Reportable

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 13748/16P

In the matter between

THE COMPETITION COMMISSION	**APPLICANT**
And	
WILMAR CONTINENTAL EDIBLE OILS AND FATS (PTY) LTD	**FIRST RESPONDENT**
D H BROTHERS INDUSTRIES (PTY) LTD T/A WILLOWTON OIL AND CAKE MILLS	**SECOND RESPONDENT**
F R WARING HOLINGS (PTY) LTD	**THIRD RESPONDENT**
AFRICA SUN OIL REFINERIES (PTY) LTD	**FOURTH RESPONDENT**
EPIC FOODS (PTY) LTD	**FIFTH RESPONDENT**

JUDGMENT

MADONDO DJP:

Introduction

[1] Both the second and third respondents seek an order under rule 6(12) (c) of the Uniform Rules of Court granting a reconsideration and setting aside the ex parte order this Court issued on 6 December 2016 at the instance of the Competition

Commission (the applicant) in terms of s 46(1) of the Competition Act 89 of 1998 (the Act) on an urgent basis.

[2] At the request of the parties, these two applications have been enrolled for hearing on the same day. While the two matters have not formally been consolidated in the light of the similarities of the parties' facts and legal issues involved in both matters, they must be heard together as one application.

[3] Both matters arise from the same ex parte application, under the same case number and supported by the same founding affidavit, resulting in the issuing of the same search warrant. The matters are closely related in that the granting of the ex parte order has to be reconsidered on the same sets of papers (founding affidavit, the order, answering affidavits of the second and third respondents and the applicant`s replying affidavits to both matters). Since the legal issues involved in both matters are substantially the same, in order to avoid inconsistency in the determination of such issues resulting in conflicting decisions on the same facts and questions of law, it is advisable and appropriate that the two matters be heard as one.

Factual Background

[4] Following a merger notification between Wilmar Continental Edible Oils and Fats (Pty) Ltd (Wilmar) and Sea Lake Investments (Sea Lake) which the applicant received on 18 July 2016, the applicant commission on 2 December 2016 initiated a complaint against the five respondents under s 4(1)(b) of the Act alleging that the five respondents, being competitors in the market for edible oils, had entered into an agreement and/or engaged in a concerted practice to fix prices and/or trading conditions in the supply of edible oils which was then allegedly going on .

[5] On 6 December 2016, the applicant made two urgent ex parte applications for the issuing of a warrant in order to conduct a search and seizure process (a dawn raid) at the premises of the five companies that were the subject of the complaint. The one application was brought in KwaZulu-Natal Division of the High Court, Pietermaritzburg, in relation to the companies within this Court's jurisdiction, and the other was brought in the Gauteng Division of the High Court, Pretoria, in relation to the companies within such court's jurisdiction.

[6] The ex parte application was lodged under case number 13748/16P in Pietermaritzburg High Court against the second, third and fourth respondents,. However, the fourth respondent objected to its application being heard together with the applications of the second and third respondents as one application.

[7] In the Pretoria High Court the ex parte application was lodged under case number 94763/16 against the first and fifth respondents.

[8] Monyemore AJ granted the application and issued an order, dated 6 December 2016, permitting the dawn raid of the companies within the jurisdiction of the Pietermaritzburg High Court. The Pretoria High Court also granted the order requested by the applicant. Accordingly, on 8 and 9 December 2016 respectively, the applicant conducted dawn raids at the premises of the five respondents.

[9] In making application for the warrant, the applicant was s fulfilling its role as an organ of state in terms of s 239 of the Constitution, its administrative powers as set out in s 21(1)(c) and its obligation to investigate anti-competitive conducts.

[10] The applicant sought and obtained the search warrants based on the allegation that there was a 'reasonable belief grounded on an information on oath' that prohibited practices as specified in s 4(1) (b) of the Act (ie price fixing or the fixing of trading conditions that substantially prevented or lessened competition in the market for manufacture and distribution of refined edible oils, baking fats and margarine) were taking place at the premises of the respondents.

