CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/11
[2012] ZACC 6

In the matter between:

COMPETITION COMMISSION
OF SOUTH AFRICA Applicant

and

SENWES LIMITED Respondent

Heard on : 22 November 2011

Decided on : 12 April 2012

JUDGMENT

JAFTA J (Mogoeng CJ, Moseneke DCJ, Nkabinde J, Skweyiya J, Van der Westhuizen J, Yacoob J and Zondo AJ concurring):

Introduction

[1] This case is about anti-competitive conduct proscribed by the Competition Act (Act).[1] The Act prohibits practices that may eliminate competition in any market

[1] Act 89 of 1998.

within South Africa's economy.[2] It also forbids abuse of dominance by business entities.[3] The Act, through the enforcement of these prohibitions, encourages and promotes competition in markets for the benefit of consumers of goods and services.

[2] Under the apartheid order, discriminatory laws were used to exclude the black majority from participating in the economy of the country. The Preamble to the Act records that the people of South Africa recognise, among other things, that discriminatory laws of the past imposed unjust restrictions on free and full participation in the economy by all South Africans. It calls for the opening up of the economy to enable all South Africans to have access to the control and ownership of the national economy. It declares that a credible competition law and effective structures to administer that law must be established in order to create an efficient functioning economy.

Statutory framework

[3] The Act came into force on 1 September 1999. It was enacted to provide for, among other matters, the establishment of the Competition Commission (Commission) which is charged with the investigation of restrictive practices, abuse of dominant position and the evaluation and approval of mergers. It also established a Competition Tribunal (Tribunal) whose responsibility it is to adjudicate these matters.[4] The Act is aimed at promoting and maintaining competition.[5] Some of its

[2] Sections 4 and 5 prohibit certain listed practices.

[3] Sections 8 and 9 forbid certain listed acts by dominant firms.

[4] See the Long Title of the Act.

objectives are directed at addressing the inequalities and imbalances which were created by the apartheid order.

[4] The Act seeks to promote a greater spread of business ownership so as to increase access to it by historically disadvantaged people. It sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved. It further seeks to provide consumers with competitive prices for goods and services. It prohibits trade practices which undermine a competitive economy.

[5] Chapter Two defines prohibited practices and abuse of a dominant position. The chapter is divided into three parts. Part A consists of sections 4 and 5 which list horizontal and vertical practices prohibited under the Act. Part B consists of sections 6 to 9 and focuses on the abuse of a dominant position by a business entity. The net is cast wide so as to prevent abuses by dominant business entities. It prohibits actions by

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[5] Section 2 provides:

> "The purpose of this Act is to promote and maintain competition in the Republic in order—
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
>
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

dominant firms which cannot be justified on account of technological, efficiency or other pro-competitive gains.[6] It also forbids price discrimination by a dominant firm.[7]

[6] Section 8 provides:

> "It is prohibited for a dominant firm to—
>
> (a) charge an excessive price to the detriment of consumers;
>
> (b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;
>
> (c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or
>
> (d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:
>
> (i) requiring or inducing a supplier or customer to not deal with a competitor;
>
> (ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;
>
> (iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;
>
> (iv) selling goods or services below their marginal or average variable cost; or
>
> (v) buying-up a scarce supply of intermediate goods or resources required by a competitor."

[7] Section 9(1) provides:

> "An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if—
>
> (a) it is likely to have the effect of substantially preventing or lessening competition;
>
> (b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
>
> (c) it involves discriminating between those purchasers in terms of—
>
> (i) the price charged for the goods or services;
>
> (ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;
>
> (iii) the provision of services in respect of the goods or services; or
>
> (iv) payment for services provided in respect of the goods or services."
>
> (v) payment for services provided in respect of the goods or services."

[6] Part C of Chapter Two is devoted to exemptions which may be granted by the Commission on application by a business entity. The Commission may exempt the applicant from the provisions of the chapter.

[7] The next chapter which is important for present purposes is Chapter Four. It deals with the establishment and powers of the Commission, the Tribunal and the Competition Appeal Court. Part A establishes the Commission as an independent body subject to the Constitution and the law. It requires that the Commission be impartial and that it performs its functions without fear, favour or prejudice.[8] The Commission consists of a Commissioner and one or more Deputy Commissioners appointed by the Minister of Trade and Industry (Minister).

[8] The Commission's powers and functions are listed in section 21 of the Act. In relevant part section 21 reads:

> "(1) The Competition Commission is responsible to –
>
> (a) implement measures to increase market transparency;
>
> (b) implement measures to develop public awareness of the provisions of this Act;
>
> (c) investigate and evaluate alleged contravention of Chapter 2;
>
> (d) grant or refuse applications for exemption in terms of Chapter 2;
>
> (e) authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3;

[8] Section 20(1) provides:

> "The Competition Commission—
>
> (a) is independent and subject only to the Constitution and the law; and
>
> (b) must be impartial and must perform its functions without fear, favour, or prejudice."

(f) negotiate and conclude consent orders in terms of section 63;

(g) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by this Act;

(h) negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;

(i) participate in the proceedings of any regulatory authority;

(j) advise, and receive advice from, any regulatory authority;

(k) over time, review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behaviour; and

(l) deal with any other matter referred to it by the Tribunal."

[9] The Commissioner appoints inspectors and other staff of the Commission.[9] Their terms and conditions are determined by the Minister or the Commissioner as the case may be, after consulting the Minister of Finance.[10]

[9] Section 24 provides:

"(1) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an inspector.

