THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case no 480/2001
REPORTABLE

In the matter between

Menzi Simelane NO

First Appellant

Ahmore Burger NO

Second Appellant

Zoleka Ntsaluba NO

Third Appellant

Willem Pretorius NO

Fourth Appellant

and

Seven-Eleven Corporation SA (Pty) Ltd

First Respondent

Seven-Eleven Africa (Pty) Ltd

Second Respondent

Before: Hefer AP, Harms, Schutz, Scott and Brand JJA

Heard: 14 November 2002

Delivered: 26 November 2002

Competition Act – differing functions of Competition Commission and Competition Tribunal - former investigates and refers – latter adjudicates – former's doings not reviewable in the normal course – nor does it have to give a hearing – as a policeman/prosecutor it does not have to display the impartiality of a judge – entitled to prosecute a test case.

JUDGMENT

SCHUTZ JA

[1] This appeal arises out of a successful review application before Van der Merwe J, reported as *Seven-Eleven Corporation SA (Pty) Ltd and Another v Simelane NO and Others* 2002 (1) SA 118 (T). The applicants (now the respondents) were two companies to which I shall refer collectively as 'Seven-Eleven'. Their managing director is Mr George Hadjidakis ('Hadjidakis'). The 'decision' which was reversed was one by the Competition Commission ('the Commission') to refer to the Competition Tribunal ('the Tribunal') complaints that Seven-Eleven was conducting certain 'prohibited practices'. The Commission and the Tribunal were both established under the Competition Act 89 of 1998 ('the Act'). The commission was not cited by name, but four of its officers were. They are the appellants. The first of them is Mr Menzi Simelane ('Simelane'), the Commissioner. Like the other three he is cited *nomine officii*. The second is Ms Vernolize Ahmore Burger

('Burger'), a Deputy Commissioner. The third is Ms Zoleka Ntsaluba ('Ntsaluba'), an investigator employed by the Commission. The fourth is Mr Willem Pretorius ('Pretorius'), who is an independent advocate holding a general retainer to assist the Commission. So the case will pass into history under Simelane's name.

[2] The reason why the review application could be brought in the High Court was that at the time of its institution the Act did not confer review powers on the Tribunal, although it had exclusive jurisdiction in respect of matters of the kind with which this case is concerned (s 65(3) of the Act). Although the Competition Appeal Court (also a creation of the Act) had exclusive appellate and review powers over the Tribunal's decisions (s 65(4)), it also did not have review powers in respect of the Commission. Accordingly the High Court at the time of institution retained its common law review jurisdiction.

[3] Because of the general exclusion of the ordinary courts from competition matters, I do not propose dealing with the merits of the complaints laid before the Commission or of its referral of them to the Tribunal. However, I shall give a brief general description of the activities of Seven-Eleven, later to touch on the merits, but only in so far as they have a bearing on the review. The frequent invitations by Seven-Eleven in the course of argument to decide some aspects of the merits will not be accepted.

[4] There were over 200 Seven-Eleven retail convenience stores. Some of them were operated by Seven-Eleven itself, but the great majority were operated by franchisees. A relatively small number of franchisees laid complaints with the Commission. The rest, or most of them, appear to be content. Indeed it is Hadjidakis's case that, apart from making a profit, he has guided numerous first-time entrepreneurs to success. He may be correct, but that is not for us to decide.

[5] Mainly by means of the individual franchise agreements Seven-Eleven

maintains a close control over important aspects of the activities of the franchisees. The name of the brand is derived from the requirement that the stores be open for business from at least 7 am to 11 pm. Armed by its experience the franchisor chooses the suppliers and determines the range of goods to be carried and obtains favourable prices from suppliers, using its buying power. The franchisees are thus relieved of having to choose their stock, but, on the other hand, they are compelled to take what Seven-Eleven determines they must stock. In some cases the goods are obtained from a Seven-Eleven warehouse, in others directly from the supplier. In either case Seven-Eleven pays the supplier. It attends to advertising on behalf of all the stores and makes available its trade marks, logos and Seven-Eleven brands. At the time when the application was brought it also determined the prices at which the franchisees sold. It would identify locations suitable for the opening of stores and would, in some cases, hire premises for sub-letting to franchisees. When a store was opened Seven-Eleven would at its own expense provision it with a full range of stock. The value of this initial stock would have to be repaid over three years. Needless to say all of this was not done out of charity. In various ways Seven-Eleven recompensed itself, for instance by way of royalties, rentals, commissions and rebates on purchases.