[11] Each of the five respondents has launched an application to challenge the lawfulness of the warrants issued in separate applications for reconsideration under the same case numbers in accordance with rule 6(12)(c) of the Uniform Rules of Court which provides:

> 'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[12] Though the respondents are applicants and *dominus litis* in the reconsideration application, the applicant in the search warrant application remains the applicant in as much as it was the party that sought and obtained the ex parte order which is sought to be reconsidered and set aside. The affidavits filed in support of the reconsideration application by the first and third respondents, are the answering affidavits in the reconsideration proceedings, and are to be taken as the replying affidavits. For practical reasons the applicant commission had to present its case first.

[13] It is impermissible for the applicant in the ex parte application to supplement its founding affidavit or attempt in its replying affidavit in the reconsideration application to introduce new evidence or facts when the order is being reconsidered. The applicant is bound by the facts in its founding affidavit.

[14] Both applications for reconsideration of 6 December 2016 order are grounded, firstly, on that the applicant failed to meet the jurisdictional threshold in s 46 of the Act in that it failed to set out information on oath or affidavit that there were reasonable grounds to believe 'that a prohibited practice was taking place or was likely to take place on first and third respondents` premises or that anything connected with the applicant`s investigation was in the possession of/or under the control of a person on the respondents' premises'. Secondly, on the applicant's failure to comply with the requirements of *uberrimae fides* in its ex parte application and to disclose facts to the court which might have influenced the court in coming to its decision to grant the 6 December 2016 order. According to the first and third respondents, the 6 December 2016 order falls to be reconsidered because in obtaining such order, the applicant withheld relevant information from the court and mischaracterised the true facts.

[15] In investigating the alleged prohibited practices, the applicant was acting on behalf of the public and in the public interest. Also, in carrying out the search and seizure processes the applicant was performing its functions under the Act. Once the applicant has concluded its investigation it will either refer the matter to the Competition Tribunal or issue the respondents with the notices of non-referral. The applicant alleges that it had reasonable grounds to believe that 'anything connected with an investigation was in the possession of or under the control of a person on the respondents' premises.'

[16] Following the issue of a search warrant, the applicant conducted a search and seizure operation at the premises of the second and third respondents on 6 and 9 December 2016 respectively. During such search, it seized documents and

electronic records. By agreement between the parties, the materials the applicant seized are being kept under seal pending the determination of this application.

[17] In terms of rule 6(12) (c) the respondents are entitled to have an order reconsidered on the presence of two jurisdictional facts: that the main application was heard as a matter of urgency; and that the first order was granted in their absence. The dominant purpose of the Uniform Rule is to afford to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence. See *ISDN Solutions (Pty) Ltd v CSDN Solutions CC & others* [1996] 4 All SA 58 (W) at 486H-487B. Read also *Oosthuizen v MIJS* 2009 (6) SA 266 (W) at 268H-I. It is common cause between the parties that the required jurisdictional facts exist in this matter.

Issues

[18] Issues for determination in this case are:

(a) Whether the applicant made out a case for the search warrant to be issued in terms of s 46 of the Act; and

(b) Whether the applicant disclosed the material facts for it to be granted an order.

[19] The applicant made an ex parte application to this Court for a search warrant in terms of s 46(1) (a) and/or (b) of the Act, which provides:

> 'A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any *premises* that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that-

(a) A *prohibited practice* has taken place, is taking place or is likely to take place on or in those *premises*; or

(b) Anything connected with an investigation in terms of *this* Act is in the possession of, or under the control of, a person who is on or in those *premises*.'

[20] In application for reconsideration under rule 6(12) (c) the court considers the matter *de novo*. See *Oosthuizen* above at 269C-D. As in the original application, the commission as applicant bears the onus to justify the granting of the ex parte order.

