

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT61/11

In the matter between:

**THE COMPETITION COMMISSION OF
SOUTH AFRICA**

Applicant

and

SENWES LIMITED

Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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1. THE NATURE OF THESE PROCEEDINGS

1.1 This application concerns first, the specificity with which the Competition Commission (“the Commission”) is required to craft its referral to the Competition Tribunal (“the Tribunal”), and second, the Tribunal’s power to consider conduct that comes to its attention through a complaint referral and to determine whether it constitutes a prohibited practice under the Competition Act 89 of 1998 (“the Act”).

1.2 The Tribunal and the Competition Appeal Court (“the CAC”) on the one hand, and the Supreme Court of Appeal (“the SCA”), on the other, have adopted fundamentally different approaches to these issues:

1.2.1 The Tribunal and the CAC adopted a purposive approach that affords the Tribunal the power to inquire into and determine any conduct that is placed before it in the course of the referral, provided the respondent has been adequately notified of the case against it.

1.2.2 The SCA, by contrast, confined the Tribunal to considering and determining the theory of harm that is clearly and fully pleaded in the Commission’s referral document. It

therefore adopted a strict, restrictive approach to pleadings in the Tribunal.

1.3 For the reasons set out more fully below, we submit that the SCA's approach unduly curtails the Tribunal's inquisitorial or investigative powers¹ and serves to undermine the object and purpose of its proceedings. Contrary to the SCA's findings, we submit that:

1.3.1 The Tribunal's jurisdiction is triggered by a referral to it. Once a matter is placed before it, it is entitled to consider and adjudicate any potentially prohibited conduct that arises in the course of that referral.²

1.3.2 Even if that is not so, any information placed before the Tribunal by the Commission prior to the hearing of a matter should be taken into account in construing the referral. Thus, witness statements and expert reports may serve to clarify or amplify the Commission's referral.³

¹ In fn39 para 223 of *Lufuno Mphaphuli*, O'Regan J found that inquisitorial powers can more clearly and less equivocally be described as investigative powers. In these submissions, we use the terms interchangeably.

² See, by contrast, para 51 of the SCA judgment (record vol 9 p 924) where Brand JA finds that the Tribunal has no power to enquire into and decide any conduct that is not expressly referred to it.

³ See, by contrast, para 52 to 53 of the SCA judgment (record vol 9 p 924) where Brand JA holds that relevant conduct must be identified in the referral document and that any evidence that travels beyond the referral document is inadmissible.

1.3.3 Finally and in any event, even on the strict approach required by the SCA, the prohibited conduct – namely, the respondent’s (“Senwes”) practice of charging differential tariffs by offering a capped tariff to farmers but not traders – was sufficiently identified in the referral document properly to ground a complaint.⁴

1.4 In these submissions, we will begin by setting out the factual and procedural background to the case. We will then address the purpose of the competition regime and the functions of the Tribunal, in order to explain the scope of the Tribunal’s inquisitorial powers and their effect on the proper conduct of proceedings. Finally, we will deal with why, on either the Tribunal’s approach or that of the SCA, the Tribunal was entitled to make a margin squeeze finding against Senwes.

2. THE FACTUAL AND PROCEDURAL BACKGROUND TO THIS CASE

2.1 This application relates to a complaint referred by the Commission to the Tribunal, that Senwes had engaged in margin squeeze conduct in the grain market.

⁴ The SCA found that the differential tariff did not give rise to the margin squeeze effect – see SCA judgment, record vol 9 p 919-920 at para 38-39. We will address why this is not so at para 6.3 below,

2.2 The Supreme Court of Appeal accepted that a margin squeeze occurs where:

“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”.⁵

2.3 Margin squeeze conduct contravenes section 8(c) of the Act because the input prices for downstream competitors are raised to the extent that downstream competitors are impeded or prevented from entering into or expanding within a market. However, the term “margin squeeze” does not appear in the Act; it is one of several terms used by economists to describe and analyse the observable effect in the market of prohibited conduct.⁶

The genesis of the margin squeeze complaint against Senwes

⁵ SCA judgment at record vol 9 p 907 para 2. In its affidavit opposing the application for leave to this court, Senwes persisted with its contention that margin squeeze abuse is controversial in comparative competition law. The SCA did not find it was. Moreover, in October 2010 the European Court of Justice unanimously held in *Deutsche Telekom AG v European Commission et al C-280/08P 14 October 2010* that margin squeeze is a self-standing abuse: “margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82EC in view of the exclusionary effect that it can create for competitors” (at para 183). See also Whish’s definition in *Competition Law Whish 6th Ed* at 744 cited with approval by the CAC, record vol 8 p 856

⁶ The Commission’s expert testified that “[t]here are various other words one can use such as predation, foreclosure, raising rival costs – to me it is very well described by the whole concept of margin squeeze” (Record vol 6, p618 lines 20 to 22)

- 2.4 Senwes is a company that supplies silo capacity to grain farmers and grain traders to enable them to store grain. It is the dominant supplier of storage in its area of operation. In addition, Senwes itself trades in grain and, in this capacity, it competes with other grain traders. Because it operates both in the storage supply market (also known as the upstream or wholesale market) and in the (downstream or retail) trading market, Senwes is considered a vertically integrated firm.
- 2.5 Historically, at the wholesale level, Senwes offered a capped seasonal storage tariff to both grain farmers and grain traders that stored grain in its silos. The tariff was set at the cost of the first 100 days of storage, while storage for the remainder of the season did not attract a separate charge.
- 2.6 From May 2003 onwards, Senwes offered the capped seasonal storage tariff to farmers only, and required traders to pay a (more expensive) uncapped daily storage tariff for the entire storage period (that is, even after the first 100 days) (“the differential tariff”). By contrast (and whilst suspect by rival grain traders who could not produce independent proof because the information was peculiarly within Senwes’ knowledge, and Senwes had made insufficient discovery), Senwes *qua* trader did not pay any (internal transfer) costs for storage.