[6] The complaints were lodged late in 1999. In terms of s 45(1) it was then the duty of the Commission to appoint an inspector and investigate the complaint. This it did.

[7] On 14 February 2000 Hadjidakis attended a meeting presided over by Burger. Also present were Ntsaluba and Pretorius. Together with Simelane (who was not present at the meeting) these persons are the appellants. Hadjidakis complains resentfully about the way in which he says he was inveigled into attending without legal representation, and about the manner of the interrogation. I shall revert to this meeting when dealing with his various submissions.

[8] At about the time the franchisees lodged their complaints with the Commission they also brought urgent proceedings before the Tribunal, seeking an interim interdict. Such relief was granted (by a majority of two to one) on 31 March 2000, in respect only of s 5(2) of the Act – that is Seven-Eleven was interdicted from imposing minimum resale prices. Seven-Eleven obeyed the interdict and claims that when it expired after six months, it merely recommended retail prices without exercising any compulsion. The remainder of the interim relief claimed was refused.

[9] On 4 May 2000 Ntsaluba deposed to an affidavit in support of a referral of the complaints of the discontented franchisees to the Tribunal. The referral itself is signed by Simelane, purporting to act for the Commission. It invokes sections included in Chapter 2, namely 4(1)(b) (restrictive horizontal practices), 5(1) (restrictive vertical practices), 5(2) (minimum resale price maintenance), 8(a) (charging an excessive price by a dominant firm) and 8(d)

(iii) (exclusionary acts by a dominant firm, including 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). Seven-Eleven is accused of:

> 'enforcing restrictive practices which include rental agreements, forced purchases, shop fittings, price fixing, insurance, sale of business and designated supplier.'

[10] Hadjidakis's complaints about the Commission's handling of matters leading to the referral are numerous. Before dealing with them it is desirable to broach two matters arising in this appeal. The first is the application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). The heads of argument filed on behalf of Seven-Eleven are replete with instances where a proposition is advanced with reference to Hadjidakis's founding or replying affidavit, whilst the contrary version put forward by the appellants is ignored or diminished. Such an approach is the converse of that laid down in *Plascon-Evans* at 634H-I, to the effect that in a case such as this, the decision must be based on those facts averred by the applicant which are admitted by the respondent, together with the facts averred by the respondent. Instances in which the rule has been ignored will be mentioned under the individual complaints.

The second aspect to which I refer relates to the nature of the differing functions of the Commission and the Tribunal. Once this is clarified many of Seven-Eleven's complaints may be simply answered.

The respective functions of the Commission and the Tribunal

[11] The main underlying legal dispute is whether the Act provides for a dichotomous procedure for the resolution of a complaint. The appellants say that there are two distinct stages. The role of the Commission is investigative, whereas that of the Tribunal is adjudicative. The Commission receives a complaint, investigates it and then determines whether it should be referred to the Tribunal. If it does refer it, then it appears before the Tribunal as prosecutor. The Tribunal, on the other hand, conducts a trial in order to determine whether the complaint is well-founded, and if it is found to be so, it decides what steps are to be taken.

Seven-Eleven, by contrast, contends that the reliance on such a dichotomy constitutes the fundamental flaw in the argument of the appellants. The functions of the Commission are said to be both investigative and adjudicative and, particularly, adjudicative in the respects with which this appeal is concerned. Reliance is placed on cases such as *Greub v The Master and Others* 1999 (1) SA 746 (C) at 750A-751D. In order to determine which of these contentions as to dichotomy is correct, brief reference to the statute needs to be made.

[12] Both the Commission and the Tribunal are creatures of statute, the statute being the Act. Both bodies must exercise their functions in accordance with the Act (s 19(1)(c) and s 26(1)(d)). The Commission consists of a Commissioner and one or more Deputy Commissioners as may