(2) The Minister may, in consultation with the Minister of Finance, determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Competition Commission.

(3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of this Act.

(4) When an inspector performs any function in terms of this Act, the inspector must—

(a) be in possession of a certificate of appointment issued to that inspector in terms of subsection (3); and

(b) show that certificate to any person who—

(i) is affected by the exercise of the functions of the inspector; and

(ii) requests to see the certificate."

[10] Section 25 provides:

"(1) The Commissioner may—

(a) appoint staff, or contract with other persons, to assist the Competition Commission in carrying out its functions; and

[10] Part B establishes the Tribunal and confers on it jurisdiction that covers the entire Republic.[11] The Tribunal consists of a Chairperson and not fewer than three but not more than ten other members appointed by the President.[12] The Chairperson manages the caseload of the Tribunal and must assign each matter referred to it to a panel of three members, one of whom must have legal training and experience.[13] A decision of a panel must contain written reasons.

(b) in consultation with the Minister and Minister of Finance, determine the remuneration, allowances, benefits, and other terms and conditions of appointment of each member of the staff."

[11] The powers of the Tribunal are provided for in section 27, which is set out in [24] below.

[12] Section 26 provides:

"(1) There is hereby established a body to be known as the Competition Tribunal, which—

(a) has jurisdiction throughout the Republic;

(b) is a juristic person;

(c) is a Tribunal of record; and

(d) must exercise its functions in accordance with this Act.

(2) The Competition Tribunal consists of a Chairperson and not less than three, but not more than ten, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the Minister, from among persons nominated by the Minister either on the Minister's initiative or in response to a public call for nominations.

(3) The President must—

(a) appoint the Chairperson and other members of the Competition Tribunal on the date that this Act comes into operation; and

(b) appoint a person to fill any vacancy on the Tribunal.

(4) Section 20, read with the changes required by the context, applies to the Competition Tribunal."

[13] Section 31, in relevant part, provides:

"(1) The Chairperson is responsible to manage the caseload of the Competition Tribunal, and must assign each matter referred to the Tribunal to a panel composed of any three members of the Tribunal.

(2) When assigning a matter in terms of subsection (1), the Chairperson must—

(a) ensure that at least one member of the panel is a person who has legal training and experience; and

(b) designate a member of the panel to preside over the panel's proceedings.

Nature of the proceedings

[11] This case comes before us as an application for leave to appeal against the judgment of the Supreme Court of Appeal, setting aside the ruling of the Tribunal in which it had found that Senwes Limited (Senwes) had contravened section 8(c) of the Act by engaging in what the Tribunal labelled a "margin squeeze". The case concerns the nature and scope of the public power conferred on the Tribunal by the Act.

[12] Before the Supreme Court of Appeal, Senwes challenged the Tribunal's ruling on two alternative grounds. It contended that the breach which the Tribunal found it had committed did not form part of the referral and consequently the Tribunal had no authority to determine it. Senwes argued, alternatively, that even if that complaint had been entertained competently, the essential elements of a margin squeeze had not been established in evidence.

[13] The Supreme Court of Appeal held that the Tribunal had exceeded its powers under the Act when it ruled that Senwes had contravened section 8(c) by engaging in a margin squeeze, and thus consideration of the alternative contention was unnecessary.

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(3) If, because of withdrawal from a hearing in terms of section 32, resignation, illness or death, a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the Chairperson must—

(a) direct that the hearing of that matter proceed before any remaining member of the panel subject to the requirements of subsection (2)(a); or

(b) terminate the proceedings before that panel and constitute another panel, which may include any member of the original panel, and direct that panel to conduct a new hearing.

(4) The decision of a panel on a matter referred to it must be in writing and include reasons for that decision."

It proceeded to determine whether, in the present circumstances, the Tribunal had the power to adjudicate the margin squeeze complaint. In doing so, the Court adopted a two-stage approach. First, it considered whether the complaint, referred to the Tribunal by the Commission, covered the margin squeeze complaint. It concluded that the margin squeeze complaint did not form part of the referral. Second, the Court considered whether the Tribunal was empowered to decide a complaint which did not form part of the referral.

[14] The Supreme Court of Appeal found that the "referral. . . constitutes the boundaries beyond which the Tribunal may not legitimately travel."[14] The Court reasoned that permitting the Tribunal to determine complaints not covered by a referral would violate the principle of legality. As a foundation for this finding the Supreme Court of Appeal relied on *Netstar (Pty) Ltd v Competition Commission*,[15] a judgment of the Competition Appeal Court. In that case it was said:

> "[I]t is necessary once again to emphasise that the tribunal is not at large to decide whether conduct is anti-competitive, and then to formulate reasons for that finding. It is . . . bound to apply the Act and engage with the issues as they arise, from a proper construction of the Act's provisions. It does so in the light of a specific complaint that has been referred to it for determination, and its only function is to determine whether, in the light of the Act's provisions and the evidence placed before it, or obtained by it pursuant to the exercise of its inquisitorial powers, that complaint is made out."[16]

[14] *Senwes Ltd v Competition Commission* [2011] 1 CPLR 1 (SCA) at para 52 (*Senwes*).

[15] 2011 (3) SA 171 (CAC) at para 61.

[16] Id at para 61.

[15] The Court also relied on section 52(1) of the Act.[17] This section obliges the Tribunal to conduct a hearing into every matter referred to it in terms of the Act. It makes it plain that every hearing will be subject to the requirements of the Tribunal's rules.