2.7 On 2 December 2004, a competing grain trader, CTH Trading (Pty) Ltd, submitted a complaint to the Competition Commission alleging, inter alia, that Senwes' practice of offering a capped seasonal tariff to farmers but not to traders constituted prohibited conduct under the Act.⁷

The ambit of the Commission's referral

2.8 The Commission investigated CTH Trading's complaint in terms of sections 49B and 50 of the Act and, on 20 December 2006, referred a complaint to the Tribunal (in terms of section 51 of the Act) alleging that Senwes had contravened, among others, section 8(c) of the Act by leveraging its dominance in the storage market to enable it to commit a prohibited exclusionary act in the downstream trading market.⁸

2.9 In essence, the Commission claimed that Senwes foreclosed the supply of grain to rival grain traders and prevented their entering or expanding in the trading market, by manipulating its storage charges.⁹

In particular, it alleged that:

⁷ This was one of a number of complaints submitted to the Commission. See CTH Trading's CC1 Form and supporting affidavit, record vol 2 p 111-154

⁸ It also referred a complaint on the basis that Senwes engaged in prohibited price discrimination in contravention of section 9(1) of the Act. The Tribunal dismissed that complaint, however, and it has not been appealed.

⁹ See referral affidavit, record vol 2 p105 para 20

2.9.1 Storage tariffs are calculated on a daily rate. Senwes had capped the storage fees charged to farmers at 100 days. Thus, farmers did not pay any additional charges for storage in excess of 100 days. By contrast, no cap on fees was offered to rival grain traders. They paid a daily rate throughout the storage period. This differential tariff meant that storage in the post-100 day period became extremely expensive for rival grain traders.¹⁰ The Commission claimed that the differential tariff impeded or prevented rival grain traders that competed with Senwes from expanding in the downstream market for grain trading, in contravention of section 8(c) of the Act.¹¹

2.9.2 In addition, Senwes offered preferential storage rates to farmers who agreed to sell their grain to Senwes (rather than a rival grain trader). This was referred to as the “conditional tariff” and was pleaded in paragraph 24 of the referral (although the evidence as to the manner in which such conduct was done – that is, via the silo certificates – was only dealt with in the witness statements and at the hearing).

¹⁰ Referral affidavit, record vol 2 p106 paras 21 and 23

¹¹ Referral affidavit, record vol 2 p108 para 30

2.10 The Commission concluded that:

“Senwes’ pricing policy for grain storage was such that it favours or facilitates a situation whereby it would not be financially feasible for a farmer to sell his/her grain to a competitor of Senwes. This practice gives Senwes an unfair advantage over its competitors in the grain trading market. This conduct thus constitutes an inducement to suppliers and customers not to deal with Senwes’ competition. The effect of this is to impede new firms from entering into the grain trading market or to impede existing firms from expanding within that market”.¹²

2.11 The Commission accordingly sought an order directing Senwes, *inter alia*:

2.11.1 to ensure that all storage and handling services were made available to all customers and buyers on the same terms;¹³
and

2.11.2 not to engage in any conduct in relation to storage services which resulted in a differential treatment of customers or which had the effect of differentiating on any basis, unless permitted by section 9(2) of the Act.¹⁴

¹² Referral affidavit, record vol 2 p107 para 26

¹³ Notice of motion, record vol 2 p 93 para 4

¹⁴ Notice of motion, record vol 2 p 93 para 5

2.12 For the purposes of this case, Senwes' trading division is a customer.

The evidence against Senwes

2.13 Approximately three weeks before the commencement of the hearing and on the directions on the Tribunal, the Commission filed witness statements,¹⁵ as well as an expert report prepared by an economist, Dr Nicola Theron.¹⁶

2.13.1 In several of the witness statements, rival grain traders pointed out that **Senwes *qua* trader was able to offer better prices to farmers than they were**, and suggested that this was because **Senwes manipulated its storage fees and/or levied tariffs on rivals that it did not charge its own storage arm.**¹⁷

2.13.2 None of them, however, had personal knowledge of these facts and the Commission was unable to corroborate their testimony because Senwes had made deficient discovery:

¹⁵ The statements of Keyser, Keyser, Van Zyl, Viljoen, Bourdairon and Bird all appear in record vol 4

¹⁶ See curriculum vitae of Dr Theron, record vol 4 p 377-382 and Econex report, record vol 4 p 383-433

¹⁷ See Keyser witness statement, record vol 4 p 330 para 22-24; Viljoen witness statement record vol 4 p 349-351 para 19-21; Bourdairon witness statement, record vol 4 p 356, 358, 366-367 para 4, 8, 26-30; Bird witness statement, record vol 4 p 373 para 7-8

2.13.2.1 Senwes did not disclose the documents underlying the deal sheets (which made clear that Senwes set the storage price without reference to external costs and did not charge storage tariffs to its own trading division) during the discovery process.

2.13.2.2 The existence of these documents only surfaced during the course of the hearing and had to be extracted from Senwes' witness, Mr Grobler, during cross examination. It was only at that stage that the Commission obtained documentary proof of Senwes' manipulative pricing strategy.¹⁸

2.13.3 In her expert report, Dr Theron nevertheless pointed out that the facts attested to by the Commission's witnesses supported the conclusion that Senwes was leveraging its dominance in the storage market to undercut the margins that its rivals in the trading market could achieve. She concluded that the facts presented to her were strongly indicative of a margin squeeze. She dealt extensively with

¹⁸ Affidavit in support of application for leave to appeal, record vol 9 p 946 para 3.2. This allegation is not denied by Senwes in its answering affidavit (record vol 10 p 1032-1054)

the margin squeeze case.¹⁹ This was sufficiently in advance of the commencement of the hearing to allow Senwes to engage with the pivotal issue. Senwes, however, consciously chose to ignore this, to avoid dealing with the matter.

2.14 Accordingly, Senwes was fully apprised of the case it had to meet well in advance of the hearing. It knew both the nature of the prohibited practice complained of, and the factual circumstances upon which that complaint was founded. Despite this, none of Senwes' expert reports addressed the margin squeeze case at all.

Senwes' approach to the case against it

2.15 Despite being put on notice that the Commission was pursuing a margin squeeze case against it, Senwes did not address the margin squeeze complaint in its supplementary expert report or its various witness statements. Instead, at the outset of the Tribunal proceedings, it handed up a schedule of objections to the Commission's witness statements which claimed, *inter alia*, that factual and expert evidence highlighting the difference between how Senwes treated its own internal division and how it treated rival grain traders and complaining

¹⁹ See Theron expert report, record vol 4 p 383-433

of margin squeeze did not relate to a complaint that had been referred.²⁰ The schedule of objections itself made clear that Senwes was aware of the margin squeeze case against it.

2.16 Counsel for Senwes drew the Tribunal's attention to the nature of the objections raised at the outset of the proceedings, but did not seek a ruling on the admissibility of the impugned evidence. Nor did he consistently object to such evidence being led or refrain from cross-examining on the margin squeeze case.