be necessary, appointed by the Minister of Trade and Industry (s 19(2)). It must be independent and impartial and must perform its functions without fear, favour, or prejudice (s 20(1)). Among its functions are the investigation and evaluation of alleged contraventions of Chapter 2 (in which is contained sections 4 to 9) and the referral, where appropriate, of complaints to the Tribunal (sections 21(1)(c) and (g)). Having so referred a matter it is then its duty and right to appear before the Tribunal and participate in its proceedings (s 20(1)(g) and s 53(a)). Section 24(1) empowers the Commission to appoint inspectors. Upon the Commission's receiving a complaint of a prohibited practice (a practice prohibited under Chapter 2) the Commissioner *must* appoint an inspector to investigate it 'as quickly as practicable' (s 45(1)). The inspector is entitled to question people and they must answer, unless the answer is self-incriminating (s 45(3)). Whilst an investigation is in progress the Commissioner is entitled to summon any person for interrogation and may require production of books and documents (s 45(4)). Powers of entry, search and seizure are conferred by sections 46 to 49. After 'completion' of the investigation the Commission *must* refer the matter to the Tribunal if it '*determines*' that a prohibited practice '*has been established*' (s 50(a)) (emphasis supplied). (The argument on behalf of Seven-Eleven is largely based upon the words 'determines' and 'established'. Seven-Eleven contends that these words indicate that a part of the Commission's functions is determinative or adjudicatory. I shall return to this aspect.) Section 50(b)

goes on to provide that if a positive determination is not made the Commission *must* issue a notice of non-referral. If it does so the complainant may refer the matter directly to the Tribunal (s 51(1)).

[13] The Tribunal is a tribunal of record (s 26(1)(c)). When a complaint is referred to it, it may adjudicate in order to determine whether any conduct prohibited in terms of Chapter 2 has occurred, and, if so, it may impose a remedy provided for in Chapter 6 (s 27(1)(c)). The Tribunal must conduct its hearings in public in an inquisitorial manner and in accordance with the principles of natural justice (s 52(2)). It must issue written reasons for its decisions (s 52(4)). Powers of summoning, interrogation and production are given (s 54). A witness must answer questions (s 56). The Commission, the complainant and the person whose conduct is the subject of complaint are entitled to legal representation (s 53).

[14] The nature of the functions allotted to the Commission and the Tribunal has been the subject of detailed consideration by the Tribunal itself, in *Norvatis SA (Pty) Ltd and Others v The Competition Commission and Others* (CT 22/CR/B/Jun 01, 2.7.2001 paras 7 and 35-61). The reasons for the Tribunal's decision in the *Norvatis* case deal at length not only with the underlying question whether the functions of the Commission are determinative as opposed to investigative, but also with more specific questions which have arisen in the appeal before us. Speaking generally and without reference to all conceivable specific cases, I approve of these reasons.

Once they are adopted, in my opinion they largely dispose of all but one of the arguments raised by Seven-Eleven. That argument will be dealt with separately in paras [40] and [41] below. It relates to whether the decision-making body within the Commission was properly constituted. Putting it aside for the moment, the contentions raised by Seven-Eleven may be listed.

[15] They are:

1. The referral by the Commission constituted an administrative decision affecting Seven-Eleven's rights, such as is subject to review.

2. The Commission acted on a 'hotch-potch' of complaints without investigating whether there was substance in them.

3. The Commission must observe the *audi alteram partem* rule and failed to do so.

4. The persons making the decisions were biased and motivated by malice.

5. Further, they were moved by an ulterior purpose.

<u>The Norvatis case</u>

[16] The following paragraphs of the Tribunal's reasons are relevant to this case:

> '40. The Commission argues that its decision to refer a complaint is neither final nor does it have any consequences for the applicants. Its powers are of a preliminary and investigative nature, comparable to those of the police services or the Directorate of Serious Economic Offences. Accordingly, the Commission submits, it has not engaged in unfair administrative action.

> 41. To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential feature of the context is the empowering statute, which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.[11]

42. In *Brenco*[12] the Supreme Court of Appeal had to consider, *inter alia*, whether the Board on Tariffs and Trade (BTT) had violated the principles of natural justice by making recommendations to the Minister of Trade and Industry without giving the respondents access to all information at its disposal or the opportunity to respond thereto prior to making the recommendation. The Court held that no single set of principles for giving effect to the rules of natural justice is applicable to all investigations, official enquiries and exercises of power. The Court emphasized the need for flexibility in the application of the principles of fairness depending on the context. The Court quoted the dicta of Sachs L.J. in *In re Pergamon Press Ltd*[13] where he stated:

> "In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand … It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate … the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the

[11] [I have retained the original footnote numbers.] *Doody v Secretary of State for the Home Department* and Other Appeals quoted extensively by the Supreme Court of Appeals in *Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Others* 2001 (4) SA 511(SCA) at 520H-521E para [13]

[12] See footnote 11

[13] [1970] 3 ALL ER 535 (CA)

present case), the way in which it normally falls to be conducted and its objective."

