THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 118/2010

In the matter between:

SENWES LIMITED **APPELLANT**

v

THE COMPETITION COMMISSION OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Senwes v Competition Commission* (118/2010) [2011] ZASCA 99 (1 June 2011)

Coram: Mpati P, Brand, Lewis, Bosielo and Seriti JJA

Heard: 11 May 2011

Delivered: 01 June 2011

Summary: Competition Act 89 of 1998 – finding of Tribunal that appellant contravened s 8(c) of the Act by conduct constituting a margin squeeze – held that this conduct not covered by the referral to the Tribunal and the finding therefore not competent.

ORDER

On appeal from: The Competition Appeal Court (Davis JP, Mailula and Malan JJA concurring, sitting as court of appeal from the Competition Tribunal).

1 The application for leave to appeal is granted with costs, including the costs of two counsel.

2 The appeal is upheld with costs including the costs of two counsel.

3 The order of the Competition Appeal Court is set aside and replaced with the following:

'(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the Competition Tribunal is set aside and replaced with the following:

"The application is dismissed."'

JUDGMENT

BRAND JA (MPATI P, LEWIS, BOSIELO and SERITI JJA concurring)

[1] This is an application for leave to appeal against an order from the Competition Appeal Court (the CAC) dismissing an appeal by the appellant (Senwes) against a judgment of the Competition Tribunal (the Tribunal) in which an application by the respondent (the Commission) was upheld. The application for leave to appeal had been referred for the hearing of argument in terms of s 21(3) of the Supreme Court Act 59 of 1959. At the heart of the impugned judgment of the Tribunal lies its finding that Senwes had contravened s 8(c) of the Competition Act 89 of 1988 (the Act) by engaging in what is classified in the parlance of competition law as a 'margin squeeze'.

[2] Section 8(c) of the Act prohibits a dominant firm from engaging in an 'exclusionary act' which is defined in s 1 of the Act as 'an act that impedes or prevents a firm from entering into, or expanding within, a market'. By the nature of things I am bound to return to these provisions as well as to the concept of a margin squeeze in more detail. But for purposes of introduction, a 'margin squeeze' is a phenomenon that occurs when a vertically integrated firm, participating in both the upstream and downstream markets, is dominant in the upstream market and supplies an essential input to its competitors in the downstream market. The dominant firm is then said to engage in a margin squeeze when it raises the price of that input to a level where the downstream competitors can no longer survive in that market.

[3] Put very simply ─ for I shall return to the facts in detail later ─ Senwes provided storage facilities in silos to farmers (producers) in a particular area. That is referred to as the 'upstream market'. It trades in the product ─ grain and maize, for example ─ by buying from farmers and selling to processors (millers and bakers) and to other traders. The trading is the 'downstream market'. Senwes is a 'vertically integrated firm' because it operated as one entity in both markets.

[4] In concluding that Senwes engaged in a margin squeeze thus described, the Tribunal made four essential findings:

(a) Senwes is a vertically integrated firm in that it participates in both the upstream market of grain storage in silos and the downstream market of grain trading.

(b) In the upstream market of grain storage Senwes is a dominant firm within its area of operation.

(c) Storage is an essential input in the downstream market of grain trading.

(d) Through manipulation of its storage charges, Senwes has prevented its competitors in the downstream market from earning a viable profit.

[5] Before the CAC, Senwes' ground of appeal amounted to two contentions:

(a) The finding of margin squeeze by the Tribunal was not competent because this was not a case that Senwes was called upon to answer: neither a margin squeeze nor the alleged conduct giving rise to the consequence of a margin squeeze was ever pleaded by the Commission (the proceedings contention).

(b) Alternatively, even if the complaint of margin squeeze could appropriately be entertained by the Tribunal, the elements of the complaint had not been established on the evidence (the evidence contention).

[6] The CAC found both these contentions wanting. In consequence it dismissed the appeal as well as the subsequent application by Senwes to appeal to this court against that judgment. In its present application before this court Senwes relies on essentially the same two grounds. A finding in favour of Senwes on the proceedings contention will render an inquiry into the evidence contention unnecessary. I therefore propose to deal with the former at the outset. But before doing so, it is appropriate to refer to the general requirements for leave to appeal to this court against a judgment of the CAC.