2.17 We submit below that in the context of this case, the Commission's referral triggered the Tribunal's inquisitorial powers to consider the conduct disclosed to it in the course of the referral and to determine the theory of harm to which it gave rise. Those inquisitorial powers are best understood in light of the Tribunal's purpose and functions. It is that topic to which we now turn.

²⁰ The schedule of "*Objectionable Aspects of Commission Witness Statements*" appears at record vol 5 p 539-558

3. THE PURPOSE OF THE COMPETITION REGIME AND THE FUNCTIONS OF THE TRIBUNAL

3.1 The Act was enacted, inter alia, to “*restrain particular trade practices which undermine a competitive economy*” and to “*establish independent institutions to monitor economic competition*”.²¹

3.2 To this end, the Act creates separate and specialised competition bodies to deal with matters that arise under the Act:²²

3.2.1 The Commission is tasked, among other things, with investigating and evaluating alleged contraventions of the Act, and referring them to the Tribunal for adjudication.²³ It performs this function by investigating complaints that have been submitted to it or which it has itself initiated in terms of section 49B(2) of the Act and, where it is satisfied that a prohibited practice has occurred, referring the matter to the Tribunal for adjudication, in terms of section 50(2) of the Act.

²¹ See preamble to the Act.

²² Although the Competition Appeal Court is part of this regime, its role is not relevant in these proceedings and we do not address it.

²³ Section 21(1)(c) and (g) of the Act.

3.2.2 In turn, the Tribunal is tasked with determining whether conduct contravenes any provision of the Act and, if so, imposing an appropriate penalty.²⁴ Its functions are set out in section 27(1) of the Act, which pertinently states:

“Functions of Competition Tribunal.—(1) The Competition Tribunal may—

(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in this Act;

(b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;

...

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.”

3.2.3 The Tribunal is an independent body established by the State to resolve disputes by the application of law and to promote access to justice in accordance with section 34 of the Constitution. It is constitutionally enjoined to act independently, impartially and fairly.²⁵ It follows that

²⁴ In these submissions, we deal only with the Tribunal’s powers and functions in respect of prohibited practices. We do not address its duties in respect of merger control.

²⁵ Section 34 provides:

“Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

where the Tribunal's powers to determine a dispute are unduly restricted, this will undermine the public's rights under section 34 of the Constitution.

3.3 The Tribunal only has jurisdiction to consider a matter that has been placed before it through a referral.²⁶ For the reasons outlined below, we submit that once a matter is placed before the Tribunal for consideration, it has wide powers to determine whether conduct arising in that matter is prohibited by chapter 2 of the Act.²⁷ The limitations on the Tribunal in discharging this duty are that it must do so fairly and within the dictates of natural justice.

3.4 In order to discharge its functions under the Act, the Tribunal is conferred powers that are fundamentally different from those of the High Court.

In para 211-212 of *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), a majority of the Court found that all courts and tribunals established by the state to resolve public disputes must meet the independence and publicity requirements of section 34.

²⁶ Section 52(1) of the Act requires the Tribunal to conduct a hearing into every matter referred to it, either by the Commission or a third party complainant.

²⁷ It is trite that where an administrative body is required to discharge a function, it is impliedly authorised to do anything that is reasonably necessary to achieve that function effectively, or that is incidental or ancillary to the performance of such function. See *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) at para 50; *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 at 672.

3.4.1 The Tribunal must conduct its hearings as expeditiously as possible, and in accordance with the principles of natural justice.²⁸

3.4.2 In addition, it is empowered to:

3.4.2.1 conduct its hearings informally or in an inquisitorial manner;²⁹

3.4.2.2 determine the procedure applicable in a particular hearing and condone any technical irregularity or non-compliance with its Rules;³⁰

3.4.2.3 direct or summon any person to appear before it, and question him or her under oath;³¹ and

3.4.2.4 accept evidence even where it is not given or proven under oath or affirmation or where it would be inadmissible in ordinary court proceedings.³²

²⁸ Section 52(2)(a) of the Act

²⁹ Section 52(2)(b) of the Act

³⁰ Section 55(1) of the Act, read with Rule 55 of the Rules for the Conduct of Proceedings in the Competition Tribunal (“the Competition Rules”)

³¹ Section 54(a) and (b) of the Act.

³² Section 55(3) of the Act.

3.4.3 The Tribunal ordinarily requires the parties to exchange witness statements and expert witness reports in advance of the hearing of the matter.³³

3.4.4 Finally, where the Tribunal determines that a prohibited practice has occurred, it is empowered to grant any appropriate order, including imposing an administrative penalty or ordering divestiture in accordance with requirements of the Act.³⁴

3.5 It is clear, then, that the Tribunal is conferred investigative powers that enable it to fulfil its fact-finding or truth-seeking role and to protect and promote the public interest. Indeed, this has repeatedly been recognised by the Tribunal and the Competition Appeal Court.³⁵

3.6 The Tribunal's public interest function and its inquisitorial or investigative powers impact the manner on which proceedings are conducted before it. It is to that matter that we now turn.

³³ In terms of Rule 22(1)(c)(vii)(aa) of the Competition Rules.

³⁴ See section 58 of the Act.

³⁵ *Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another* [2003] 1 CPLR 10 (CAC) at 22; *American Natural Soda Ash Corp v Botswana Ash (Pty) Ltd* [2001–2002] CPLR 430 (CT) at 442
Supreme Health Administrators (Pty) Ltd and others v Competition Commission and others [2006] 1 CPLR 422 (CT) at para 19

4. THE SCOPE OF THE TRIBUNAL'S INQUISITORIAL POWERS AND THEIR EFFECT ON THE PROPER CONDUCT OF PROCEEDINGS

The scope of the powers conferred on administrative tribunals generally

4.1 At common law, our courts have recognised that administrative tribunals may require different powers and procedures to a court in order to discharge their functions. They are accordingly not bound by the ordinary rules of evidence and incidence of proof (unless the empowering statute provides for their application).³⁶

4.2 Rather, the parties to a dispute must place relevant facts and argument before the administrative tribunal, which is then required to discharge its functions by taking a decision based on the facts before it.³⁷ It is thus ordinarily for the tribunal (and not just the parties) to determine the ambit of the dispute before it and to ascertain what factors and evidence are relevant.