Leave to appeal

[16] As stated earlier, the Commission seeks leave to appeal against the judgment of the Supreme Court of Appeal. There can be no doubt that this matter raises a constitutional issue. As is apparent from the above, the Supreme Court of Appeal's order is based on the finding that the Tribunal, in adjudicating the margin squeeze abuse, had exceeded its statutory powers and thereby violated the principle of legality which forms part of the rule of law.

[17] The question whether the Tribunal had exceeded its statutory power in entertaining the margin squeeze abuse concerns one of the most important principles in the control of public power in our constitutional order, the principle of legality.[18]

[18] It is by now axiomatic that leave may be granted if a matter raises a constitutional issue and it is also in the interests of justice that it be granted. A number of considerations show that it is in the interests of justice to do so here. First,

[17] Section 52(1) provides:

> "The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act."

[18] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 35.

the issue raised is of considerable public importance. The Tribunal was established to exercise powers in the interest of the general public by creating and maintaining "markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire".[19]

[19] Second, as one of the structures established to administer the Act, the Tribunal plays a vital role in creating an open economic environment in which all South Africans can have equal opportunities to participate in the national economy. The elimination of prohibited practices and abuse of a dominant position fall within the jurisdiction of the Tribunal. A correct interpretation of its powers is essential to its effectiveness in the fight against these practices.

[20] Third, prospects of success are fairly good. The interpretation given to the Tribunal's empowering provisions by the Supreme Court of Appeal may seriously undermine the objectives for which the Act was passed. These provisions are vital to the enforcement of the Act. I am satisfied that leave to appeal must be granted.

Issues

[21] The Commission challenges the finding by the Supreme Court of Appeal that the referral did not cover the complaint relating to the contravention of section 8(c), which the Tribunal found Senwes had committed. The Commission contends that that complaint formed part of the referral submitted to the Tribunal. If, however, this

[19] Preamble to the Act.

Court finds that the referral did not include the relevant complaint, the Commission argues that, properly construed, the provisions of the Act empower the Tribunal to decide a complaint that did not form part of the referral but was added later. The proper interpretation of the relevant provisions of the Act lies at the heart of these issues.

Interpretation of the relevant provisions

[22] Under the Act complaints of anti-competitive behaviour are investigated by the Commissioner before they are referred to the Tribunal.[20] This is the position irrespective of whether the complaint was initiated by the Commission or was submitted to it by a third party.[21] If the investigation reveals that no prohibited practice or abuse has occurred the Commission may not refer the complaint to the Tribunal. It may issue a notice of non-referral if the complaint was submitted to it by a third party, in which case the complainant may refer the complaint to the Tribunal.[22]

[20] Section 50 of the Act provides:

> "(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.
>
> (2) Within one year after a complaint was submitted to it, the Commissioner must—
>
> (a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or
>
> (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form."

[21] Section 49B(3) provides:

> "Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable."

[22] Section 51(1) provides:

> "If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure."

[23] Once a complaint has been referred, the Tribunal is obliged to conduct a hearing into the matter. It is the mere referral of a complaint that triggers the exercise of the Tribunal's adjudicative powers. The object of the hearing is to determine whether a prohibited practice has indeed occurred. If a prohibited practice is established, then the Tribunal may impose a remedy it deems appropriate, choosing from a number of remedies listed in the Act.[23]

[24] The functions of the Tribunal are set out in section 27, which also confers on it the power to adjudicate complaints and determine whether any of the provisions of Chapter Two have been contravened. It will be recalled that section 8(c) whose contravention is at issue here, forms part of this Chapter. Section 27 provides:

> "(1) The Competition Tribunal may—

[23] Section 58 provides:

> "(1) In addition to its other powers in terms of this Act, the Competition Tribunal may—
>
> (a) make an appropriate order in relation to a prohibited practice, including—
>
> (i) interdicting any prohibited practice;
>
> (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice;
>
> (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section;
>
> (iv) ordering divestiture, subject to section 60;
>
> (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65;
>
> (vi) declaring the whole or any part of an agreement to be void;
>
> (vii) ordering access to an essential facility on terms reasonably required;
>
> (b) confirm a consent agreement in terms of section 49D as an order of the Tribunal; or
>
> (c) subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of—
>
> (i) the Competition Commission or Competition Tribunal rules; or
>
> (ii) a time limit set out in this Act."

> (a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act;
> (b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;
> (c) hear appeals from, or review any decision of, the Competition Commission that may, in terms of this Act, be referred to it; and
> (d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act."

[25] A plain reading of section 27 reveals that the Tribunal is empowered to "adjudicate in relation to any conduct prohibited in terms of Chapter 2" and "determine whether prohibited conduct has occurred". Apart from deciding reviews and appeals against decisions of the Commission, the Tribunal is also authorised to "adjudicate on any other matter that may, in terms of this Act, be considered by it". Thus, the section sets out matters that fall within the competence of the Tribunal.

[26] Section 8(c) is also relevant to the determination of the issues. It provides:

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

[27] Plainly the section requires the presence of three conditions in order to establish that an abuse of dominance has occurred. First, the act in which the dominant firm was engaged must be an "exclusionary act" as defined in the empowering legislation.

In terms of the legislation the words "exclusionary act" mean "an act that impedes or prevents a firm from entering into, or expanding within, a market".[24]

[28] Second, the act in which the dominant firm was engaged must fall outside the scope of section 8(d). Third, the anti-competitive effect of that act must outweigh its technological, efficiency or other pro-competitive gain.