Requirements for leave to appeal

[7] These requirements were succinctly formulated in *American Natural Soda Ash Corporation v Competition Commission* 2005 (6) SA 158 (SCA) para 19.1:

'This Court's inherent constitutional power to protect and regulate its own process empowers it to require applicants for leave to appeal from a specialist appellate tribunal to demonstrate, in addition to a reasonable prospect of success, that there are "special circumstances" indicating that a further appeal should lie.'

And para 21:

'As we observed in *NUMSA*[1] (para 43), the procedures for applying for leave to appeal, and the factors relevant to obtaining special leave, are well established. The criterion for the grant of special leave to appeal is not merely that there is a reasonable prospect that the decision of the CAC will be reversed – but that the applicants can establish "some additional factor or criterion". One is where the matter, though depending mainly on factual issues, is of very great importance to the parties or of great public importance. In

[1] *National Union of Metal Workers of South Africa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA).

applying this criterion, this Court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that disputes about competition issues be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted.'

[8] The central question is therefore whether Senwes has demonstrated on the basis of either its proceedings contention or its evidence contention (a) reasonable prospects of success on appeal; and (b) that there are special circumstances requiring a further appeal to this court. I shall consider these questions against the factual background that follows.

Background

[9] Senwes has been in existence for almost a hundred years. For most of that period it was an agricultural co-operative. But in April 1997, it was converted into a public company. Its area of operation is mainly in the Free State and to a lesser extent in the North-West, Gauteng and the Northern Cape. Within its area of operation it owns 56 grain silos, which represents more than 90 per cent of the grain storage capacity in that area. The extent of its dominance in that market is due to historic reasons.

[10] These reasons were, according to expert testimony before the Tribunal, that agricultural marketing in this country had been characterised for many years, by State intervention. It started in 1937[2] as part of a global trend towards State intervention in agricultural affairs after the Great Depression. Grain industries were controlled by different control boards, eg the Maize Board, the Wheat Board and so forth. These boards administered single channel marketing schemes; they were the only buyers and sellers of the commodities that they controlled; they administered fixed prices at which these commodities were bought from farmers and sold to millers; and they appointed agents to perform the physical handling functions to move the commodities from farm gate to mill door.

[2]Originally with the Marketing Act 26 of 1937 which was then consolidated and redrafted in the Marketing Act 59 of 1968.

[11] Generally speaking, the agents of the boards were agricultural cooperatives. These agents earned most of their income from handling and storing grain on behalf of the boards. The boards usually appointed only one agent in a particular area. This, of course, afforded the cooperatives a competitive edge in their areas of operation. To enable them to perform their agency functions, cooperatives were encouraged to build bulk silos. Financial assistance was afforded to them, generally in the form of low interest loans by the Land Bank. Senwes was one of these cooperatives.

[12] Drastic changes in the system came about with the deregulation of agricultural marketing in terms of the Marketing of Agricultural Products Act 47 of 1996. Under the deregulated system, single marketing channels were formally terminated, control boards were disbanded and grain traders entered the scene. What did not change, however, was that the agricultural cooperatives retained ownership of the silos. In addition, silos are enormously expensive and since there proved to be a general over-supply of silo storage capacity in the country, the construction of new silos does not constitute a financially viable option.

[13] Under the deregulated system the vertical linkages in the South African grain industry can broadly be described as follows. The first link of the supply chain comprises the grain producers, ie the farmers. The next level is the silo owners. Then there is the level of grain traders and finally, there are the processors, consisting of the millers and (in the case of wheat), the bakers. The new entrants after deregulation, the grain traders, provide an intermediary service between the producers and the processors. In doing so they usually earn a margin from the difference between the purchase price and the sale price of grain.

[14] Another significant change brought about by deregulation was that grain can now be traded as a commodity on the South African Futures Exchange (Safex).[3] In order to facilitate this trading, contracts are standardised according to product (eg white maize), contract size (eg 100 tons), date of delivery in the

[3]Which is part of the Johannesburg Securities Exchange.

future and location (eg Bultfontein Silo). A requirement for trade on Safex is a negotiable instrument. In the case of grain, this instrument is referred to as a silo certificate which is issued by a Safex approved silo. Silo certificates guarantee the holder's entitlement to a fixed quantity of the specified grain product at the issuing silo on the specified date of delivery. The Senwes silos are authorised by Safex to issue these silo certificates.