³⁶ *Lambert v Director of Census* 1956 (3) SA 452 (T) at 455A-B; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 903H; *Kloof GM Co Ltd v National Union of Mineworkers* 1987 (1) SA 598 (T) at 605I-606E. See also De Ville *Judicial Review of Administrative Action in South Africa* (Lexisnexis Butterworth, 2005) at 323

³⁷ *Johannesburg Local Road Transportation Board* at 904B; *Bulk Deals Six CC and another v Chairman of the Liquor Board of the Western Cape and others* 2002 (2) SA 99 (C) at para 9.2; *Niewoudt v Chairman, Subcommittee over Amnesty for the TRC*; *Du Toit v Chairman, Subcommittee over Amnesty for the TRC*; *Ras v Chairman, Subcommittee over Amnesty for the TRC* 2002 (3) SA 143 (C) at para 2 of Traverso J and Ngwenya J's majority judgment.

4.3 This approach applies axiomatically in tribunals (like the Tribunal) that are vested with inquisitorial or investigative functions:

4.3.1 This Court has recognised that the purpose of inquisitorial proceedings is to facilitate the expeditious and affordable settlement of disputes by eschewing reliance on the adversarial procedures set out in the Uniform Rules of Court.³⁸

4.3.2 The conferral of inquisitorial powers on a tribunal serves fundamentally to change its role in proceedings:

4.3.2.1 A tribunal with inquisitorial powers is required to engage proactively in the proceedings before it and to inquire into the facts giving rise to the proceedings – including by questioning witnesses and calling for evidence.³⁹

³⁸ *Lufuno Mphaphuli* at para 236 and 260 (per O'Regan J for the majority). See also *S v Baloyi (Minister of Justice & Another intervening)* 2000 (2) SA 425 (CC) at para 30. See also *George & Others v Minister of Environmental Affairs & Tourism* 2005 (6) SA 297 (EqC) at para 12.

³⁹ *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC) at para 101(9); *Baloyi* at para 31; *Islamic Unity Convention v Minister of Telecommunications and Others* 2008 (3) SA 383 (CC) at para 47-48

4.3.2.2 The role of an inquisitorial body is accurately captured in the judgment of *Mlifi v Klingenberg* **1999 (2) SA 674 (LCC)**, which dealt with the Land Claims Court's power to conduct any part of its proceedings informally or inquisitorially, in terms of section 32(3) of the Restitution of Land Rights Act 22 of 1994. The Court held:

*“The inquisitorial system rejects the notion of a passive Judge. On the contrary the Judge is expected actively to undertake a comprehensive investigation into the facts surrounding the dispute. He or she need not rely solely on the evidence adduced by the parties. His or her role is to find the objective or material truth.”*⁴⁰

4.3.3 This Court has confirmed that a tribunal vested with inquisitorial powers is entitled to determine the scope of the dispute before it and the relevant facts for consideration, provided the process that it adopts is fair.⁴¹ It has moreover emphasised that the content of the fairness requirement is different in inquisitorial and adversarial proceedings, and

⁴⁰ *Mlifi* at para 107

⁴¹ *Lufuno Mphaphuli* at fn 39 para 223. See also *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T) at para 13.

courts must guard against adopting the procedures stipulated by the Rules of Court in investigative proceedings.⁴²

4.4 It is clear, then, that inquisitorial tribunals (including the Tribunal) have a far greater degree of control than courts of law over the disputes before them. They are entitled, among other things, to determine the scope of the case before them and the legislative provisions that have allegedly been contravened, provided that they do so in a manner that is fair.

The effect of inquisitorial powers on the manner in which a case is pleaded

4.5 The characteristics of inquisitorial proceedings also have important implications for the content of, and a tribunal's reliance on, pleadings:

4.5.1 In adversarial court proceedings, pleadings serve to delineate the dispute between the parties, to allocate the onus and to ascertain what evidence is relevant and admissible.⁴³

4.5.2 In administrative tribunals, pleadings play a wholly different role. They serve to place information before the tribunal but

⁴² *Lufuno Mphaphuli* at para 223, 236 and 261. See also *Islamic Unity* at para 48

⁴³ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-G; *Mobil Oil SA (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 710H.

must be understood in light of other documents and evidence submitted by the parties.

4.5.3 This is particularly so where – as in the present case – the parties are required to file comprehensive witness statements and expert reports. The purpose of those documents is to delineate and particularise the scope of the dispute between the parties. As the English Court of Appeal held in *McPhilemy v Times Newspapers Ltd (Re-Amendment: Justification)*:⁴⁴

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to CPR 16, paragraph 9.3 requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.”

⁴⁴ [1999] 3 All ER 775 at 792-793

As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements pleadings frequently become of only historic interest.

[emphasis added]

4.6 We accordingly submit that the Tribunal is far less constrained by the pleadings (that is, the referral document) and the Commission's initial framing of the case than a high court would be in adversarial proceedings.⁴⁵

The effect on Tribunal proceedings

4.7 We submit that two potential consequences flow from the wide inquisitorial powers conferred on the Tribunal:

4.7.1 First, once the Tribunal has jurisdiction over a matter (because it has been referred to it for adjudication), it is entitled to determine whether conduct that is brought to its attention in the course of referral proceedings constitutes a prohibited practice under the Act – regardless of whether that conduct was the focus of the Commission's referral. We accordingly

⁴⁵ The Tribunal has itself recognised this. See *American Natural Soda Ash Corporation and Another v Botswana Ash (Pty) Limited* [2001–2002] CPLR 430 (CT) at 442. See also *Brassey et al Competition Law* 1ed (Juta & Co, 2002) at p308-310

submit that the SCA erred in finding that the Tribunal was confined to adjudicating only conduct expressly identified for determination in the referral.⁴⁶

4.7.2 Second (and in any event), the Tribunal is not constrained to considering the referral document in isolation. The referral may be particularised or amplified by the Commission in its prosecution of the case (through, *inter alia*, its witness statements and expert reports) and must be understood holistically.