[29] If a complaint pertaining to a contravention of section 8(c) is properly referred to the Tribunal and the evidence led at the hearing establishes all three elements, the Tribunal must find that a firm against whom the complaint was brought has violated this section. The Tribunal need not put any label on the contravention. What is required of it is to determine whether an abuse of dominance has occurred. If it has, it may impose an appropriate remedy.

Background to referral

[30] Trading in grain takes place in a supply chain involving different role players. It commences with farmers who produce grain and sell it to traders. The traders resell it to millers and bakers (processors) as and when the latter require to be supplied with grain. From this processors produce consumable goods sold to retailers who supply the public.

[24] Section 1(1)(viii)

[31] Storage, as the Supreme Court of Appeal observed, plays a critical role in the physical grain trade, as processors do not use the whole supply of grain during the four-month harvest season, usually between May and August. Grain not used during that period needs to be stored so that processors can be supplied continuously throughout the year. Storage facilities are important for two reasons. They are needed for storing the grain and the fees charged for storage are built into the price at which grain is traded.

[32] Storage is predominantly provided by silo owners like Senwes, which is almost a hundred years old. Due to historical reasons Senwes has a market share of over 80% in the area where it operates. Before deregulation of agriculture markets, Senwes and other cooperatives enjoyed the monopoly of being sole agents of the marketing boards in areas where they carried on business.[25] Their role was to collect grain from farmers and store it until they received instructions from the marketing boards to deliver the grain to processors. The boards had the exclusive rights to buy and sell grain at prices fixed by them.[26]

[33] Senwes and other agents obtained loans to build silos in which grain was stored. When the markets were deregulated and the various boards were disbanded,[27] Senwes retained ownership of the silos. It was converted into a company and formed a unit through which it traded in grain. The ownership of silos gave Senwes an

[25] The boards were called the Maize Board and the Wheat Board.

[26] These boards were established and operated in terms of the Marketing Act 59 of 1968.

[27] Deregulation was effected in terms of the Marketing of Agricultural Products Act 47 of 1996.

advantage to dominate the grain storage market. When other traders entered the market they were discouraged from building their own silos by the prohibitively high costs. Consequently they had to depend on storage provided by owners of existing silos.

[34] Before 2003 Senwes charged all its customers the same fee for storage, regardless of whether they were traders or farmers. During the first 100 days of storage all customers paid the same daily fee. After 100 days a capped tariff applied to all until the next harvest season. In 2003 Senwes withdrew the capped tariff that applied to traders but continued to offer it to farmers. This new arrangement was called the "differential tariff" because it differentiated between traders and farmers.

[35] The differential tariff adversely affected the business operations of rival traders. Specifically, rival traders were unable to compete with prices Senwes offered to farmers for their grain because the traders had to factor in the high storage costs charged by Senwes. Meanwhile it turned out that Senwes did not charge its trading arm storage fees.

The referral

[36] The question whether the complaint that was found to have been established by the Tribunal adequately canvassed that which was referred to it must be determined with reference to the terms of the referral. The complaints which were eventually referred to the Tribunal for adjudication were based on complaints submitted to the

Commission by CTH Trading (Pty) Ltd (CTH). This company, which is a rival trader of Senwes, asserted that Senwes had abused its dominant position in the storage market in contravention of sections 8 and 9 of the Act. On 20 December 2006 the Commission referred some of the complaints to the Tribunal.

[37] For present purposes we are not concerned with the complaints that were not established at the hearing before the Tribunal. Our focus should be directed at the complaint relating to the contravention of section 8(c) only. In this regard the referral stated:

> "Senwes' practice of charging differential tariff fees for storage, is exclusionary and has an anti-competitive effect, as it impedes or prevents CTH and other grain traders who compete with Senwes from expanding within the downstream market for grain trading and is thus in contravention of section 8(c) of the Act.
>
> The anti-competitive effect of the differential storage fees charged by Senwes outweighs any technological efficiency or other pro-competitive gain that it might have."

[38] Plainly this complaint tracks the language of the section while setting out the essential elements of the contravention. It points out that it was the differential fees charged by Senwes that constituted an exclusionary act which impeded CTH and other traders from expanding. The complaint concludes by stating that the anti-competitive effect of the differential storage fees outweighs technological, efficiency or other pro-competitive gain.

[39] It was this same complaint which the Tribunal found to have been established in evidence. As it appears below, the error made by the Tribunal was to call it a margin squeeze. In my respectful view, the Supreme Court of Appeal erred when it held that the Tribunal considered a complaint which was not covered by the referral.

The hearing

[40] The Tribunal was called upon to adjudicate this complaint and determine whether prohibited conduct had occurred. A straightforward process was, however, complicated by what turned out to be a red herring. Before the hearing at the Tribunal, Senwes and the Commission exchanged witness statements. Among those furnished by the Commission, was a statement by an economist, Dr Nicola Theron. The Commission had sought her expert advice on whether, on the basis of the factual statements made available to her, Senwes had contravened the Act. In the opinion statement that she prepared, in addition to the abuses mentioned in the referral, Dr Theron stated that Senwes had also committed a margin squeeze. This was the first time that a reference was made to margin squeeze.

[41] In its response Senwes raised an objection to evidence dealing with a margin squeeze complaint on the ground that it was irrelevant because Senwes was not facing this complaint. Before the hearing started, Senwes prepared a schedule of objections which was served on the Commission and was submitted to the Tribunal.