43. The Court then examined the provisions of the BTT Act[14] as part of the context to determine what the requirements of fairness are in BTT investigations. It found that in terms of that Act BTT performs both an investigative and determinative function. It went on to hold that:

> "Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative function, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation. In the context of enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973, investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner."

44. The Court was of the view that when BTT carried out its investigative functions fairness did not demand that "every shred of information provided to BTT should be made available to the respondents"[15]. The standard applicable in the conduct of the investigative function is the general principle that an interested party must know the "gist" or the substance of the case that it has to meet.

45. Another complaint made in this matter against BTT was that its inspectors had obtained information from a party and that the information had not been given to the respondents so that they could test its correctness. On this point the Court held:

[14] Act No 107 of 1986

[15] At paragraph [42]

> "There is no requirement that BTT in the investigation of a matter must inform the parties of every step that is to be taken in the investigation and permit parties to be present when the investigation is pursued by way of the verification exercise. There is no unfairness to the respondents in permitting the officials of BTT to clarify information without notice to the respondents. To hold otherwise would not only unduly hamper the exercise of the investigative powers of BTT, but would seek to transform an investigative process into an adjudicative process that is neither envisaged by the BTT Act, nor what the *audi* principle requires".[16]

46. The Court found that BTT had not engaged in unfair procedural action when, in making the recommendation to the Minister, it relied on information that it had not disclosed to the respondents.

47. Nor is the result in *Brenco* surprising or novel. It represents the practical and flexible approach our courts have taken on many occasions to administrative fairness challenges.

48. In *Huisman v Minister of Local Government, Housing and Works* 1996 (1) SA 836 (A), Van den Heever JA placed a significant emphasis on the theme of administrative efficiency and held that proceedings of administrative bodies could be endlessly protracted were such "right" (in this case the right to reply) to be held to exist. Whilst the case deals with a different set of procedures not analogous to those in this case it does illustrate the consistent approach of our courts in striking a compromise between fairness and practical concerns of efficiency.

49. The same could be said of the Competition Commission – the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of section 50(2), its every action would be subject to scrutiny under the principle of administrative review in the manner suggested by the applicants in this matter.

[16] *Brenco* supra at paragraph [51]

50. Moreover, there is no express provision in the Act requiring or compelling the Commission to furnish reasons or to afford the applicant the opportunity to be heard prior to the Commission referring the restrictive practice complaint to the Tribunal. It would have to be inferred, and it seems to be difficult to read into the Act a necessary inference which compels the Commissioner to afford the applicant the right to be heard.

51. In *Park – Ross v Director for Serious Economic Offences* 1998 (1) SA 108 (C) Farlam J had to decide whether an applicant subject to a proceeding in terms of the Serious Economic Offences Act was entitled access to written statements given by witnesses to the Director of Serious Economic Offences. In coming to the conclusion that he was not, he remarked:

> "It is convenient to deal with the right to be heard first. I agree with … that the applicant has no right at this stage to invoke the *audi alteram partem* rule. In my view, it is clear that the powers of the respondent are as Mr Gauntlett argued, of a preliminary and investigative nature. In essence, in this context, they do not differ from those vested in members of the police service."[17]

52. In *Van der Merwe and Others v Slabbert NO and Others* 1998 (3) SA 613 (N), Booysen J, stated the principle that:

> "It is so that bodies required to investigate only need in general not observe the rules of natural justice and that bodies are required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice, depending on the circumstances."[18]

53. We turn now to the application of the above conclusion to the above circumstances of the present case.

[17] See judgment at 122. Although the applicants argued that cases dealing with criminal procedures were not analogous we fail to see why. A complaint referral is brought at the instance of a public body in much the same way as a prosecution and the Tribunal can impose penalties in event of a contravention including an administrative fine.

[18] See judgment at 624

54. The *Brenco* decision is entirely in point in relation to the matter at hand. It is our view that the distinction drawn by the Court between an investigative and a determinative function performed by public bodies is crucial in ensuring that public bodies are not unduly restrained in their work where the exercise of their powers carries no serious or final consequences for affected parties.