[21] The first question for decision is whether there was sufficient information on oath as evidence to justify such investigation, and the ultimate issue of a search warrant. Section 46 (1) (b) sets out that the applicant must demonstrate, on oath, that there are reasonable grounds to believe that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

[22] It is sufficient if the information on oath demonstrates that there are reasonable grounds to believe that anything connected with an investigation of the alleged contravention of s 4(1) in the edible oils market under the Act is in the possession of or under the control of a person on those premises. The applicant referred to the Sea Lake as the source of the information upon which it relied for the warrant it sought and obtained in this matter. According to the applicant, the Sea Lake was the genesis of the investigation into prohibited practice in the refined oils industry, which led to the granting of an ex parte order on 6 December 2016 and ultimately the raids on the respondents' premises.

[23] Mahomed Rayhaaz Essack (Mr Essack), a businessman and the managing director of Sea Lake, has deposed to an affidavit on behalf of Sea Lake. However, the affidavit does not confirm the allegations by the applicant in its founding affidavit but, instead, he places material information before this Court which contradicts what the applicant said in its founding affidavit in the ex parte application. Mr Essack flatly denies that he said that there was a collusive arrangement between Sea Lake and its competitors (first respondent). Such a suspicion had arisen from the fact that Sea Lake was allocated the business of Shoprite Checkers in KwaZulu-Natal. Sea Lake then discovered that its competitors were trying to entice Shoprite Checkers away from it and were doing so on the basis that Sea Lake would soon cease to exist.

[24] In turn, Sea Lake lodged a complaint to its attorneys, Stowell & Company, about this turn of events. According to Mr Essack, Sea Lake communicated to its attorneys that incorrect information had been leaked out to the applicant to its prejudice. The Sea Lake attorneys were in fact attempting to express Sea Lake's outrage at what its competitors were doing. Its attorneys ought to have complained about firms attempting to dominate the market rather than about horizontal relationships. Sea Lake's complaint was about its competitors muscling in on its business and not about any collusion amongst its competitors.

[25] Mr Essack says that the attorneys might have misunderstood what he was conveying or they got carried away. What was said about collusion in "MRE2" was not based on instructions emanating from Sea Lake. The founding affidavit relies on a suspicion fundamentally of a collusive horizontal practice where prices were fixed.

[26] Towards the end of October 2016 or early November 2016, an applicant`s investigator approached Mr Essack and intimated to him that should he provide the

applicant with the evidence concerning collusive practices within edible oil industry, the applicant would offer Sea Lake indemnity. Mr Essack spurned such offer on the grounds that he could not provide any evidence in that regard since as far as he was concerned and aware; there were no collusive practices within the industry.

[27] According to the applicant, the information Sea Lake communicated to it finds corroboration in annexures “MRE1” and “MRE 2” respectively, “MRE 1” is the letter dated 4 October 2016 that Brian Kurtz of Stowell & Company addressed to Dineo of the applicant stating that the Sea Lake, as the clients of Stowell & Company, were aware of the fact that there was collusion in the market which deserved investigations. According to the letter, they (Sea Lake) were of the view that there was a concerted practice between firms in a horizontal relationship deliberately calculated to lessen competition by attempting to marginalise and eliminate Sea Lake as a relatively small supplier which has a long history of excellent reliable supply in this market. Mr Essack denies that was what Sea Lake conveyed to its attorneys.

[28] Once again in “MRE 2”, also from Stowell & Company, Kurtz indicates that there was collusion in the market for the manufacture and distribution of refined oils and that there could be prospects of further collusion. The applicant seeks to place reliance on the Kurtz email as justifying the inference that ‘there is collusion in the market for the manufacture and distribution of refined edible oils’. Mr Essack denies all this.

[29] In his affidavit, Mr Essack attaches “MRE 4” a letter from Stowell & Company in which Kurtz confirms that the statement that there is collusion in the industry was written without instructions by Sea Lake. According to Mr Essack, the applicant had

no cause to approach the court in way it did. As a consequence, there is no confirmatory affidavit either by Mr Essack or Sea Lake to the alleged collusive conduct in the refined edible oil market.

[30] It has been argued on behalf of the respondents that the applicant`s failure to file a confirmatory affidavit in respect of the double hearsay evidence regarding the alleged prohibited practice means that there is no 'information on oath' which could ground 'a reasonable belief' that there were collusive dealings in the market. At best, the grounds amounted to conjecture and speculation. The applicant relied on hearsay evidence which does not amount to evidence on oath.