[15] Safex transactions do not necessarily result in physical delivery of grain. On the contrary, the amount of grain traded on Safex exceeds the physical grain trade by a factor of eight. For present purposes we are not really concerned with the Safex trade, but with the physical trade in grain. Yet the Safex trade is important because the prices that traders offer to farmers in the physical trade are determined with reference to the Safex price. In broad outline, the physical price of grain is calculated by deducting the anticipated price of storage and transport as well as the trader's margin from the Safex price. Because Safex constitutes a national market, grain prices are determined with reference to a national standard of which both producers and processors are well aware. Moreover, committees within Safex recommend annual tariffs for daily storage rates. Though these rates are not binding, they are in practice followed by silo owners, including Senwes.

[16] Storage plays a vital role in the physical grain trade. It flows from the fact that the harvesting season of grain is limited to three or four months. In the case of maize – which comprises about 80 per cent of the grain crop in South Africa – it is between May and August. Processors, on the other hand, require a constant supply throughout the year. Grain not consumed during the harvest season therefore requires to be stored. Storage is predominantly supplied by silo owners. An alternative is to store grain in huge silo bags (up to 200 tons). At present, however, this alternative has some features that makes it less appealing, not the least of which is that silo bags are not eligible for silo certificates and are therefore excluded from the Safex trade. In the end, about 75 per cent of the total grain crop is stored in commercial silos like those that belong to Senwes.

[17] Storage cost forms a major part of the eventual price of the grain that requires storage. It is calculated on the basis of one ton per day, for which the Safex recommended tariff was, at the time of the proceedings before the Tribunal, in the region of 40 cents. Storage for 100 days would therefore amount to R40 per ton, which can, by way of illustration, be compared to the trader's margin which was, during the same period, in the region of R15 to R17 per ton.

[18] This brings me closer to the complaints brought against Senwes which centred around the storage tariffs that it imposed. Historically Senwes offered two options to all its storage customers ─ both farmers and traders: A daily tariff which was the Safex recommended tariff; and a lump sum storage amount that was roughly equivalent to 100 days of storage at the daily tariff. This was referred to as the capped tariff. The capped tariff applied only until the next harvest season when either the daily tariff or a new capped tariff started again. In May 2003 Senwes removed the capped tariff for traders and offered it to farmers only. This new dispensation became known as the differential tariff because it differentiated between farmers and traders. A trader who stored for longer than 100 days thus continued to pay the daily tariff. At the same time a rumour started amongst competitors of Senwes that farmers were only eligible for the capped tariff if they sold their grain to Senwes. If they sold to other traders instead, they would have to pay a daily tariff on an uncapped basis. Against this background I now turn to the complaint as it was formulated by the Commission in its referral to the Tribunal.

The referral

[19] The complaint against Senwes was referred to the Tribunal by the Commission in its prosecutorial role on 20 December 2006. It had its origin in a formal complaint by a competitor of Senwes in the trading market, C T H Trading (Pty) Ltd (CTH), which was filed on 2 December 2004. In accordance with the rules of the Tribunal, the referral was by way of notice of motion, which embodied

the prayers for relief, supported by an affidavit, stating the grounds of the complaint and the material facts upon which the Commission relied.[4]

[20] The referral was in line with, though substantially narrower than, the original complaint. So, for example, complaints by CTH about administrative charges raised by Senwes and the fact that Senwes provided finance to farmers who sold their crops to it, were not referred. What the referral focussed on were two allegations of fact. First, that Senwes offered a capped tariff only to farmers who sold their grain to it. Second, that Senwes discriminated against its customers who are traders in that the capped tariff was offered to farmers only and was not available to traders.

[21] The first alleged factual situation was said to constitute a contravention of s 8(d)(i) of the Act, which prohibits a dominant firm from 'inducing a customer not to deal with a competitor'. Senwes' answer to this charge was a denial that it offered the capped tariff only to farmers who ultimately sold to it. As a fact, so Senwes contended, its storage charges in no way distinguished between farmers who sold their crop to it and those who did not. Even at this early stage I find it convenient to point out that on this issue the Tribunal found for Senwes and that the CAC accepted this finding as correct. In consequence we need no longer be detained by this charge.

[22] The second complaint relied on the differential tariff levied on farmers and traders, respectively, which practice was admitted by Senwes. The Commission's main complaint based on this practice was that it constituted price discrimination as envisaged in s 9 of the Act, which provides, in relevant part:

'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

[4]See rules 14 and 15 of the Rules for the Conduct of Proceedings in the Competition Tribunal which were promulgated in terms of s 27(2) of the Act.