55. In the context of this application the distinction drawn by the Court between investigative and determinative administrative conduct by public bodies disposes of the applicants' case. In terms of the decision in the *Brenco* case the violations of natural justice alleged by the applicants against the Commission can only be upheld if the complaint referral by the Commission constitutes a determinative action. Our view is that it does not. Section 21 of the Act, which deals with the functions of the Commission, states that the Commission has the power to investigate and evaluate alleged contraventions of Chapter 2. Chapter 2 deals with prohibited practices. The Commission therefore is empowered to investigate and evaluate alleged prohibited practices, and, in terms of section 50(2), refer to the Tribunal those complaints that in respect of which, it "determines", a prohibited practice has been established. The Commission is an investigative body, which in referring the complaint to the Tribunal is only instituting the initial procedural step on the road to a hearing.

56. The Tribunal, on the other hand, is specifically empowered by section 27(a) of the Act to adjudicate on prohibited practices and to determine whether a prohibited practice has actually occurred. In terms of section 52(2)(a) the Tribunal is explicitly enjoined to apply the rules of natural justice. A respondent in proceedings before the Tribunal clearly is afforded administrative justice rights; in terms of the Tribunal Rules it may request information prior to a hearing and be represented. The Tribunal clearly exercises a determinative action as it is empowered to do by the Act and therefore it is enjoined to conduct its proceedings in accordance with the tenets of natural justice. The Commission

is not subject to the same requirement precisely because the legislature, like the Court in *Brenco*, sought, in this Act, to distinguish between investigative and adjudicative procedures.

57. Thus if one looks at the complaint procedure holistically, in accordance with the analysis in the *Brenco* case, and not in piecemeal fashion, one comes to the conclusion that, on existing case law which is binding on the High Court, the applicants' argument that it is entitled to administrative justice at the complaint referral stage has no prospect of success before the High Court. Their application attempts to transform an investigative process into an adjudicative process which, in the words of the court in the *Brenco* case "is neither envisaged by the BTT Act (read Competition Act), nor what the *audi* principle requires".

58. Furthermore, this application incorrectly assumes that if the applicants were in anyway prejudiced by the complaint referral, such prejudice cannot be remedied through the processes in the Tribunal. This is clearly not the case. As a matter of fact MSD, one of the respondents in the complaint referral, has applied to the Tribunal for a dismissal of the complaint referral on various grounds. The applicants have therefore ignored the fact that Tribunal Rules and procedures provide them with remedies if the referral is approached holistically.

59. If one examines the grounds of the applicants' complaint about why the Commission proceeded unfairly we will see that all three are accommodated in the Tribunal's procedures as set out in the Act and the Tribunal's Rules. Thus, in the proceedings before the Tribunal, the applicants would have to be given access to material evidence adverse to them, would be given a hearing to dispute adverse evidence and the Commission would have to be able to substantiate its allegations otherwise its case would fail.

60. If the applicants' contentions are correct the complaint referral process would amount to two sets of hearings, one before the Commission prior to its act of referring the

complaint and then the process before the Tribunal. The investigator, the Commission, would be asked to adjudicate over what it had thus far investigated despite the fact that it is not the final arbiter. A more pointless and inefficient process is hard to imagine. At the time that the Commission makes its referral the respondent firm (ie the applicants in this case) is not required to defend itself. That takes place when the hearing procedures evolve as part of the Tribunal process, that is, after the step of referral. Fairness is not compromised by denying natural justice prematurely; it is only compromised if it is ultimately denied.

61. In order to get around the difficulties occasioned by the case law and in particular the *Brenco* decision the applicants argued that in referring a complaint to us the Commission exercises a determinative action. Their argument revolves around the wording of section 50(2), which states that the Commission shall refer a complaint to the tribunal "if it determines that a prohibited practice has been established" (our underlining). In the applicants' argument the use of the word "determines" is proof that a complaint referral by the Commission is a determinative function. In our view the applicants are emphasizing form over substance. On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice has occurred it cannot impose a fine or any other remedy, it must refer the complaint to the Tribunal. Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice. Even where the Commission decides not to refer a complaint this decision is also not determinative of the complaint – in terms of section 51(1) of the Act the complainant has the right to refer the complaint to the Tribunal directly. We repeat what we have stated above that the decision by the Commission to refer a complaint is merely one of the

> steps in the resolution of a complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and this is why the Act entitles a respondent in Tribunal proceedings to the principles of natural justice. In the light of the above and the *Brenco* decision, we see no prospect of this argument succeeding in the High Court.'

See also *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others* (CT 08/CR/B/May 01, 23.8.01 paras 31-35), Brassey *et al Competition Law* 301 and cf *The Master v Deedat and Others* 2000 (3) SA 1076 (N) at 1082F-1084I.