[42] At the commencement of the hearing, counsel made it clear that Senwes persisted in its objection to evidence relating to the margin squeeze. But the Tribunal did not rule on the objection. The hearing proceeded and both parties led evidence. Apart from the expert evidence of Dr Theron, the Commission led evidence of various witnesses on the differential fee charged to traders for storage and its effect on their businesses. Of importance is the evidence of Dr Herbert Keyser, a director of Brisen Commodities (Pty) Ltd (Brisen). He testified that although his firm could compete with Senwes during the first 100 days of storage, the removal of the capped tariff and the charges it had to pay after that period rendered further competition with the trading arm of Senwes impossible. He said the differential tariff charge impeded Brisen and other traders from expanding their businesses.

[43] The Tribunal was satisfied that an exclusionary act as defined in the Act had been established. It proceeded to consider the evidence led on the anti-competitive effect of that act. Following its analysis of the evidence, the Tribunal concluded that the anti-competitive effect of the differential tariff outweighed its technological, efficiency or other pro-competitive gain. The Tribunal then held that Senwes had contravened section 8(c) by engaging in margin squeeze conduct.

[44] The finding that Senwes had contravened section 8(c) is supported by the evidence on record and therefore was properly made. What gave rise to controversy was the label attached to it by the Tribunal. In this regard the Tribunal erred because

the complaint submitted to it did not refer to margin squeeze nor does the section on which it was based use the label.

[45] But the Tribunal's error did not detract from the fact that conduct amounting to a contravention of section 8(c) had been established. That contravention fell squarely within the Commission's referral. It follows that the Supreme Court of Appeal erred when it held that the referral did not cover the complaint in respect of which Senwes was found to have contravened the section.

[46] Proceeding from the premise that the Tribunal is a creature of a statute with no inherent powers, the Supreme Court Appeal held that "its hearings are subject to the overriding limitation that the hearing must be confined to matters set out in the referral".[28] On this approach the Court concluded that the referral constitutes the boundaries beyond which the Tribunal may not legitimately travel. The Court held further that evidence which the Tribunal is entitled to admit in terms of section 55[29] is limited to evidence relevant to matters set out in the referral.[30]

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[28] *Senwes* above n 14 at para 52.

[29] Section 55 provides:

> "(1) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).
>
> (2) The Tribunal may condone any technical irregularities arising in any of its proceedings.
>
> (3) The Tribunal may—
>
> (a) accept as evidence any relevant oral testimony, document or other thing, whether or not—
>
> (i) it is given or proven under oath or affirmation; or
>
> (ii) would be admissible as evidence in court; but

[47] For these findings, as mentioned earlier, the Supreme Court of Appeal relied on the provisions of section 52.[31] What emerges from the reading of section 52 is the fact that the Tribunal does not itself initiate a hearing. The Act gives this power to the Commission and in appropriate cases the complainant. This accords with the devolution of power, carefully crafted, between the three organs charged with the responsibility to enforce the Act. In terms of that devolution, the power to investigate

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

[30] *Senwes* above n 14 at para 53.

[31] Section 52 provides:

"(1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act.

(2) Subject to subsections (3) and (4), the Competition Tribunal—

(a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and

(b) may conduct its hearings informally or in an inquisitorial manner.

(2A) Despite subsection (2)(a), the Chairperson of the Tribunal may order that a matter be heard—

(a) in chambers, if no oral evidence will be heard, or that oral submissions be made at the hearing; or

(b) by telephone or video conference, if it is in the interests of justice and expediency to do so.

(3) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings—

(a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;

(b) if the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable in civil proceedings in a High Court.

(4) At the conclusion of a hearing, the Competition Tribunal must make any order permitted in terms of this Act, and must issue written reasons for its decision.

(5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each hearing, subject to any ruling to protect confidential information made in terms of subsection (3)(a)."

complaints and initiate hearings vests in the Commission. A hearing is initiated by means of a referral.[32]

[48] The fact that section 52(1) expressly states that the Tribunal must conduct a hearing into every matter referred to it does not necessarily mean that the Tribunal has no power to entertain a matter not included in the referral. This section does not define the powers of the Tribunal. Instead it deals with the procedure to be followed when conducting a hearing. The section is located in Chapter Five which is concerned with the investigation and adjudication procedures. In essence section 52(1) obliges the Tribunal to conduct a hearing whenever a complaint is referred to it. It is clear from the reading of the section as a whole that the Tribunal cannot initiate a hearing. But this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral.

[49] While it is true that the Tribunal can exercise only those powers given to it by the Act, the flaw in the approach adopted by the Supreme Court of Appeal, in my respectful view, lies in the fact that it conflates matters of jurisdiction and procedure.

[32] Section 51 provides:

> "(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.
>
> (2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1), or by a complainant in terms of subsection (1), must be in the prescribed form.
>
> (3) The Chairperson of the Competition Tribunal must, by notice in the Gazette, publish each referral made to the Tribunal.
>
> (4) The notice published in terms of subsection (3) must include—
>
> (a) the name of the respondent; and
>
> (b) the nature of the conduct that is the subject of the referral."

As mentioned above, the Tribunal's jurisdiction to adjudicate contraventions of section 8 of the Act is beyond question.

[50] Accordingly, the construction given to section 52(1) by the Supreme Court of Appeal is at odds with the scheme of the Act, including the structure of section 52, when read in its entirety. This section gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal. Most importantly, it also authorises the Tribunal to adopt an inquisitorial approach to a hearing. Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry.