4.8 Indeed, this second contention – that the referral is not interpreted in isolation but with reference to the case in fact pursued by the Commission – would hold true even in adversarial high court proceedings:

4.8.1 It is trite that the object of a trial is to do justice between the parties. A court will not generally allow technical and wholly academic points to frustrate the proceedings and to prevent it

⁴⁶ See SCA judgement, record vol 9 p 924 para 51-52

from adjudicating upon the real issues.⁴⁷ Thus, although pleadings in adversarial proceedings serve to define the issues, their importance should not be unduly magnified.⁴⁸

4.8.2 Where an issue is not raised in the pleadings but the affected party has had every opportunity to place all the facts before the trial court and there has been a full investigation of the matter, the court is entitled to treat the issue as if it has been expressly and timeously raised.⁴⁹

4.8.3 Thus, in *Sentrachem Limited v Wenhold*,⁵⁰ Groskopf JA held that despite the fact that the plaintiff's particulars of claim did not set out a particular cause of action with sufficient clarity, "*it was clear that the defendant must have been aware, if not from the outset, then from very soon after commencement of the trial, that the plaintiff was relying on the said principle*".⁵¹

4.8.4 Furthermore, there is ordinarily no justification for interference on appeal merely because the pleadings in the

⁴⁷ *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at para 36, citing with approval *Le Grand (trading as Jeannes) v Carmelu (Pvt) Limited trading as Lynwood Fashions* 1980 (1) SA 240 (ZRA) and *R v Hepworth* 1928 AD 265 at 277

⁴⁸ *Shill v Milner* 1937 AD 101 at 105

⁴⁹ *Middleton v Carr* 1949 (2) SA 374 (A) at 385-386

⁵⁰ 1995 (4) SA 312 (A)

⁵¹ *Sentrachem* at 319A/B-F and 320A-B

trial court were not as explicit as they might have been.⁵² A court should only intervene where the appellant can show that it would have conducted its case in a materially different way if the respondent's claim had been properly pleaded.⁵³

4.9 Thus, we submit that the SCA erred in finding that the referral must be strictly construed.⁵⁴ It must be interpreted purposively and in light of the actual case advanced by the Commission.

4.10 Although the Tribunal has wide powers to ensure that the case before it is properly ventilated, we do not suggest that it is entirely unconstrained in its approach. It must ensure that the proceedings before it remain fair. It is to that requirement that we now turn.

The requirement of fairness

4.11 Fairness is concerned with ensuring that each party to the proceedings has been afforded a proper opportunity to present its case and to rebut the case against it.⁵⁵ It mandates a context-specific enquiry. The

⁵² *Robinson v Randfontein Estates Gold Mining Company Limited* 1925 AD 173 at 198. See also *Stead v Conradie en Andere* 1995 (2) SA 111 (A) at 122

⁵³ *Fourway Haulage SA (Pty) Limited v SA National Roads Agency Limited* 2009 (2) SA 150 (SCA) at para 14

⁵⁴ SCA judgment, record vol 9 p 924 para 53

⁵⁵ *Lufuno Mphaphuli* at para 261

appropriate process to achieve fairness must be determined on a case-by-case basis.⁵⁶

4.12 In addition to its constitutional obligation to act independently, impartially and fairly, the Tribunal is statutorily enjoined to conduct its proceedings in accordance with the requirements of natural justice.⁵⁷ This requires at a minimum that:

4.12.1 The parties are notified of the case sought to be made against them and are given an opportunity to adduce evidence in support of their own case and to challenge evidence that undermines it; and

4.12.2 The Tribunal takes a decision based on the evidence before it and furnishes reasons for its decision.⁵⁸

5. WAS THE TRIBUNAL ENTITLED TO CONSIDER AND DETERMINE THE MARGIN SQUEEZE COMPLAINT?

5.1 We submit (with reference to the factual background set out above) that the requirements of fairness were met in the present case, and that

⁵⁶ *Islamic Unity* at para 73

⁵⁷ Section 52(1)(b) of the Act.

⁵⁸ See Baxter Administrative Law (Juta & Co, 1984) at p 249-251

the Tribunal was entitled to consider and determine the margin squeeze complaint.

5.1.1 The Commission identified the impugned practice – that is, Senwes’ differential pricing – and the provision of the Act that its conduct contravened, in its complaint referral.⁵⁹

5.1.2 The details of the margin squeeze complaint were amplified in its witness statements and expert report. In fact, the term “margin squeeze” was expressly employed.

5.1.3 Thus, by the time the trial commenced, Senwes knew the nature of the complaint against it and the circumstances and information upon which it was founded.⁶⁰ Indeed, its own schedule of objections demonstrated that it had detailed knowledge of the case it was called to meet. The Commission was certainly not keeping anything up its sleeve.⁶¹

5.1.4 The margin squeeze complaint was traversed both by Senwes’ own counsel and members of the Tribunal during testimony

⁵⁹ We will address this submission in more detail below.

⁶⁰ *Ross v Government Mining Engineer* 1920 (TPD) 1 at 5; *Tao Ying Metal Industry (Pty) Limited v Pooe N.O and Others* 2007 (5) SA 146 (SCA) at para 6. See also Baxter at p546-547

⁶¹ See, by contrast, *Sullivan v Wheat Industry Central Board* 1946 (TPD) 194 at 206

by the Commission's witnesses and witnesses called on behalf of Senwes. Counsel for Senwes' at times cross-examined the Commission's witnesses on the margin squeeze complaint (while purporting to reserve its right to object to the complaint at the close of proceedings). By way of example:

5.1.4.1 Counsel for Senwes cross-examined a number of witnesses who gave evidence of the differential treatment of Senwes' own trading arm and rival grain traders (which evidence is only relevant to the margin squeeze case).⁶²

5.1.4.2 Indeed, during the course of such cross-examination and in response to an objection by the Commission's counsel, the Tribunal put Senwes to an election to pursue a ruling on admissibility or to continue with the hearing. The exchange took place as follows:

“ADV BRASSEY: Now my learned friend led you on that particular statement, notwithstanding the fact that it falls beyond the compass of the pleadings. So I'm going to deal with it briefly with

⁶² See, for example, transcript of evidence, vol 6 p 591-592 (where Adv Brassey cross-examines Mr Keyser on this differential treatment); p 600 (where Adv Brassey cross-examines Mr Bester on internal storage charges).

you, but on the supposition that ultimately at the end of the case I will argue that it is not relevant for the purposes of this case. In what respect you make... .

ADV BHANA: Chair, may I just make this observation? My learned friend must decide which horse he is going to ride. If he says it is totally irrelevant, then he must stick to that. If he says he is going to deal with it, then he must deal with it properly, but he can't say I dealt with it on the basis that I am going to argue it's irrelevant, so I don't fully deal with it.

ADV BRASSEY: I will deal with it on precisely the basis I wish Sir. Now could I ask you . . . ?

CHAIRPERSON: Just tell me why you're saying it's irrelevant?

ADV BRASSEY: Because there's no basis laid in the pleadings for this particular allegation, that the Senwes trading division is dealt with in a way different from other traders, and that's not the point that it raised. And I will take you to the argument in relation to that ultimately and you will see what the pleadings actually say and the pleadings make out a case for discriminatory pricing as between producers and traders. It has nothing to do with this.