Administrative decision or no – Point 1

[17] I cannot do better than refer to what is said in the *Norvatis* case. For the reasons there stated it is clear that in a case such as the one we are concerned with the function of the Commission is investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like. Seven-Eleven should husband its powder for the contest before the Tribunal.

The 'hotch-potch' referral without proper investigation – Point 2

[18] I do not think that it would be unduly unkind to say that the argument under this heading is itself something of a hotch-potch. In the first place it is complained that the referral extends to a considerable number of practices of a disparate nature. I have difficulty with this argument. If complainants lodge a cluster of complaints and the Commission finds that there is *prima facie* merit in all of them, then the cluster will be replicated in the referral.

[19] But then it is said that it did not conduct its investigations in sufficient depth and failed to take all the evidence into account. For instance, emphasis is placed on the complaints by franchisees that Seven-Eleven inflicted its shop-fittings and its insurance policies on them, when Hadjidakis is supposed to have repelled these complaints at the interrogation on 14 February 2000. If there is merit in Hadjidakis's criticisms (and I express no view on that) then it may show incompetence on the Commission's part and result in the failure of the prosecution on those counts, but I fail to see how it makes the Commission's actions reviewable.

[20] Then it is complained that a majority of franchisees actually approve of Seven-Eleven's policies, so that those of them who have resorted to the Commission are simply a dissident minority. The Commission, it is said, should have polled all of them and should then have been guided by the popular will. The Commission retorts that it is not its function to conduct a popularity poll, but to investigate and refer prohibited practices. If they occur it is its duty to do so. This is a legitimate stand, in my opinion.

[21] I consider that there is no merit in Point 2.

Audi alteram partem – Point 3

[22] Seven-Eleven contends that the Commission, already at the investigation stage, should have put its cards on the table, should have told it what its evidence was, and should then have held a hearing at which Seven-Eleven would have been given the opportunity to refute the evidence. For the

reasons set out in the *Brenco* and *Norvartis* judgments, as set out above, I consider that there is no merit in these submissions. Again, when it appears before the Tribunal, Seven-Eleven will have a full opportunity to view documents, hear the witnesses, cross-examine them and lead evidence and make submissions. According to the authorities all that it is entitled to at the investigation stage is the 'gist' of the case against it (see para [44] of *Norvartis* above), and that, I think it has been told, by means of a copy of the referral document which it received in May 2000. This document is mentioned in para [9] above. Brief it may be, but it gives dates, sections and the alleged prohibited practices. As a matter of law I do not think that Seven-Eleven was entitled to more than it got. It may be added that by May 2000 the hearing of the application for an interim injunction had been concluded. During the course of this proceeding detailed evidence was produced. There can be no suggestion that by the time of the referral Hadjidakis was still stumbling in the dark. He knew in detail what the case was and he chose not to avail himself of the invitation to have a further meeting with the Commission, as will be set out below.

[23] But that is not the only reason for holding that there is no merit in the *audi* point. In my opinion Hadjidakis was given the opportunity of a full hearing. If he did not make the most of his opportunity, the blame for that does not lie with the Commission.

[24] A meeting was arranged at the Commission's offices for 14 February

2000. According to Hadjidakis he was led into an ambush. His version is that a message from the Commission was passed on to him by Seven-Eleven's financial manager, Mr Griesel. When Hadjidakis and Griesel later parted they were no longer on good terms. An affidavit was obtained from Griesel by the Commission, but Seven-Eleven's counsel did not request that he be subjected to cross-examination. (Indeed Seven-Eleven made no request that anyone should give oral evidence.) According to Hadjidakis the message conveyed that the meeting would be 'quite informal', that it would be 'off the record' and that it was unnecessary that he be accompanied by his legal advisors. Burger and Griesel agree that the word 'informal' was used, but say that by this was intended that formalities would be curtailed to a minimum and that the structure would be that of a meeting and not a trial. At this point the rule in *Plascon-Evans* becomes decisive. They deny that statements to the effect that the meeting would be 'off the record' or that lawyers could be dispensed with were made. This is the version which must be accepted. And the matter goes much further. Griesel says that he was told that the purpose of the meeting was to allow Hadjidakis to establish Seven-Eleven's version or defence and that he would be fully entitled to legal representation and to put his case before the Commission in whatever way he saw fit. Griesel further says that he and Hadjidakis's attorney, Mr Simon, were fully aware of the gravity and importance of the meeting. He pressed upon Hadjidakis the importance of legal representation and initially Hadjidakis

seemed to agree with him. At that stage the intention was to brief Seven-Eleven's legal team, which included senior counsel. There was even an initial consultation with the team.