Failure to rule on objections

[51] There is, however, one further matter that must be mentioned. Senwes objected to the leading of evidence on margin squeeze. The Tribunal was obliged to give a ruling on this objection but it failed to do so. Just as in the case of any request made to the Tribunal, a party that raises an objection at a hearing before the Tribunal is entitled to a ruling. However, the Tribunal's failure did not, in my view, render the proceedings against Senwes unfair. This is so because Senwes was aware that one of the complaints laid against it was that it contravened the provisions of section 8(c). Before the hearing commenced, Senwes received notice of evidence that was going to be led in support of this and the other complaints. When this evidence was led at the hearing, Senwes was represented by experienced senior counsel. Therefore it had ample opportunity to refute the allegations against it.

[52] In these circumstances there can be no complaint of procedural unfairness in respect of matters which were set out in the referral. Senwes was afforded adequate opportunity to deal with those matters and raise whatever defence it desired to advance. Its failure to ward off the charge of contravening section 8(c) cannot be attributed to the Tribunal's omission. It follows that the appeal must succeed.

[53] A suggestion is made in the judgment of Froneman J that the referral is capable of two reasonable interpretations, the one preferred here and the construction assigned to the referral by the Supreme Court of Appeal. Flowing from this it is held that Senwes will be prejudiced by the disposal of the matter by this Court on the basis of the interpretation it prefers. Therefore, the matter must be remitted to the Tribunal for a re-hearing.

[54] I disagree. The Supreme Court of Appeal did not approach the matter on the footing that the referral is capable of two reasonable interpretations. Nor has Senwes argued this in any of the forums before which the matter served. The only objection raised by Senwes from the outset was that a margin squeeze complaint was not covered by the referral and therefore evidence supporting it was irrelevant and should not be led at the hearing before the Tribunal. In the Competition Appeal Court, the Supreme Court of Appeal and in this Court, Senwes added the contention that, if it is found that margin squeeze was part of the referral, then the evidence led did not prove

it. The Supreme Court of Appeal did not determine this issue because it held that the referral did not cover a margin squeeze complaint.

[55] I also do not hold that a margin squeeze complaint formed part of the referral. Instead I hold that the referral covered a contravention of section 8(c) of the Act, a fact that was never disputed by Senwes nor could it reasonably dispute it. There can be no prejudice to Senwes flowing from this finding. It received the referral which contained the complaint that it contravened section 8(c) in advance and before the hearing at the Tribunal. That same complaint formed part of the issues to be determined by the Tribunal. In addition, Senwes received statements of witnesses who were going to testify in support of that complaint. All of this happened before the hearing at the Tribunal. At the hearing Senwes was given an opportunity to refute the complaint. Therefore, a remittal is not warranted, in my view, because there is no prejudice or unfairness to Senwes.

[56] Of course, as mentioned above, it was necessary for the Tribunal to rule on Senwes' objections. But the failure to do so does not, in my view, give rise to prejudice, whether potential or actual. On the interpretation I prefer, margin squeeze does not come into the equation.

Costs

[57] This case raises a constitutional issue of importance, namely the content and scope of powers vested in the Tribunal which plays a vital role in the enforcement of

the Act. It constitutes litigation to which the general rule, that the unsuccessful litigant against the state ought not to be ordered to pay costs, applies.[33] The Commission is an organ of state. Therefore, each party must pay its own costs.

Order

[58] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order issued by the Supreme Court of Appeal is set aside.
4. The ruling of the Tribunal is amended by deleting the reference to margin squeeze.
5. There is no order as to costs.

FRONEMAN J (Cameron J concurring):

[59] I have had the benefit of reading the judgment of Jafta J (main judgment). Although I agree that leave should be granted and that the appeal should succeed, we differ on the remedy that should follow. In my view the matter should be referred back to the Competition Tribunal (Tribunal) to make a proper ruling on the ambit of the referral in order for the hearing to proceed on the basis of that ruling.

[33] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 CC; 2009 (10) BCLR 1014 (CC) at para 43.

[60] The Competition Appeal Court, the Supreme Court of Appeal and the main judgment all came to opposing conclusions regarding the proper ambit of the referral in terms of which the Tribunal conducted the hearing. The conclusion has in each case been used to determine the outcome of the appeal without further ado, namely to affirm or reverse the Tribunal's finding. I would respectfully suggest that in doing so a crucial aspect of the function of the Tribunal when conducting a hearing into a matter referred to it in terms of the Competition Act[1] (Act), has been overlooked. A proper appreciation of the Tribunal's function is necessary to determine not only the ambit of a referral, but also the procedure that should be followed when a dispute arises about the ambit of a referral.

[61] Perhaps the point is illustrated most starkly by how the Supreme Court of Appeal dealt with an argument that the Commission advanced before it. This was that because Senwes had failed to seek a ruling from the Tribunal on the proper ambit of the referral, it was precluded from raising that question on appeal. The Supreme Court of Appeal rejected this argument. It said that both Senwes and the Commission took a gamble in their approach: Senwes, in that it might be wrong in its interpretation of the referral, and the Commission, by refusing to seek a formal amendment of the referral.[2] It held that Senwes could pursue the point on appeal, and ruled in its favour. But surely a gamble by the parties cannot determine the Tribunal's functional obligations in conducting a hearing in terms of the Act?