[31] The allegation relating to the prohibited practice is said to be a double hearsay on the ground that it emanated from an unidentified source who was not even party to the alleged conversation. The applicant avers that somebody at Sea Lake apparently told it that Sea Lake was aware that the first respondent had called the third respondent to discuss market shares. It also appears as if an individual (who is not Mr Essack) recorded negotiations on how to prize sales with a competitor in respect of a customer. This recording was relied upon in the application for the search warrant.

[32] It has been argued on behalf of the applicant that the evidence falls to be admitted in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act), though such an argument has never been raised in the founding affidavit. The strict rules on ex parte applications are that the applicant must properly make its case when it first approaches the court. However, the court has, in terms of s 3(1) of the Evidence Act, discretion to decide whether or not to admit hearsay evidence. The test for the admission of hearsay under the section is-

'(c) the court, having regard to—

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

[33] Before deciding whether or not it is in the interests of justice for this Court to admit the double hearsay information in this matter I propose first to deal with the nature of the proceedings. It has been the applicant's contention that the lower standard of proof in the civil trial proceedings compels the result that our courts more easily admit hearsay in such proceedings.

[34] An order sought to conduct a search on the respondents' premises centres on the infringement of the respondents' rights to privacy. The Supreme Court of Appeal and the Constitutional Court have made it clear that courts must closely regulate and scrutinise the issue and execution of search warrants because they involve a serious encroachment of rights and amount to an invasion of privacy, even when executed on business premises.

[35] In *Minister of Justice & others v Desai, NO* 1948 (3) SA 395 (A) at 403 Tindall ACJ held that a search warrant 'constitutes a serious encroachment on the rights of the individual and consequently it is the duty of courts of law to scrutinise most carefully anything done under that section'. In *Goqwana v Minister of Safety and*

Security NO [2016] 1 ALL SA 629 (SCA) para 15 Willis JA quoted such decision with approval and emphasis on the case scrutiny by the courts. In *Magajane v Chairperson, North West Gambling Board & others* 2006 (5) SA 250 (CC) para 74, the Constitutional Court held that 'the warrant guarantees that the State must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the Court prior to the intrusion'.

[36] It therefore follows that in the circumstances of this case, the hearsay information cannot lightly be admitted without scrutiny. Mr Motau, for the applicant has argued that the contention that the information the applicant relied upon in its affidavit is a double hearsay is rather a challenge directed at the value of the evidence presented by the applicant in this regard. Mr Essack denies the very existence of the information and hence the evidence on which the applicant sought to base its alleged belief.

[37] The reason for the evidence in question not being tendered by Mr Essack is that he disavows the information he allegedly communicated to the applicant, and not of non-availability of a person upon whose credibility the probative value of the evidence in question depends. For this double hearsay information to be admitted, the applicant must have obtained confirmatory affidavits by Mr Essack and by that certain individual who allegedly overheard the discussions between the first and the third respondents, as the persons upon whose credibility the probative value of the information/evidence depends.

[38] Mr Essack's disavowal of the information is that he could not provide any evidence of collusive practices and that as far as he was concerned and aware; there were no collusive practices or dealings in the manufacturing and distribution

market for edible oils. Also, Mr Essack denies that Sea Lake informed the applicant that the first and second respondents had held a meeting to discuss their responses to the applicant's questionnaire.

[39] There was no confirmation to the facts Mr Mohlala of the applicant deposed to in the affidavit on behalf of the applicant. Since the facts Mr Mohlala deposed to in the applicant`s founding affidavit were not within his personal knowledge his evidence was hearsay and, it could not therefore constitute an information on oath as the Act requires.

[40] In *Von Abo v Government of the Republic of South Africa & others* 2009 (2) SA 526 (T) para 46 Prinsloo J said:

> 'The courts have long and consistently held that it is impermissible for a deponent to an affidavit to give evidence on behalf of another where the latter does not file a confirmatory affidavit to confirm the evidence. . . . "One person cannot make an affidavit on behalf of another."'