[25] Then Hadjidakis changed his mind. He decided, said Griesel, that he did not need an expensive legal team to deal with something which he was more than capable of himself disposing of in a morning. Both Griesel and Simon strongly advised him against what they considered to be a 'rash decision', but he persisted and went to the meeting alone. He was, said Griesel, 'a man notorious for his temperament and persistence'. It is clear that on the papers we must reject Hadjidakis's version that he was led into an ambush. The version of the facts which we must accept is that, having been earnestly warned against doing so, he decided to encounter the Commission on his own.

[26] The record of proceedings before the Commission's representatives, Burger, Pretorius and Ntsaluba, annexed to Seven-Eleven's application, is 148 pages long. The meeting lasted for five hours, with two short breaks. Hadjidakis version was that he was taken aback to find the cozy meeting which he had been led to expect, replaced by aggressive cross-examination, in circumstances in which he was not legally represented, 'despite my express desire to consult legal advisors'. This last statement is contradicted not only by the Commission's Burger, who says that she was rather surprised that Hadjidakis had arrived without representation, but by the record itself. After

welcoming him she said:

> 'You are aware that you can be assisted by an attorney or an advocate in these proceedings and you elected to attend in your own capacity, is that correct?'

Hadjidakis responded:

> 'Yes, I understand that.'

[27] The meeting then proceeded. Some time later Hadjidakis protested that he had been brought there under false pretences, the pretence being that all that would happen was a cozy chat. Instead he was being interrogated. But, he added:

> 'I just want it to go on record, I will carry on with the interrogation, I am quite capable of answering your questions.'

Some time later he accused the Commission's representatives of bias against him. Pretorius then said to him:

> 'George if you want to go, we will just subpoena you back George, it is fine.'

Hadjidakis replied:

> 'I am sorry, next time I will come with my advocate and then they will take measures.'

[28] Pretorius then told him that if he wished to go home he was free to do so, but that he would have to come back with his lawyers. Burger then said 'I will then adjourn this meeting', to which Hadjidakis responded 'You do not have to adjourn the meeting'.

[29] Towards the end of the meeting Pretorius told him that he was under no obligation to come back to them but that he was welcome to do so if he wished, after he had spoken to his lawyers.

[30] To be added to all this is what Griesel further has to say. He says that on the day of the meeting he received two or three telephone calls from Hadjidakis, who told him that they were having a break in the proceedings. Hadjidakis expressed concern at the manner in which matters were developing. The atmosphere was not amiable and serious allegations were being made. Griesel advised him to stop the proceedings and arrange a new date when his legal team could attend. Hadjidakis did not take his advice.

[31] From all this it emerges that the Commission representatives were ready to respect Hadjidakis's rights, and that it was his own headstrongness that caused that he went to the meeting unprepared and unrepresented, and insisted on remaining there despite offers that he could withdraw and come back on another day with his legal team.

[32] Accordingly, on the facts also, assuming even that there was a duty to afford a hearing, Hadjidakis had his hearing. Both on the facts and the law there is no merit in Point 3.

Bias – Malice – Point 4

[33] Hadjidakis's complaint is that in a variety of ways the investigating

team manifested forejudgement, with a consequent malicious intent to harm him. Examples advanced include the request by the Commission that the Tribunal impose a maximum penalty percentage of 10 % on certain income, the making of an application for a default judgment, the failure to interview all franchisees, unfavourable and favourable (with this point I have dealt already), and the behaviour of the Commissions' representatives at the meeting of 14 February. I do not consider it necessary to determine whether any 'bias' in such respects has been demonstrated, because the point can be disposed of on another basis. But I would point out that it is not unusual for a prosecutor or plaintiff to pitch a strong opening bid (the 10 %), that the Commission was entitled to apply for a default judgment when Seven-Eleven delayed in filing its opposition and that a measure of robustness is unsurprising in an interrogation or a cross-examination (a measure of, not license for, robustness).