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[1] Act 89 of 1998.
[2] *Senwes Ltd v Competition Commission* [2011] ZASCA 99; [2011] 1 CPLR 1 (SCA) at para 55.

[62] The Tribunal has an obligation to determine the proper ambit of the referral in accordance with the provisions of the Act. It also has an obligation to ensure that its determination of that issue is made in a manner and at a time that is fair to the parties involved in the proceedings. The content of both these obligations depends on the proper interpretation and application of the Act. It is the determination of these obligations that establishes the contours of the legality of the Tribunal's conduct during a hearing. And those are the constitutional issues that need to be decided – not whether a gamble by either party paid off.

Interpretation of the referral

[63] The Supreme Court of Appeal determined the ambit of the referral with reference to whether a "complaint of margin squeeze" formed part of it.[3] It did so by using the terms "charge" and "conviction":[4]

> "In formulating my reasons . . . I refer, for the sake of brevity, to the conduct complained of in the referral as 'the charge' and to the conduct which the Tribunal found to be objectionable as 'the conviction' . . . . To have founded a complaint of margin squeeze the Commission would have had to refer to the discrimination as between [Senwes], qua trader, and other traders, in the downstream market, caused by its participation and dominance in the upstream market. That, as I see it, is the essential difference between the conviction and the charge."

[3] Id at para 38.

[4] Id.

[64] Having determined the terms of the referral, the Supreme Court of Appeal then went on to deal with an argument that the Tribunal was entitled to go beyond the terms of the referral because of its procedural powers under the Act, which differ from those of a court in adversarial proceedings:

> "While all this may be true, the starting point of an enquiry into the scope of the Tribunal's authority, is that we are dealing with a creature of the Act. It has no inherent powers. In accordance with the constitutional principle of legality, it has to act within the powers conferred upon it by the Act. In terms of section 52(1), the Tribunal must conduct a hearing, subject to its rules, into any matter referred to it. The reverse side of this must be that the Tribunal has no power to enquire into and to decide any matter not referred to it . . . .
>
> Thus understood, all the provisions of the Act and the rules pertaining to the Tribunal's conduct of its hearings are subject to the overriding limitation that the hearing must be confined to matters set out in the referral."[5] (Footnote omitted.)

[65] In my respectful view the Supreme Court of Appeal erred in its approach to determining the ambit of the referral, by failing to have regard to the relevant provisions of the Act. The Act does not use the language of "charge" and "conviction" at all. Even if they were used merely for the sake of brevity, the metaphor or analogy that they carry is inapposite to the Tribunal's powers in conducting a hearing. They are suggestive of an approach that the Tribunal's powers to determine the terms of a referral must be narrow and restricted. The provisions of the Act do not justify that kind of restrictive approach.[6]

[5] Id at paras 51 and 52.

[6] The language of criminal penalty and procedure, and hence a restrictive approach, may be more appropriate to the investigative powers of the Commission. See *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA) (*Woodlands*) at para 10.

[66] Section 27(1)(a) of the Act provides that the Tribunal may—

> "adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in this Act."

[67] Section 52 provides in relevant part:

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

[68] Section 55 reads:

> "(1) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2).
>
> (2) The Tribunal may condone any technical irregularities arising in any of its proceedings.
>
> (3) The Tribunal may—
>
> (a) accept as evidence any relevant oral testimony, document or other thing, whether or not—
>
> (i) it is given or proven under oath or affirmation; or
>
> (ii) would be admissible in court; but
>
> (b) refuse to accept any oral testimony, document or other thing that is unduly repetitious."

[69] These provisions indicate that there is indeed a material and significant difference between the Tribunal and civil courts. One of the functions of the Tribunal is to adjudicate on any conduct prohibited under Chapter 2 of the Act. In order to do so, the provisions for hearings referred to the Tribunal place an emphasis on speed, informality and a non-technical approach to its task. There is no indication in the Act that the interpretation and determination of the ambit of a referral should be narrowly or restrictively interpreted. Excessive formality would not be in keeping with the purpose of the Act.[7]

[70] The Supreme Court of Appeal interpreted the referral thus:[8]

> "The differential tariff referred to in the charge focussed on a comparison between traders and farmers. The margin squeeze which formed the basis of the conviction, on the other hand, focussed on a discrimination by Senwes, as storage provider, against other traders in favour of its own trading arm. To have founded a complaint of margin squeeze the Commission would have had to refer to the discrimination as between it, qua trader, and other traders in the downstream market, caused by its participation and dominance in the upstream market. That, as I see it, is the essential difference between the conviction and the charge."

[7] Section 2 of the Act provides:

> "The purpose of this Act is to promote and maintain competition in the Republic in order—
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
>
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

[8] Above n 2 at para 38.

[71] After quoting the referral's reference to section 8(c) of the Act, the main judgment in this Court comes to a different conclusion. It finds without more that the referral covered the conduct found to violate the statute:[9]

> "Plainly this complaint tracks the language of the section while setting out the essential elements of the contravention. It points out that it was the differential fees charged by Senwes that constituted an exclusionary act which impeded CTH and other traders from expanding. The complaint concludes by stating that the anti-competitive effect of the differential storage fees outweighs technological, efficiency or other pro-competitive gain.
>
> It was this same complaint which the Tribunal found to have been established in evidence. As it appears below, the error made by the Tribunal was to call it a margin squeeze. In my respectful view, the Supreme Court of Appeal erred when it held that the Tribunal considered a complaint which was not covered by the referral."