(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 . . . ‘

[23] As to why the differential tariff constituted a contravention of s 9, the Commission motivated its case as follows in paragraph 32 to 34 of the affidavit supporting the referral.

‘32 The service of provision of commercial handling and storage facilities of grain by Senwes to producers and traders constitutes a sale, in equivalent transactions, of services of like grade and quality to different purchasers.

33 Senwes’ differentiated pricing policy for grain storage between producers and traders is such that it involves discriminating between those purchasers in terms of:

33.1 The price charged for the service; or

33.2 The discount or rebate given or allowed in relation to the supply of the service.

34 The aforegoing conduct further has the effect of substantially preventing or lessening competition within the contemplation of section 9(1) and is therefore prohibited price discrimination in terms of the Act.’

[24] Senwes’ answer to this charge was in essence that farmers and traders are not competitors in the same market and that the differential tariff would therefore have no negative effect on competition. In the event, both the Tribunal and the CAC held this complaint to be ill-founded as well. Again, we therefore need not be detained any further by the charge of price discrimination under s 9.

[25] But according to the referral, the Commission founded an alternative complaint on the basis of the differential tariff, which the Tribunal and the CAC eventually endorsed, namely, that the differential tariff constituted an exclusionary act with anti-competitive effect as envisaged in the prohibition contained in s 8(c)

of the Act.[5] The terse motivation advanced in the referral for the alternative complaint was that:

'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.'

[26] Senwes contended from the start that the charge under 8(c) was, on the face of it, without a factual foundation. After it had filed its answering affidavit,[6] Senwes therefore applied for the Tribunal to adjudicate the complaint based on a differential tariff by way of exception.[7] As the basis for the exception it contended that 'it is axiomatic that conduct can only have an effect on competition between identified persons or groups of persons if the persons identified compete with each other in the same market' and that, because the roles of farmers and traders 'are complementary, not competitive, giving producers better storage rates than traders, can never produce anti-competitive consequences'. The Commission did not deal with the exception on its merits. It opposed the application on two procedural bases: That its case against Senwes was set out with sufficient clarity and particularity in the referral; and that Senwes had elected to file an answering affidavit and thereby waived its right to except. In the event the Tribunal dismissed the application for leave to except out of hand and without reasons.

Witness statements

[27] Subsequently, witness statements were exchanged between the parties. This happened shortly before the commencement of the hearing before the Tribunal. The witness statements pertained to both expert witnesses and

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[5]The full text of s 8(c) 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; or . . .'

[6] In terms of Tribunal Rule 16.

[7] Though the rules of the Tribunal do not provide for exception procedure, Senwes contended that the Tribunal could entertain an exception on the basis of s 27(1)(d) of the Act which authorizes it 'to make any ruling or order necessary or incidental to the performance of its functions in terms of the Act'.

witnesses on fact. According to factual witness statements filed on behalf of the Commission, traders competing with Senwes complained that they would be better able to trade if they were afforded the benefit of the capped tariff. But their complaint went further. Because they were not offered the capped tariff, so they said, Senwes was able to beat the offer they made to farmers in that it was able to deduct a lesser amount for storage from the Safex price. What this amounted to, of course, was not a comparison of the position of traders *vis-à-vis* farmers, but with the position of competing traders *vis-à-vis* Senwes qua trader. In short, the complaint thus formulated was that Senwes as storage provider offered a better deal to its trading arm than to other traders. The witnesses were careful, however, not to level this charge in express terms. They put the charge no higher than 'I suspect that Senwes does not deal with its own trading division as it does with a third party trader when it comes to storage charges'.

[28] In the same vein, factual witnesses also complained about administrative charges that were levied by Senwes – qua storage provider – on other traders, but not on its own trading arm. So, for example, they complained about a charge of R8,50 per ton levied by Senwes on other traders for information about their own stock stored in the Senwes silos. If a trader therefore sought information about its own stock of, say, 5 000 tons in a Senwes silo, it had to pay an amount of R42 500. Further, if a trader required Senwes to issue a silo certificate, the cost would be R1,50 per ton, irrespective of volume. A silo certificate for 100 tons would therefore cost R150 and a 10 000 ton certificate, R15 000. Neither of these charges, so the witnesses said, were levied on the Senwes trading arm. Since competing traders were bound to deduct these expenses from the Safex price in arriving at the price that they offered to farmers, it was almost impossible to compete with Senwes in a market where the profit margin was no more than R15 per ton.

