. Complaint one and two do not create a "conflict of interests", as the facts underlying the complaints and the witnesses relevant thereto are quite distinct from those relating to complaints three, five, and six. However, there is a distinct overlap between complaints three and five on the one hand, and complaint six on the other hand, with regard to the underlying facts and the witnesses relevant to each and that this might lead to a situation in which Clover and its main witnesses will simultaneously be required to defend themselves against complaint three and five, and to support the Commission's allegations and submissions in respect of complaint six. This situation will cause prejudice to Clover.

15 Clover's Heads of Argument page 11.
16 See Founding Affidavit, annexure "HBS86", presentation document dated 14 November 2005, para 14.3.

38] The Commission has denied that the C-milk system forms an integral and indivisible part of the milk balancing scheme and has submitted that these two are distinct and differentiated on the level of activity, the parties involved and the local/regional operation. The Commission contends that Clover devised the C-milk category with the purpose of preventing surplus milk from falling into the hands of a competitor. Thus the C-milk system was vertical as between producers and processors whereas balancing took place on a horizontal level as between competitors. In addition, the C-milk scheme was operational at a local level, whereas balancing took place on a national level. Moreover, different parties were involved in the two forms of conduct.

39] In addition to the above, the Commission argues that Clover quoted selective parts of the Conditional Immunity and omitted the very heart of the document. Clover entered into the negotiations and subsequently concluded that corporate leniency agreement, while being advised by its current attorneys of record and had "full knowledge of these facts and negotiations".[17] One of those conditions stated that:

> 1. *It is acceptable that upon formal acceptance of the terms and conditions set out in this document, Clover will be granted conditional immunity from prosecution before the Competition Tribunal for its involvement in cartel activities concerning collusion with other role players in the milk industry regarding "surplus removal" of milk, that resulted in price fixing in contravention of section 4(1)(b) of the Competition Act (Act 89 of 1998, as amended*
>
> 2. ***It is further recorded that the application by Clover for immunity regarding its internal prohibition on producers not to sell off "C-quota" milk was unsuccessful and will still form part of the original investigation as a possible abuse of dominance by Clover" (Our emphasis)***

17 Commission's Heads of Arguments page 27.

40] On the basis of the above, the Commission argues that Clover accepted the conditional immunity on these terms and that it should not be allowed to "wriggle out" of the hearing concerning its C-milk scheme. Clover has submitted that it is not that it was unaware of the Commission granting partial leniency on complaint six, with the express condition that complaint three would still be investigated and possibly be prosecuted, but it is challenging the correctness thereof.[18] Clover argues that it would be improper and inherently unfair for the Tribunal to hear complaint three when Clover was granted immunity on complaint six, which has substantially the same evidence and witnesses. Clover argues that the tenets of justice and fairness apply to all agreements that the Commission concludes as a public body and those demands are what Clover is claiming. Moreover, the proceedings before the Tribunal must be conducted in a manner that is both procedurally and substantively fair and that if the Tribunal hears the case against Clover as it currently stands (with the third complaint), that would infringe on Clover's right to just administrative action as envisaged in sections 33(1) and 34 of the Constitution, the provisions of PAJA and also section 52(2)(a) of the Act. The Tribunal must therefore dismiss the third and/or fifth complaint as against Clover, or alternatively, the sixth complaint should be separated out for determination prior to the determination of the third and fifth complaints.[19]

41] It is not clear to us in which way Clover's right to fair administrative action and its rights under PAJA were or would be infringed by the Commission's refusal to grant it immunity in relation to the C-milk scheme. However, it is clear to us that at the time of entering into the corporate leniency agreement Clover fully appreciated that it would still face prosecution on complaint three and that its earlier request for immunity in relation thereto had been turned down by the Commission and the terms of the agreement at the time without challenging the correctness or fairness of the Commission's determination. Thus, Clover was fully aware of all the conditions to the corporate leniency agreement.

42] It is important to bear in mind that this immunity is nothing but an agreement between

18 Clover's Heads of Arguments pages 52-53.
19 See Clover's Heads of Arguments page 83.

Clover and the Commission that the Commission would not prosecute it on certain counts. Moreover it is conditional upon whether or not Clover lends its full co-operation to the Commission in the prosecution of the other respondents, something that can only be determined by Clover's conduct at trial. In any event, the issue that Clover relies upon for this application, namely, that the milk balancing scheme (complaint six) and the C-milk scheme are an integral part of the same conduct is something that can only be decided upon after evidence has been led on the two schemes and is more appropriately decided at trial. Questions of unfairness arising from this, if any, to Clover would also be better decided at trial.

43] As far as unfairness to Clover, as argued in the third point *in limine*, is concerned, this can only be determined once preparations for trial are advanced to the stage where it is possible to assess this and to assess whether or not a separation of the proceedings, as suggested by the Commission, would be necessary. At this point in time preparations are still at an early stage with witness statements yet to be filed. In our view it would be premature for us to determine questions of fairness at this stage of the proceedings. It is only at a later stage that the prejudice that Clover would suffer can be fully ascertained and be effectively dealt with.

Order

1. Clover's first, second and third points *in limine* are dismissed.

2. Ladismith's *point in limine* is dismissed.

3. No order is made as to costs.

_____ **23 June 2008**

D Lewis **DATE**

Tribunal Member

N Manoim and Y Carrim concur in the judgment of D Lewis

Tribunal Researcher	:	R Kariga
For the first and second applicants	:	D Unterhalter (SC) assisted by W Pretorius and J Wilson, instructed by Roestoff Venter and Kruse Attorneys
For the third applicant	:	G Engelbrecht, instructed by Jan S Devilliers Attorneys
For the Commission	:	R Bhana (SC) assisted by A Coetzee and V Ngalwana, instructed by Knowles Hussein and Lindsay Inc.
For the third respondent in the complaint referral	:	A Cockrell, instructed by Cliffe Dekker Attorneys