CHAIRPERSON: You must decide your own course here Mr Brassey, that's all I can say.

ADV BRASSEY: I am. . .”⁶³

5.1.4.3 Senwes' counsel then continued with his cross-examination of Mr Keyser.

⁶³ Testimony of Mr Keyser, record vol 6 p 592-593

5.1.4.4 Subsequently, **Senwes’ counsel did not object when Dr Theron gave evidence in chief on the margin squeeze case against it.**⁶⁴ This is significant because Senwes’ schedule of objections did not contend that the evidence in Dr Theron’s witness statement concerning margin squeeze was inadmissible. **In dealing with Dr Theron’s report, the schedule makes specific and explicit objections to aspects such as “access to essential facilities” and “input finance” but did not advance an objection that the margin squeeze abuse had not been referred.**⁶⁵

5.1.4.5 Indeed, Senwes’ counsel cross-examined Dr Theron on her contentions in relation to margin squeeze. At this point, counsel for the Commission again placed on record that Senwes was not entitled simultaneously to claim that matter was irrelevant and to cross-examine on it.⁶⁶ Again, Senwes’ counsel refrained from formally moving for a ruling on its objection.

⁶⁴ Testimony of Dr Theron, record vol 6 p 618-629

⁶⁵ Record vol 5 p 558 para 11-13. During cross examination some attempt was made to argue relevance with the witness but it was not pursued – see Dr Theron’s testimony, record vol 6 p 637-639.

⁶⁶ Testimony of Dr Theron, record vol 6 p 646, 651

5.1.4.6 Senwes again failed to object when the Commission's counsel cross-examined Senwes' own witnesses on the margin squeeze case. This cross-examination elicited an admission that Senwes did not charge its trading arm any storage charges or internal transfer costs (either in the pre- or post-100 day period) and that its business strategy was to leverage its dominance in the storage market to realise profits in the trading market.⁶⁷

5.2 In the circumstances, we submit that Senwes was plainly aware of the case sought to be made against it.

5.3 Nor could Senwes have been under the impression that the Tribunal had determined not to deal with the margin squeeze case:

5.3.1 A significant volume of evidence was led in respect of the margin squeeze case.⁶⁸ Although Senwes' counsel occasionally objected to the admission of this evidence, none of its objections were upheld by the Tribunal. The Tribunal

⁶⁷ Testimony of Mr Booyens, record vol 6 p 656-662; testimony of Mr Grobler, record vol 6 p 665-669, 669; testimony of Mr Hodge, record vol 7 p 693-697

⁶⁸ See schedule demonstrating some of the main references in the witness statements and oral testimony pertaining to the facts relevant to the margin squeeze case, record vol 10 p 991-1031

did not curtail the Commission in leading evidence or cross-examining at all.

5.3.2 Furthermore, Senwes' witness, Mr Booyens, was repeatedly questioned by members of the Tribunal on his concession that Senwes did not charge its trading arm storage costs and on its business model.⁶⁹ It was plain that the Tribunal considered itself seized of the margin squeeze complaint and that it had, in fact, entered into the arena to undertake a comprehensive investigation into the facts surrounding the dispute.

5.4 Senwes contends that "*at the level of fact, the Tribunal did not invoke an inquisitorial process*"⁷⁰, and argues that the Tribunal, "*far from exercising [its] inquisitorial powers . . . played a passive role*"⁷¹. This ignores the actively inquisitorial role that the Tribunal undertook by questioning witnesses for both the Commission and Senwes about facts giving rise to the margin squeeze.⁷² It also posits that the Tribunal must formally signal a shift into an inquisitorial mode of dispute adjudication when, in fact, by virtue of the procedural

⁶⁹ Testimony of Mr Booyens, record vol 6 p 658; vol 8 p 798-799

⁷⁰ Opposing affidavit in the application for leave to this Court, record vol 10 p 1048 para 25.

⁷¹ Opposing Affidavit in the application for leave to this Court, record vol 10 p 1043 para 20.2.

⁷² Testimony of Mr Booyens, record vol 6 p 658; vol 8 p 798-799; See, for example, testimony of HC Keyser, record vol 6 p 587

flexibility afforded to the Tribunal under section 52 of the Act, it is free to conduct hearings informally or in an inquisitorial manner subject only to the requirements of fairness and the principles of natural justice.

5.5 Senwes had ample opportunity to deal with the margin squeeze issue and to place facts before the Tribunal to undermine the case against it:

5.5.1 Dr Theron's expert report (which expressly dealt with the margin squeeze case) was filed in October 2007 and she testified one month later, in late November 2007. Mr Booyens (the Senwes employee who conceded that Senwes did not pay internal storage charges) testified in November 2007 and January 2008. Mr Grobler (who belatedly furnished the undiscovered documents that confirmed the lack of internal storage charges) also testified in January 2008.⁷³

5.5.2 Senwes' expert, Mr Hodge, testified in June 2008 – that is, almost 8 months after the Commission's expert report was

⁷³ See schedule of dates on which witnesses testified, record vol 9 p 978-979

filed and at least five months after Senwes' witnesses had made their concessions.

5.5.3 Nevertheless, on Senwes' instruction, Mr Hodge failed to engage with the margin squeeze case at all – **although he conceded that the case had been pertinently raised against Senwes by the Commission.**⁷⁴

5.6 In the circumstances, we submit that Senwes' destiny was in its own hands. It had the right of *audi* but specifically elected not to avail itself of that right. Instead, it chose to take an unjustifiably limited view of the case it had to meet as a conscious strategy. It ignored witness statements and *viva voce* evidence and then sought to argue that the case had not been properly pleaded.

5.7 It was not sufficient for Senwes simply to hand up a schedule headed "*Objectionable Aspects of Commission Witness Statements*" and then to assume that its objections had been upheld. Knowing full well what the Commission's case was, it should have sought a ruling at the commencement of the hearing as to whether the margin squeeze case was properly referred and whether evidence pertaining to it was

⁷⁴ Testimony of Mr Hodge, vol 7 p 694-698

inadmissible. Had it done so, the matter could have been dealt with at the outset of proceedings and the Commission could have amplified the terms of the referral, if necessary.