[29] The concept of margin squeeze was pertinently raised for the first time in the witness statement of an expert economist, Dr Nicola Theron, which was filed

by the Commission, together with its factual witness statements. With reference to this concept, she levelled the following charge against Senwes:

'A margin squeeze generally prevents rivals also active in the downstream market from making a profit. The dominant firm uses its power over supply of the downstream input to distort competition in this way. This can be done by raising input prices to a level where the rival firms cannot survive or compete. Generally, there should not be a discriminating difference between prices charged to the downstream rivals and its own integrated business . . . . In the current case this is the alleged practice that Senwes is guilty of.'

[30] In support of this charge she relied on the following examples emanating from the factual witness statements:

(a) That the capped tariff was not available to traders, but only to farmers.

(b) That the capped storage tariff was only available to farmers who sold to Senwes ─ an allegation which the Tribunal found not to have been established.

(c) The levying of administrative fees by Senwes for information which 'are so much that it often makes a trade unprofitable' ─ a complaint originally made by CTH but not referred to the Tribunal.

(d) That Senwes provided finance to farmers on condition that they sell their crops to Senwes ─ again a complaint originally made by CTH but not referred to the Tribunal.

Objections by Senwes

[31] Upon receipt of the witness statements, Senwes prepared a document entitled 'A Schedule of Objections'. The schedule recited the alleged objectionable conduct by Senwes referred to the Tribunal and then proceeded, with reference to each witness statement, to identify those paragraphs that contained evidence of conduct or practices that did not form part of the referral. Thus it started by pointing out that the only alleged practices of Senwes referred to the Tribunal were:

'(a) differentiating between traders and producers of grain in respect of silo costs for grain stored in excess of 100 days; and

(b) differentiating silo costs for producers who sell to Senwes from those who do not.'

[32] Traversing the factual witness statements, the schedule pertinently raised objections to the introduction of evidence relating to a comparison between how Senwes treated its own trading arm, on the one hand, and competing traders on the other. With regard to the expert witness statement by Dr Theron, Senwes objected to her expressing an opinion based on alleged abuses that had not been referred. The schedule was conveyed to the Commission prior to the hearing.

[33] At the commencement of the hearing, Senwes formerly presented its schedule of objections to the Tribunal. In the course of going through the schedule, counsel for Senwes requested that the objections be treated as being raised against all evidence tendered in despite the objections and that he would not burden the Tribunal by raising an objection each time evidence was presented outside the referral. In response to the objections, both the Commission and the Tribunal remained passive. In particular, the Tribunal gave no indication that it would be willing to entertain complaints outside the referral.

[34] The factual evidence presented by the Commission followed the course predicted in its witness statements. Despite the general nature of the objection raised at the outset, counsel for Senwes from time to time pertinently objected to evidence relating to discrimination by Senwes against other traders in favour of its own trading arm. The views expressed by Dr Theron as an expert were likewise in line with those formulated in her witness statement. Under cross-examination, she admitted that the thesis of a margin squeeze rested squarely on an assumption of discrimination by Senwes against competing traders in favour of its own trading arm. At the same time she conceded, however, that she had no knowledge of what charges Senwes imposed on its trading arm.

[35] The gap in the factual basis of the Commission's case thus exposed was closed in cross-examination of the factual witnesses on behalf of Senwes. In short they were compelled to concede that Senwes did not charge its trading arm

any storage costs at all. The expert witness called on behalf of Senwes refused to take issue with Dr Theron on the matter of margin squeeze, because, so he testified, he was advised by Senwes' legal representatives that it fell outside the ambit of the referral and was therefore irrelevant.

Margin squeeze covered by the referral

[36] The Commission's primary argument which found favour with both the Tribunal and the CAC was that Senwes' conduct which the Commission eventually held to be in contravention of the Act, was indeed covered by the referral. Though the concept of a margin squeeze in itself was not specifically mentioned in the referral, so the Commission argued, Senwes' conduct which attracted that label was part of the complaint referred. In this regard the Commission inter alia relied on the following allegation in the referral:

'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 a contravention of s 8(c) of the Act.'