Mohlala, acting on behalf of the applicant commission, could only depose to matters in his own knowledge. If the facts were not within his personal knowledge there must be a confirmatory affidavit by the person upon whose credibility the probative of such facts depended. It is common cause that no confirmatory affidavit by Mr Essack or any other person was filed. The facts Mr Hohlala deposed to with regard to Mr Essack or Sea Lake are therefore hearsay and inadmissible. See also *Gerhardt v State President & others* 1989 (2) SA 499 (T) at 504F-H.

[41] In ex parte applications, the applicant must disclose all material facts, which might influence the court to grant or refuse the relief sought. Failure to do so may result in the setting aside of the order sought. The non-disclosure or suppression of

facts need not be wilful or mala fide to incur the penalty of rescission; and the court, appraised of the true facts, has discretion to set aside the former order or to preserve it. See *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349A-B.

[42] In *Phillips and others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 29, Howie P said:

> 'It is trite that an *ex parte* applicant must disclose all material facts that might influence the court in deciding the application. If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has discretion, when given the full facts, to set aside the provisional order or confirm it. In exercising that discretion the later court will have regard to the extent of the non-disclosure; the question whether the first court might have been influenced by proper disclosure; the reasons for non-disclosure and the consequences of setting the provisional order aside.'

[43] In the present matter, the applicant had a duty to disclose each and every fact and circumstance which might influence the court in deciding to grant or withhold the relief sought. It is not in dispute that the applicant was aware when it launched this application that Sea Lake had disputed that the applicant`s interpretation of the Kurtz email was correct. According to Mr Essack, the Kurtz email was previously aimed at framing Sea Lakes' concern that its competitors were targeting its customers and not that there was collusion in the market. Secondly, it is not in dispute that in late October or early November 2016 (ie prior to the launching of the applicant`s application), Mr Essack specifically refused an offer of 'indemnity' for Sea Lake from the applicant in return for providing evidence of collusive practices in the refined oils market, that the applicant seeks to investigate. Such refusal by Mr Essack was based on the fact that he could not provide any evidence of the alleged practices and

that as far as he was concerned and aware; there were no collusive practices or dealings in the refined oils market. Thirdly, in its founding affidavit, the applicant concedes that Sea Lake had intimated to it that it was denying the contents of the correspondence from Stowell & Company. Finally, it is not in dispute that the third respondent is not a participant on the 'manufacturing level' of the market. However, the applicant did not disclose any such material facts to the court hearing an ex parte application.

[44] It has been argued on behalf of the respondents that the applicant`s non-disclosure or suppression of the material facts pertaining to the Sea Lake's interpretation of the Kurtz email; the Sea Lake's refusal of indemnity by the applicant; the equivocation of Mr Essack on the information he had communicated to the applicant on behalf of Sea Lake and its lack of knowledge as to why the first respondent had called the managing director of the third respondent breached the duty of the utmost good faith which the applicant had when it sought a search warrant and, that such non-disclosure justifies the setting aside of the warrant in its entirety. The applicant maintains that all the material facts were disclosed. In my judgment, it has correctly been argued that the ex parte application was based on a series of material factual inaccuracies that were, or should have been known to the applicant, which should have been drawn to the attention of the court. In fact, the search warrant was granted on incomplete facts or information.

[45] The first, second, third and fourth respondents, being the competitors (in horizontal relationship) in the market for the manufacture and distribution of refined edible oils, are alleged to have entered into an agreement and/or engaged in a concerted prohibited practices of price-fixing in the supply of bulk and packaged edible oils in breach of s 4(1) (b) (i) of the Act.

[46] Prohibited practices as specified in s 4(1)(b) of the Act are, among others, price fixing and/or fixing of trading conditions which have the effect of substantially lessening or preventing competition in the market for the manufacture and distribution of refined oils, baking fats and margarine, is taking place at particular premises.