5.8 In these circumstances, it is difficult to avoid the inference that Senwes took a tactical decision not to address the margin squeeze case because it had no defence to the claim. That inference is bolstered by its decision to withhold crucial documents from discovery. It is further supported by its subsequent admission that its differential pricing practices could cause a margin squeeze. In Senwes' answering affidavit in the remedies hearing, its deponent stated:

“Senwes appreciates, subject to the reservation of its rights, that a margin squeeze could be caused by an increase by Senwes of the storage costs paid by traders in circumstances where Senwes' internal trading division does not incur the same costs and where Senwes, furthermore, sells grain to millers at margins at which third party traders cannot compete.”⁷⁵

5.9 For all of these reasons, we submit that on a proper understanding of the Tribunal's powers and the case advanced by the Commission, Senwes' was properly notified of the margin squeeze case against it

⁷⁵ See answering affidavit in remedies hearing, record vol 9 p 881-882 para 4.1.

She then states that Senwes has, since May 2008, taken a decision to charge its own trading arm for storage on the same basis that it charges rival grain traders.

and had ample opportunity to advance a defence. That it failed to do justifies the Tribunal's finding against it.

6. EVEN ON THE SCA'S APPROACH, THE COMPLAINT WAS ADEQUATELY ALLEGED

6.1 Contrary to our submissions above, the SCA found that the Tribunal could only lawfully adjudicate conduct that had been referred to in the referral document.⁷⁶

6.2 We submit that even on this restrictive approach, the margin squeeze complaint against Senwes was adequately pleaded. This is because of the conceptual difference between the **conduct** that is identified in the complaint and the anti-competitive **effect** (or theory of harm) to which it gives rise.

6.3 The margin squeeze effect arose in the present case as follows:

6.3.1 The differential tariff is at the root of the harm.

6.3.2 This is so because all of the independent (third party) traders gave consistent evidence that in the pre-100 day period (i.e.

⁷⁶ See SCA judgment, record vol 9 p 924 para 53

when there was no difference in the tariff charged to customers), they could compete effectively with Senwes *qua* trader.⁷⁷ Yet, post-100 days, these traders could not compete with Senwes' trading division because the storage charges paid by them were not capped. This is precisely what the Tribunal (which has a specialist knowledge of these matters) found to be the conduct causing the economic harm.⁷⁸

6.3.3 Thus, the **conduct** that caused the margin squeeze **effect** was the differential tariff (and not the fact that Senwes' trading division did not pay storage fees, as the SCA found).⁷⁹ That this is so is illustrated by the fact that Senwes' trading division was not charged storage either in the pre-100 day or in the post-100 day period. Yet, in the pre-100 day period, third party traders managed to compete with Senwes' trading

⁷⁷ See, for example, witness statement of K Keyser, record vol 4 p 325 para 7-8; evidence of HC Keyser, record vol 6 p 583-584.

⁷⁸ Tribunal decision, record vol 1 p 70 at para 264 where the Tribunal held (albeit in relation to the section 8(d) complaint) that:

"The evidence of foreclosure in the earlier period i.e. the period when the daily tariff applies to all, farmers and traders is not that marked. Both the data offered by the Commission and the evidence of the traders seems to suggest that the exclusionary effect is felt post cap. Indeed this is the express evidence of traders such as Keyser who seems to concede that pre-cap they can compete effectively with Senwes both for purchases from farmers and traders."

⁷⁹ See SCA judgment, record vol 9 p 919-920 para 38-39

division because they were not faced with a differential tariff.

6.3.4 Put differently, one could ask if third party traders were not discriminated against and were offered the benefit of the capped tariff post-100 days, could they compete with Senwes' trading division in that period? The evidence of the witnesses was that clearly they could.⁸⁰

6.3.5 Bearing this in mind, it is significant that when regard is had to the founding affidavit in the complaint referral, the Commission complained of the foreclosure effect of the conduct on the basis that third party traders were foreclosed from competing in the downstream market (in which Senwes' trading division was a competitor).⁸¹ Thus, at its root the harm identified was the foreclosure effect but the conduct giving rise to that harm was the differential tariff.

6.3.6 Viewed from yet another perspective, because grain traders are not afforded the advantage of the capped tariff, they pay

⁸⁰ See, for example, witness statement of K Keyser, record vol 4 p 325 para 7-8; evidence of HC Keyser, record vol 6 p 583-584.

⁸¹ Referral, record vol 2 p 105 para 20

a relatively high cost for storage after the first 100 days, which they must absorb in order to offer competitive prices to farmers. This means that it is simply not economically feasible for those traders to trade at a profit in the post-100 day period. Storage charges wipe out their profit margins.

6.3.7 By contrast, Senwes does not have to absorb more than 100-days' worth of costs because the producers from whom its purchases enjoy the benefit of the capped tariff. It can accordingly offer a better price to farmers, while maintaining its margins.

6.3.8 In fact, Senwes' internal pricing for storage is such that no storage charges are levied on its internal trading division at all. The result is that its trading division bears a storage cost of zero or significantly less than its rivals.

6.3.9 This combination of strategies results in Senwes' profit margins being significantly higher than those of its rivals.

6.3.10 Consequently, it can always outbid its rivals in offering higher prices to farmers to purchase grain. This ability is

based on nothing more than the fact that it inflates the storage costs to its trading rivals.

6.3.11 As a result, rival grain traders are foreclosed from entering or expanding in the market in the post-cap period.

6.4 It follows that the Commission's referral document adequately identified and disclosed the impugned conduct that gave rise to the margin squeeze effect. We respectfully submit that the SCA's finding to the contrary was erroneous.

7. APPROPRIATE RELIEF

7.1 For all the reasons set out above, we submit that the Tribunal's approach was justified and that its finding that Senwes engaged in margin squeeze conduct in contravention of section 8(c) of the Act should be upheld. If that is so, then the SCA's order should be replaced with an order dismissing the appeal, with costs (as provided in prayer 2 of the notice of motion).

7.2 If, however, this Court is concerned that the Tribunal did not put Senwes on proper notice that it would consider the margin squeeze complaint and that Senwes should be afforded a further opportunity to

meet the case against it, then we submit that the margin squeeze complaint should be referred back to the Tribunal for adjudication on such terms that it deems meet.⁸² This would ensure that the matter is properly and finally resolved – a remedy that would plainly be in the interests of justice. If the matter is not remitted back, Senwes' misconduct and perjury⁸³ would be rewarded and its admitted violation which has persisted over a prolonged period and has forced rival traders out of the market, would go unpenalised. Prayer 3 of the notice of motion is directed toward this relief.