[37] These allegations, so the Commission's argument proceeded, are borne out by the evidence of one of its factual witnesses, Mr Herbert Keyser. What Keyser testified, amongst other things, is that, although his firm can compete with Senwes during the first 100 days of storage, the charges it had to pay for storage after that period rendered further competition with the trading arm of Senwes impossible. Had his firm been allowed the same benefit of a capped tariff afforded to farmers, it would have been able to compete with Senwes after 100 days as well. This evidence shows, so the Commission's argument concluded, that it is Senwes' conduct of charging a differential tariff which had properly been pleaded, which constituted the marginal squeeze.

[38] Unlike the Tribunal and the CAC I do not believe that the Commission's argument can be sustained. In formulating my reasons for saying this, 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'. 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.

[39] The difference becomes more apparent once it is appreciated that the complaint of a differential tariff, between traders and farmers could be removed by abolition of the 100 day cap for farmers as well. That would place farmers and traders on the same footing. Yet it would not assist the traders in their competition with Senwes at all. Conversely, if the trading arm of Senwes was charged the same storage fee as other traders after 100 days, the abolition of the 100 day cap for traders would have no impact on the ability of the latter to compete with the former. All this is borne out by Keyser's concession in cross-examination that his real complaint against the abolition of the 100 day cap for traders was grounded on his suspicion ─ which turned out to be true ─ that the abolition of the cap did not apply to the Senwes trading arm.

[40] But the difference between the charge and the conviction goes deeper. Since the conviction is entirely dependent on the discrimination by Senwes against other traders, the abolition of the 100 day cap can be no less objectionable in principle than the charges for silo fees and information that Senwes levied against other traders, but not against its own trading arm. That much appears from the evidence of Dr Theron. It is clear from her expert opinion that all these charges contribute in equal measure to the consequence of a margin squeeze. Yet, while the abolition of a cap was part of the referral, the other charges were not. This goes to show, in my view, that the discrimination by Senwes against other traders was not the subject of the referral.

[41] If the charges levied by Senwes qua storage owner against its own trading arm was as vital to the charge as it was to the conviction, one would have expected the Commission to have investigated these charges prior to the referral, in terms of its wide powers under ss 46 - 49(A) of the Act. That would have rendered it unnecessary for the witnesses called by the Commission to speculate and for the Commission to rely on concessions by Senwes' witnesses with regard to these matters. This again seems to show that these matters, which turned out to be vital to the conviction, were not even regarded as relevant at the time of the referral.

[42] In its judgment refusing leave to appeal to this court, the CAC found support for its view that the conviction was covered by the charge in the following quotations from the referral:

'Senwes abuses its dominance in the handling and storage of grain market by charging in effect a lower storage fee to a producer who agrees to sell the grain stored in Senwes' silos to Senwes. [This statement is contrary to the actual finding by the Tribunal with which the CAC agreed.] Producers who sell their products through third parties that compete with Senwes downstream pay a higher fee for the storage of grain. CTH alleges that this practice has made it virtually impossible for it to compete with Senwes in a trading market within the relevant geographical area.'

[43] The answer to the reliance on these allegations, I think, is that they were made in support of a charge which the Tribunal found not to have been established ─ ie that Senwes contravened s 8(d)(i) of the Act, which prohibits a dominant firm from inducing a customer not to deal with a competitor. They had nothing to do with the discrimination by Senwes against other traders in favour of its own trading arm, which formed the basis of the conviction.

[44] Finally, I believe the difference between the charge and the conviction is borne out by the Commission's change of course with regard to the remedies it sought against Senwes. Originally the remedies sought were set out in the notice of motion. At the commencement of the hearing, the Tribunal was asked, by agreement between the parties, to decide the merits of the complaint first while

the issues pertaining to the appropriate remedies stood over for later determination. The remedies originally sought were in line with the charge. In the main they comprised orders declaring the practice of differential tariffs a prohibited practice, an interdict against its continuation and the imposition of an administrative penalty under s 59(1) of the Act.

[45] But the Commission must have realised that the remedies originally sought would not prevent the conduct constituting the margin queeze of which Senwes was convicted. Compliance would require no more from Senwes than to abolish the 100 day cap with reference to farmers. After the decision of the Tribunal and the CAC in its favour, the Commission therefore applied for a drastic amendment to the remedies it proposed to seek at the resumed hearing before the Tribunal. These would include:

(a) An order against Senwes to sell either its grain trading division or its storage division to a separate registered company.

(b) Directing that all parties who store grain with Senwes would be charged for such storage on the same terms and conditions.