[47] For the applicant to succeed in its application it had to demonstrate that there were reasonable grounds to believe that a prohibited practice had taken place, was taking place or was likely to take place on the respondents' premises and/or that the 'material connected with the investigation' would be found on the premises of the respondents.

[48] It is not in dispute that the third respondent is a supplier of crude oil to the refined oils markets and not a competitor of the first respondent in the refined oils market. However, Mr Motau for the applicant has argued that the point of contention is that the market being investigated is not only that of the manufacturing but it plainly contemplates both horizontal and vertical planes. In his argument, he concluded by saying that the claim that the applicant only targeted firms 'in horizontal relationships' is incorrect. According to the applicant the first respondent has admitted that it discussed market share information with the third respondent regarding the answers to the market share questionnaire to be forwarded to the applicant commission.

[49] Section 4(1) (b) of the Act provides:

‘(1) An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –

(a) …

(b) It involves any of the following restrictive horizontal practices:

(i) Directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) …

(iii) …’

[50] Explicit in the section is that the targeted entities are those in a horizontal relationship to each other. It is not in dispute that as the third respondent is supplying crude oil to the entities involved in the refined oils market is in vertical relationship with them and therefore, not hit by the prohibition. Section 4(1)(b) of the Act is aimed at preventing companies operating within a single economic entity similar to a group of companies, from being accused of perpetrating restrictive horizontal practices in consequence of their interaction with one another as part of the group.

[51] It has also been argued on behalf of the applicant that the third respondent is the sole shareholder of Agvestco (Pty) Ltd (Agvestco), an investment holding 30 per cent interest in the fourth respondent. It has been contended on behalf of the applicant that even if the third respondent does not have direct control of Africa Sun the structure of the entities gives the third respondent material influence over Africa Sun through its wholly owned subsidiary, company, Agvestco. According to the applicant, Agvestco has considerable influence or control over the fourth respondent. While Agvestco has a 30 percent minority shareholding, it is entitled to appoint three out of six directors of the fourth respondent’s Board of Directors.

[52] Mr Trengove, for the third respondent, has correctly argued that indirect acquisition of a minority shareholding in the fourth respondent, via Agvestco, does not suggest that the third respondent itself become a supplier of refined edible oil. The Act does not recognise accessory or vicarious liability for a holding company arising from an alleged action by a company in which it has an indirect minority shareholding. If the company in which there is minority shareholding partakes in prohibited horizontal practices, then that company that trades in the market is liable, not the company's indirect minority shareholder (or even a majority shareholder).

[53] It is admitted that the first respondent sought Mr Francis' assistance (the managing director of the third respondent) to try to provide accurate information to the applicant in completing a standard questionnaire the applicant commission had sent to the first respondent, in relation to their merger application with Sea Lake. When the first respondent sought information about the market share of the fourth respondent in KwaZulu-Natal, they approached Mr Francis and asked him to provide accurate information to the applicant in completing a standard questionnaire, in relation to the first respondent's merger application with the Sea Lake. Francis indicated that he did not have the required information but offered to guess an estimated figure. However, this conversation has nothing to do with any type of collusion in the refined oil market nor that it had information on its premises about the collusion between the third respondent and other respondents. I agree with Trengove that such a discussion between the first respondent and Francis would not only be innocent but it would not give rise to any reasonable belief that price fixing was occurring in the refined oils market.

Conclusion

[54] The applicant failed to make out a case for the issuing of a search warrant in terms of s 46 of the Act. The absence of Mr Essack's confirmatory affidavit impacted negatively on the existence let alone the reasonableness of the grounds upon which the applicant based its belief that the prohibited act was committed or likely to be committed and that information connected to the applicant`s investigation could be found on the premises of the respondents. The managing director of Sea Lake, Mr Essack, who filed an affidavit on behalf of Sea Lake, denies that Sea Lake had ever intended to suggest or convey that there was collusion in the refined oils market, and states that what he had told the applicant had nothing to do with price-fixing in the refined oil market.