[72] The crux of the difference between the two interpretations of the referral is that the Supreme Court of Appeal read it as referring only to discrimination between producers and traders while the main judgment reads it more broadly.

[73] It seems to me that on either interpretation there would have been potential prejudice to the parties. The interpretation in the main judgment would have required Senwes to address whether its conduct was preventing traders from competing with it.[10] On the Supreme Court of Appeal's interpretation, the Commission would have

[9] Main judgment at [38]-[39] above.

[10] As the Supreme Court of Appeal (above n 2) pointed out in para 35 of its judgment, the expert witness called on behalf of Senwes refused to take issue with the Commission's expert on the matter of margin squeeze,

had to consider whether it should apply for an amendment to make it clear that the section 8(c) alternative in the referral embraced the effect of Senwes' conduct on traders competing with Senwes, qua trader, downstream, as the Tribunal and CAC found.

[74] The Supreme Court of Appeal's restricted approach to the interpretation of the referral also excluded the possibility that the ambit of the referral could be extended through the witness statements that the Commission had filed in support of the referral. Those statements plainly included reference to the downstream effects on traders competing with Senwes (the "margin squeeze" case).[11]

[75] For the reasons set out earlier,[12] I do not think that a restricted approach of this kind is warranted. For the purposes of this judgment one does not need to go beyond a finding that the interpretation of the referral preferred in the main judgment is a reasonable one. It is therefore clear from the contrary judicial findings that precede this Court's judgment that the referral was open to more than one reasonable interpretation. The witness statements clarified the ambiguity of two contrasting reasonable approaches. It was, at the very least, possible that the Tribunal could have

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because, so he testified, he was advised by Senwes' legal representatives that it fell outside the ambit of the referral and was therefore irrelevant.

[11] The Tribunal found that Senwes, as a "vertically integrated firm that is dominant" (that is, a dominant storage provider that also competed against other firms trading in grain) had by abolishing the "capped tariff" raised the costs to traders competing with it in the grain trading market who were dependent on Senwes for a service critical to it, namely grain storage, which Senwes also self-supplied. In essence the Tribunal found, and the CAC affirmed, that Senwes' "squeeze" in abolishing the cap for competitor traders precluded them from obtaining a viable margin, and that this constituted an infringement of section 8(c).

[12] At [66]-[69] above.

ruled that the content of the witness statements was reasonably connected to the conduct complained of in the referral.

[76] The potential prejudice to Senwes at this stage of the proceedings no longer related to the Commission's procedural powers in investigating the initial complaint against it, as was the case in *Woodlands*.[13] The investigation for the purposes of referring the complaint has been completed. The focus now was the fairness of the hearing itself.[14] A ruling on the proper ambit of the referral would have had to take into account its impact on whether Senwes would have been unduly prejudiced in the presentation of its case at the hearing, but that is not what happened.

The duty to make a ruling

[77] That the ambit of the referral was disputed before the hearing had started is clear. Senwes sought, unsuccessfully, to dispose of it by way of an exception. After receiving the Commission's witness statements, it compiled a schedule of objections which it handed up to the Tribunal at the commencement of the hearing. Then followed a game of brinkmanship by Senwes. During the course of the hearing it made and repeated its objections to certain evidence, without ever asking formally for a ruling and, inconsistently, challenged the evidence by way of cross-examination, interspersed with promises that it would call contradictory evidence. A finding on the ambit of the referral was made only after evidence had been presented and final argument heard, when the Tribunal delivered its judgment.

[13] Above n 6 at paras 9-20 and 34-6.

[14] In "accordance with the principles of natural justice" in the language of section 52(2)(d) of the Act.

[78] Even in ordinary civil courts the emphasis and trend is towards a court-driven case management so as to ensure that time and resources are not wasted and that only the real issues between litigants are adjudicated. In the case of hearings in terms of the Act, the Tribunal is in an even stronger position than ordinary civil courts in this regard. It may cut to the heart of the matter before it with expedition, informality and Tribunal-led intervention.[15] Whatever the seniority of counsel involved, there is no justification for the Tribunal to allow a hearing to start and continue without clearly defining the issues that need to be adjudicated. If the ambit of the issues is disputed by the parties, as it was in this case, the Tribunal has a duty, firmly rooted in the provisions of the Act, to determine the dispute. Ideally these kinds of disputes should be resolved in pre-hearing conferences,[16] but if they are not, and if objections are raised at the hearing, then the Tribunal must make a ruling on them. Not to do so increases the potential that affected parties will complain that they have been prejudiced, as is illustrated by this case.

[79] Accordingly, I am of the view that the Tribunal should have made a ruling on the ambit of the referral, either at the start of the hearing, or at least as soon as it had become obvious during the proceedings that the dispute about the ambit of the referral was not about to go away. The failure to do so was a misdirection and resulted in a failure of justice.

[15] Sections 52(2) and 55.

[16] Rule 21 of the Competition Tribunal Rules.

[80] For these reasons, I would refer the matter back to the Tribunal to make a ruling on the ambit of the referral. That will enable both parties, if so advised and able, to lead any further evidence needed in the light of the Tribunal's ruling.

For the Applicant:	Advocate W Trengove SC and Advocate G Marcus, Advocate AR Bhana SC, Advocate T Dalrymple and Advocate I Goodman instructed by the the State Attorney.
For Respondent:	Advocate MSM Brassey SC and Advocate MJ Engelbrecht instructed by DLA Cliffe Dekker Hofmeyr Inc.