8. LEAVE TO APPEAL

8.1 This application clearly raises constitutional issues, namely:

8.1.1 The scope of the Tribunal's powers to consider and adjudicate on an alleged prohibited practice, and the legality of its findings in respect of a particular complaint,⁸⁴

⁸² *Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 97.

⁸³ One of Senwes' witnesses, Mr Pretorius, admitted to perjury and the Commission was ordered by the Tribunal to report the matter to the relevant authorities. See Tribunal judgment, vol 1 p 21 para 80; p 80 para 306

⁸⁴ It is trite that the legality of the exercise of a public power is a constitutional issue – see *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 33.

- 8.1.2 The nature and purpose of inquisitorial powers conferred on the Tribunal and the fairness of the procedure adopted by it;⁸⁵ and
- 8.1.3 The proper balance to be struck between protecting a respondent's right to a fair hearing (on the one hand) and the public interest in having prohibited conduct considered and adjudicated by the Tribunal in terms of section 34 of the Constitution (on the other).
- 8.2 Each of these issues raises complex questions of statutory and constitutional interpretation that have bearing on the future conduct of the Tribunal. It is appropriate that this Court provide guidance in this regard.
- 8.3 In addition, this matter is of crucial importance to the Commission and the manner in which it discharges its function in the public interest.
- 8.4 Finally, we submit that, for the reasons advanced above, the applicant has good prospects of success on appeal.

⁸⁵ See, for example, *Baloyi* at para 31

8.5 In all these circumstances, we submit that it is in the interests of justice that leave to appeal be granted and that this matter be determined by this Court.

9. CONCLUSION

9.1 In the circumstances, we submit that the CAC was correct when it held that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings in the same way as would a court during a civil trial, and that the Tribunal ought not to be “*inflexibly constrained by an adversarial model of adjudication*”.⁸⁶

9.2 The narrow approach argued for by Senwes and endorsed by the SCA would, we submit, stifle the Tribunal’s functioning (bearing in mind it is a specialist Tribunal with institutional expertise) and prevent competition law disputes being adjudicated upon with the expedition demanded by the Act and case law.

9.3 Accordingly, we submit that this Court should find that:

⁸⁶ CAC judgment, record vol 8 p 827-828 para 39-40

- 9.3.1 Once a matter has been referred to the Tribunal, it is at large to consider and determine the lawfulness of any conduct arising in that referral; and/or
- 9.3.2 In determining the scope of the referral, the Tribunal should have regard to the case factually pursued by the Commission (and disclosed in its witness statements and expert reports).
- 9.4 On either of these grounds, the Tribunal was entitled to find (and justified in finding) that Senwes had engaged in margin squeeze conduct in contravention of section 8(c) of the Act.
- 9.5 However, even on the restrictive approach adopted by the SCA, the Commission's referral adequately set out the conduct at the root of the margin squeeze case. On this alternative basis, the Tribunal's decision should also have been upheld.
- 9.6 For these reasons, we submit that:
- 9.6.1 Application for leave to appeal should be granted;

9.6.2 The appeal should be upheld with costs, including the costs of two counsel; and

9.6.3 The order of the SCA should be substituted with an order in terms of prayer 2 *alternatively* prayer 3 of the notice of motion.⁸⁷

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Sandton
6 October 2011

⁸⁷ Notice of motion, record vol 9 p 930-932

LIST OF AUTHORITIES

American Natural Soda Ash Corporation and Another v Botswana Ash (Pty) Limited [2001 – 2002] CPLR 430 (CT)

Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation of South Africa and another [2003] 1 CPLR 10 (CAC)

Bulk Deals Six CC and another v Chairman of the Liquor Board of the Western Cape and others 2002 (2) SA 99 (C)

Fourway Haulage SA (Pty) Limited v SA National Roads Agency Limited 2009 (2) SA 150 (SCA)

George & Others v Minister of Environmental Affairs & Tourism 2005 (6) SA 297 (EqC)

Head of Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another 2010 (2) SA 415 (CC)

Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)

Islamic Unity Convention v Minister of Telecommunications and Others 2008 (4) BCLR 384 (CC); 2008 (3) SA 383 (CC)

Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A)

Joyce & McGregor Ltd v Cape Provincial Administration 1946 AD 658

Kloof Gold Mining Co Ltd v National Union of Mineworkers 1987 (1) SA 598 (T)

Lambert v Director of Census 1956 (3) SA 452 (T)

Le Grand (trading as Jeannes) v Carmelu (Pvt) Limited trading as Lynwood Fashions 1980 (1) SA 240 (ZRA)

Lufuni Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)

Matatiele Municipality and Others v President of the RSA and Others 2006 (5) SA 47 (CC)

McPhilemy v Times Newspapers Ltd (Re-Amendment: Justification) [1999] 3 All ER 775

Meepo v Kotze and Others 2008 (1) SA 104 (NC)

Middleton v Carr 1949 (2) SA 374 (A)

Mlifi v Klingenberg 1999 (2) SA 674 (LCC)

Mobil Oil SA (Pty) Ltd v Mechin 1965 (2) SA 706 (A)

Niewoudt v Chairman, Subcommittee over Amnesty for the TRC: Du Toit v Chairman, Subcommittee over Amnesty for the TRC: Ras v Chairman, Subcommittee over Amnesty for the TRC 2002 (3) SA 143 (C)

Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

R v Hepworth 1928 AD 265 at 277

Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg [2007] JOL 18960 (T)

Robinson v Randfontein Estates Gold Mining Company Limited 1925 AD 173

Ross v Government Mining Engineer 1920 (TPD) 1

S v Baloyi (Minister of Justice & Another intervening) 2000 (2) SA 425 (CC)

S v Dlamini, S v Dladla, S v Joubert, S v Schietekat 1999 (4) SA 623 (CC)

Sentrachem Limited v Wenhold 1995 (4) SA 312 (A)

Shill v Milner 1937 (AD) 101

Stead v Conradie en Andere 1995 (2) SA 111 (A)

Supreme Health Administrators (Pty) Ltd and others v Competition Commission and others [2006] 1 CPLR 422 (CT)

Tao Ying Metal Industry (Pty) Limited v Pooe N.O and Others 2007 (5) SA 146 (SCA)

STATUTES

Competition Act 89 of 1998

Restitution of Land Rights Act 22 of 1994

BOOKS AND ARTICLES

Baxter Administrative Law (Juta & Co, 1984)

Brassey et al Competition Law 1ed (Juta & Co, 2002)

De Ville Judicial Review of Administrative Action in South Africa (Lexisnexis Butterworth, 2005)