[55] The applicant is guilty of the lack of bona fides in not disclosing in its founding affidavit the equivocation of Mr Essack of Sea Lake on the collusion in the market. Had this information been disclosed to the court, the mere allegations as to collusion in the market could not provide the basis for the granting of the search warrant. Nor did the applicant disclose to the court that the third respondent, as the supplier of raw material to the refined oils market, is not in horizontal but in vertical relationship with other respondents. Implicit in this matter is that the court, in granting the ex parte application in this regard, acted on incomplete, inaccurate and incorrect information.

[56] The applicant's allegations as to the alleged prohibited practice based as they are on the double hearsay, could never ground 'reasonable belief' that there were collusive dealings in the market. The information contained in the founding affidavit was not deposed to by a person with personal knowledge of the purported infractions. Mr Essack, who allegedly had the required knowledge, has instead, filed

an affidavit in which he denies what the applicant had imputed to him or his company (Sea Lake) in its founding affidavit.

[57] The applicant's founding affidavit does not disclose any evidence at all of any price-fixing between the third respondent and any other respondent. First, the email from an attorney (Mr Kurtz) for Sea Lake does not implicate the third respondent at all. Second, it was the conversation between Sea Lake and the first respondent provided to the applicant by Sea Lake's own managing director. Thirdly, neither the third respondent nor any of its wholly owned subsidiaries are members of the South African Oil Processors Association. In its replying affidavit, the applicant accepts that it is the fourth respondent that is a member of South African Oil Procession Association. Fourthly, the third respondent does not carry on business as a competitor in the refined oils market at all.

[58] The applicant did not disclose any basis upon which it believed that the third respondent is a competitor in the refined oils market. The third respondent is a mere holding company and it does not trade in any refined oils market at all. Its wholly-owned subsidiary, the third respondent, is a commodity trading in bulk (raw) oils which it supplies to the refined oil manufactures. The fourth respondent is thus in a vertical relationship with the other respondents as a supplier of raw materials (which other respondents require for processing and manufacturing refined edible oils).

[59] The applicant did not tender any evidence to show that the third respondent engaged in any price-fixing with any of the respondents save that it relies on the conversation between the first respondent and Mr Francis, the managing director of the third respondent. However, the conversation had nothing to do with any type of collusion in the refined oil market. Therefore, it could not provide a reasonable basis

to believe that the third respondent was involved in price-fixing in the refined oils market, or that it had information on its premises about collusion between it and other respondents.

[60] The applicant did not adduce any evidence to conclude that the second and third respondents were engaged in price-fixing with any of the other respondents. Nor did it tender any evidence that the information connected with its investigation was on the premises of the respondents. The applicant was also guilty of serious breach of its duty of good faith to this Court to disclose material facts in its ex parte application, as outlined above. Inevitably, I conclude that the applicant failed to satisfy any of the jurisdictional requirements of s 46(1)(*a*) and/or (*b*) of the Act for its application against both respondents.

Order

[61] I accordingly make the following order:

(a) The search warrant is set aside in so far as it authorises a search of the premises of the second and third respondents respectively;

(b) The commission is ordered to return all materials seized from the second and third respondents' premises respectively, and all copies or recording of those materials;

(c) The commission is ordered to pay the second and third respondents' costs including the costs of two counsels.

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MADONDO DJP

Appearances

Date reserved:	1 March 2018
Date delivered:	15 June 2018
For applicant:	Adv Motau SC with S. Scott
Instructed by:	Ndzabandzaba Attorneys
	c/o Kwela Attorneys
For 1st Respondent:	
Instructed by:	Norton Rose Fulbright
	c/o Pencarrow Crescent,
For 2nd Respondent:	Adv Du Plessis with S. Pudifin-Jones
Instructed by:	Cliffe Dekker Hofmeyr
	c/o Shepstone and Wylie
For 3rd Respondent:	Adv Trengove SC with A. Coutsoudis
Instructed by:	Cox Yeats
For 4th Respondent:	
Instructed by:	Shaukat Karim & Co.
	c/o Grant & Swanepoel
For 5th Respondent:	
Instructed by:	Knowles Hussain Lindsay Inc.