[46] In the affidavit supporting the amendment application (p 196) the deponent on behalf of the Commission explained that, in order to remove the margin squeeze, it is necessary to ensure that the price paid to Senwes by other traders for storage facilities must be equal to what Senwes' own trading division has to pay. This result can only be attained, so the deponent continued, by a full business separation of Senwes' different business entities. From all this it is clear, in my view, that the conduct constituting a margin squeeze was so far removed from the referral that it was not even contemplated in the relief originally sought.

Was the Tribunal entitled to go beyond the terms of the referral?

[47] The further contention advanced by the Commission, which also found favour with both the Tribunal and the CAC, was that even if Senwes' conduct which led to its conviction was not covered by the terms of the referral, the

Tribunal was entitled to go beyond its terms in the circumstances of this case. As to why the Tribunal was entitled to do so, the Commission relied on the following arguments.

(a) Tribunal proceedings should not be equated with a civil dispute between parties. Consequently the Tribunal is entitled to adopt a more flexible approach to pleadings than a court does in civil proceedings.

(b) On Senwes' own admission it became aware that the Commission intended to rely on conduct constituting a margin squeeze, prior to the hearing, when witness statements were exchanged. Despite ample opportunity to do so, Senwes however deliberately elected, in the implementation of a conscious strategy, not to deal with that part of the Commission's case. In the words of the Commission, Senwes took this high risk gamble because it had no answer to these allegations. A party who conducts litigation in a manner which amounts to a high risk gamble, so the Commission contended, cannot be heard to complain when the strategy fails.

(c) Senwes had no answer to the charge of a margin squeeze because Senwes' witnesses conceded that its own trading division did not incur the storage costs that other traders had to pay; that in consequence other traders could not compete with it; and thus conceded, for all practicable purposes, that Senwes was guilty of margin squeeze conduct.

(d) Senwes had failed to seek a ruling from the Tribunal that conduct constituting a margin squeeze was not part of the complaint referred nor did it properly object to the introduction of evidence to that effect.

[48] Again I do not agree with the Tribunal and the CAC in their acceptance of the contentions by the Commission. In motivating my conclusion I propose to deal with the arguments advanced in support of the contention, individually.

[49] Elaborating on its argument based on the difference between the Tribunal and civil courts, the Commission pointed out that proceedings before the Tribunal are not aimed at resolving civil disputes between parties, but at the protection of the public from anti-competitive behaviour. Hence the Tribunal should not be

constrained by the ambit of pleadings to the extent of a civil court. Rules of procedure, the Commission contended, are for the convenience of the Tribunal and are not to stand in the way of its endeavour to fulfil the purposes of the Act.

[50] This approach, so the Commission continued, is borne out by the provisions of ss 52 and 55 of the Act. Thus, for example, s 52 provides that the Tribunal must adhere to the principles of natural justice but that it may conduct its hearings informally or in an inquisitorial manner. And, in terms of s 55, the Tribunal is authorised to accept as evidence any relevant oral testimony, document or other thing, whether or not it is given or proven under oath or affirmation and whether or not it would be admissible as evidence in a court. What is apparent from these provisions, so the Commission contended, is that the Tribunal has unique procedural powers which differ from those of a court in adversarial civil proceedings.

[51] 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.[8] In terms of s 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. I therefore agree with the following statement by the CAC in *Netstar*:[9]

'. . . . [I]t is necessary once again to emphasize 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.'

[8] See eg *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56-59.
[9] *Netstar (Pty) Ltd v Competition Commission SA* (99/CAC/May 10) [2011] ZACAC 1 (15 February 2011) para 61.

[52] 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. Of course these matters can be extended by an amendment of the referral.[10] Moreover, I accept for the sake of argument that, as in the case of civil matters before the courts, the referral can be extended by agreement (expressed or implied) between the parties[11] but the principle remains that the referral, with or without extension, constitutes the boundaries beyond which the Tribunal may not legitimately travel.

[53] In terms of s 55 of the Act the Tribunal's power to receive evidence in an informal way is limited by the section to evidence that is relevant. Irrelevant evidence may not be allowed in any way, whether formal or informal. That, of course, includes evidence introduced by cross-examination. Relevance is determined by the subject matter of the hearing which, in turn, is determined by the referral. The same goes for the Tribunal's power to gather information in an inquisitorial manner. In doing so it may not stray beyond matters circumscribed by the referral. That would offend the principle of legality.