[34] But supposing that there was some 'bias' I do not think that any right of Seven-Eleven was infringed. The policeman may be impatient to have the suspect behind bars, but that does not entitle the suspect to his freedom. Similar was the situation that arose in *Receiver of Revenue, Port Elizabeth v Jeeva and Others: Klerck and Others NNO v Jeeva and Others* 1996 (2) SA 573 (A). The respondents on appeal were to be examined at an enquiry in terms of s 418 (read with s 417) of the Companies Act 61 of 1973. They complained that the liquidator had shown bias against them. This Court drew

a clear distinction between the functions of the Commissioner, who presides at the enquiry, and the liquidator who represents the company in liquidation and the creditors at the enquiry (at 579G-580B). The Commissioner has to act in a quasi-judicial capacity. The liquidator, by contrast, acts neither in an administrative nor a quasi-judicial capacity. He is not in a position of authority *vis-à-vis* the witness. He does not determine or affect any of his rights. He may act as adversary of the witness, and he owes no higher duty to him than any other litigant. In my opinion the analogy is close. The duty of the Tribunal corresponds to that of the Commissioner (under s 418) and the Commission to that of the liquidator.

[35] Accordingly I do not consider that Point 4 has any merit either.

Ulterior motive – Point 5

[36] The principle relied upon by Seven-Eleven is that a person or body which is given powers for a certain purpose may not use them in order to achieve another purpose: *van Eck NO and van Rensburg NO v Etna Stores* 1947 (2) SA 984(A). The complaint is that the object of the referral is not the possibly legitimate one of securing the conviction of Seven-Eleven, but the improper one of securing from the Tribunal a favourable decision on 'relational dominance', for use in future cases – this while using the prosecution of Seven-Eleven as a stalking-horse. *Cf Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 394B-I.

[37] I do not propose giving a detailed description of the meaning of 'relational dominance'. Its relevance is to s 8 of the Act (one of the sections relied on by the Commission) which requires for proof of contravention the element that the person arraigned is 'dominant'. From the internal papers of the Commission disclosed in the course of the review it is clear that the Commission does not consider that it will be able to prove 'dominance' in any of the better-established ways. Hence to secure a s 8 conviction it wishes to obtain a favourable decision on 'relational dominance', which is concerned with the power of the franchisor to dominate the franchisee and impose anti-competitive practices on him. The Commission believes that a favourable decision will ease its burden of proof in some future cases. To this extent Seven-Eleven's case is being used as a test case. But I can see nothing wrong in that. Indeed I would have thought it the duty of the Commission to obtain a definitive decision as soon as possible. If that is done in a particular case, for the other party it may be irksome, but he has to bear the imposition as one of the hazards of litigation. The Commission was not a party to the interim interdict proceedings, in which the Tribunal found that relational dominance had not been established. Those proceedings were brought by some franchisees. The Commission was merely an observer. It believes that it can make a better case than did the franchisees.

[38] But even though Seven-Eleven's prosecution is being used as a test case, it is clear, from the Commission's internal documents and its affidavits,

that it is seeking to obtain the conviction of Seven-Eleven under s 8 and that it considers that a favourable decision on relational dominance is crucial to such a conviction. That is a legitimate object. Indeed it may be the Commission's duty, depending on the merits of the case upon which it acts.

[39] Accordingly I do not consider that there is any substance in Point 5 either.

Did the correct body, correctly constituted, decide the referral? Point 0

[40] The point here is the loose-standing one referred to in para [14]. The Act requires that the Commission decides on a referral. Seven-Eleven submits that the Commission did not decide – that either the decision was made by a committee called Exco, which is not the Commission – or that, if the Commission did purport to decide the referral, it is invalid because not all its members participated in the decision – which is what the Act is said to require. As to this last point, the legal one, argument was addressed to us, but I do not consider if necessary to deal with it, as the facts are clear and do not support either of Seven-Eleven's factual submissions.

[41] Again applying the rule in *Plascon-Evans*, we must act on the Commission's version. Whatever supposed inconsistencies there may be in the affidavits of Simelane and Burger, their purport is plain. The decision to refer was taken by the Commission, whatever may have gone before, and it was taken by all its members. No purpose would be served by setting out the details of the evidence. Seven-Eleven's case under this head is no more than

speculation based on some of the Commission's documents. Accordingly I consider that there is no merit in this Point 0 either.

Conclusion

[42] Van der Merwe J, *a quo*, found for Seven-Eleven on all the points with which I have dealt. For the reasons I have given I find for Seven-Eleven on none of them. Seven-Eleven's application should have been dismissed.

[43] The appeal is allowed with costs, including the costs of two counsel. The order made *a quo* is set aside and is replaced with the following:

"The application is dismissed with costs including the costs of two counsel."

W P SCHUTZ

JUDGE OF APPEAL

CONCUR

HEFER AP
HARMS JA

SCOTT JA

BRAND JA