[54] As to the argument that Senwes had been forewarned by the contents of the witness statements that the Commission intended to rely on conduct constituting a margin squeeze, the answer is that the Commission could not render irrelevant evidence relevant by incorporating it into witness statements. Whether Senwes had sufficient opportunity to deal with this irrelevant evidence is neither here nor there. I accept that if Senwes had decided to confront the new case, it could have done so. Presumably the referral would then have been extended by implied agreement. But Senwes was under no obligation to so do. It was entitled to do what it did, namely to adopt the stance that the evidence pertaining to a margin squeeze was irrelevant.

[55] With regard to the argument based on Senwes' failure to seek a ruling from the Tribunal as to whether the conduct constituting a margin squeeze was

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[10] In terms of rule 18 of the Rules of the Tribunal.
[11] See eg *Shill v Milner* 1937 AD 101 at 105; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 14.

part of the referral before it adopted the stance that it did, I believe the answer is this: in doing so Senwes took a gamble that it might be wrong in its interpretation of the referral. If it turned out that as an objective fact the conduct constituting a margin squeeze was indeed covered by the referral, that gamble would have been lost. But the converse is equally true. In the light of Senwes' consistent attitude first in its exception and then in its objections, the Commission was aware of the contention that its case based on margin squeeze fell outside the referral. By refusing to seek an amendment of the referral so as to incorporate the complaint of a margin squeeze, it is the Commission which took the gamble and lost.

[56] This brings me to the Commission's argument that Senwes took the technical stance because it had no defence against the charge of a margin squeeze. I believe there is more than one answer to this argument. The first is that since Senwes' stance had been found to be properly taken, its motive for doing so is of no consequence. Secondly, the concessions by Senwes' witnesses which proved to be a vital part of the Commission's case were elicited through cross-examination aimed at irrelevant issues and therefore inadmissible. Of far greater consequence, however, is that Senwes, in the light of its stance, steadfastly refused to engage with a charge of a margin squeeze. Whether or not it has a defence to that charge we simply do not know.

[57] The Commission's argument that Senwes had failed to object properly is primarily based on the fact that it did not raise a pertinent objection every time evidence was presented by the Commission in support of a margin squeeze. This objection comes as somewhat surprising in the light of the statement by counsel for Senwes at the commencement of the hearing that the objections raised in the document entitled 'Schedule of Objections' should be treated as being raised against all evidence tendered in spite of them. But be that as it may, the argument shows a lack of appreciation as to the role of an objection. A failure to object does not render irrelevant evidence tendered by the opposing party relevant. But in the absence of an objection it might be argued that the issues

had been extended by implied agreement. In the light of Senwes' persistent attitude throughout the proceedings that the complaint of a margin squeeze was not part of the case against it, any suggestion of an implied agreement to incorporate that complaint is clearly unsustainable.

Compliance with the requirements of special leave.

[58] As to the requirement of reasonable prospects of success, it should be clear by now that in my view Senwes not only succeeded in satisfying this requirement, but that the appeal should in fact succeed. In criminal law parlance, Senwes was acquitted of the charges brought against it and convicted on one which was not.

[59] As to the requirements of 'special circumstances' it bears no denial that the matter is of vital importance to Senwes, particularly in the light of the remedies the Commission now proposes to seek at the resumed hearing of the Tribunal. After all, what the Commission will now seek is that Senwes be broken up as a business entity with all the ramifications that that might entail. Moreover, it is clearly in the public interest that the Tribunal should not, in the exercise of its far-reaching powers, stray beyond the authority bestowed upon it by the Act. Although it probably did so with the best of intentions, it exceeded its powers and thereby contravened the principle of legality which is an aspect of the rule of law itself and therefore admits of no exception.

Relief

For these reasons it is ordered:

1 The application for leave to appeal is granted with costs, including the costs of two counsel.

2 The appeal is upheld with costs including the costs of two counsel.

3 The order of the Competition Appeal Court is set aside and replaced with the following:

'(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The order of the Competition Tribunal is set aside and replaced with the following:

“The application is dismissed.”’

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F D J Brand

Judge of Appeal

APPEARANCES:

M S M Brassey SC (with him W G Engelbrecht)

Instructed by Cliffe Dekker Hofmeyr Inc, Sandton
Symington & De Kok, Bloemfontein

A R Bhana SC (with him T Dalrymple)

Instructed by The State Attorney, Pretoria
The State Attorney, Bloemfontein