

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT61/2011
SCA CASE NO: 188/2010
CAC CASE NO: 87/CAC/FEB09

In the matter between:

**THE COMPETITION COMMISSION
OF SOUTH AFRICA**

Applicant

and

SENWES LIMITED

Respondent

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INTRODUCTION

1. On 3 February 2009 the Competition Tribunal ('the Tribunal') found that Senwes Limited ('Senwes') had contravened s 8(c) of the Competition Act 89 of 1998 ('the Competition Act')¹ through engaging in a so-called 'margin squeeze'.² Senwes was found to be charging grain traders a higher fee for grain storage than that company, in its capacity as a trader in grain, would either have paid or could reasonably have expected to pay for the same service were it an independent participant in the market.³ As a result, so the Tribunal concluded, the profit margins of Senwes' competitors in the trading market were being squeezed and competition in the trading market was being undermined.⁴
2. In the ensuing appeal before the Competition Appeal Court ('the CAC'), Senwes contended that the finding travelled well beyond the scope of the issues upon which the Tribunal was permitted to

¹ Section 8(c), as read with s 1(1)(x), prohibits a dominant firm from engaging in an exclusionary act – that is, an act that impedes or prevents a firm entering into, or expanding within, a market – if that act outweighs its technological, efficiency or other pro-competitive gains.

² Tribunal decision para [305] Record vol 1 p 79 lines 22 – 24. In the parlance of comparative competition law, a margin squeeze is said to exist when a supplier, exploiting its power as the provider of an essential service in one market, charges a fee for the service that is higher than its competitors in a second market can reasonably be expected to bear when competing with the supplier in the downstream market. See, for example, R O' Donoghue and AJ Padilla *The Law and Economics of Article 82 EC* Hart Publishing 2006 at pp 303 and 304, quoted with approval by the Tribunal at para [117] Record vol 1 p 31 lines 1 – 4 and lines 6 – 8. See also the definition adopted by the European Court of First Instance (as it then was) in case T – 271/03 *Deutsche Telekom AG v Commission of the European Communities*, judgment of 10 April 2008 at para 167.

³ Tribunal decision para [149] Record vol 1 p 39 line 19 to p 40 line 4.

⁴ Tribunal decision para [271] Record vol 1 p 72.

pronounce and that, in any event, the evidence fell woefully short of the level of proof required to demonstrate the existence of the margin squeeze. Compounding the problem, the firm contended, was the absence from the statute of any explicit endorsement for the notion that a margin squeeze constitutes a statutory contravention.⁵

Senwes argued that, particularly given the highly controversial status and uncertain scope of the offence in comparative jurisprudence,⁶ the Competition Commission (‘the Commission’) had been under a heightened duty to plead the contravention in specific terms and prove it properly if that was indeed the nature of its case against Senwes.⁷ Neither had happened in the present case.

3. On appeal to the Supreme Court of Appeal (‘SCA’) from the adverse judgment of the CAC,⁸ Senwes again advanced these contentions.⁹ In its judgment, the SCA declined to accept that the margin squeeze case was covered by the referral¹⁰ or that the Tribunal was entitled, either in principle or in the circumstances of

⁵ The Competition Act, in ss 8 and 9, condemns practices when they are engaged in by firms who enjoy market power. Neither of these sections contains, in terms, a prohibition against engaging in a margin squeeze.

⁶ The essence of the controversy is reflected in Senwes’ heads of argument in the SCA, annexure ALG1 to AA Record vol 10 p1061 line 2 – p 1063 line 13.

⁷ Cf Notice of appeal Record vol 1 pp 81 – 89.

⁸ CAC judgment of 13 November 2009 Record vol 8 pp 806 – 850.

⁹ Senwes’ argument before the SCA is reflected in its heads of argument filed in that court.

See annexure ALG1 to AA Record vol 10 pp 1055 – 1107.

¹⁰ SCA judgment at para [38] Record vol 9 p 919 line 22 – p 920 line 4.

the present case, to go beyond the referral and make out a case *sua sponte*.¹¹ According to the SCA:

- 3.1. The starting point of an enquiry into the scope of the Tribunal's authority is that it is a creature of statute and that it must act within the powers conferred upon it by the Competition Act. The Tribunal has no power to enquire into and decide matters not referred to it:¹² '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', which may only be extended by amendment.¹³
- 3.2. The Tribunal's power to receive evidence in an informal manner does not mean that it can rely in its decisions on evidence that is irrelevant. Relevance, in turn, is determined by the terms of the referral.¹⁴ In addition, irrelevant evidence could not be rendered relevant by incorporating it in witness statements, and Senwes was entitled to resist the informal enlargement of issues before the Tribunal.¹⁵
- 3.3. The Commission was aware of Senwes' contention that the margin squeeze case fell outside the ambit of the referral, but it

¹¹SCA judgment paras [47] – [48] Record vol 9 p 922 line 22 – p 923 line 23.

¹²SCA judgment para [51] Record vol 9 p 924 lines 11 – 25.

¹³SCA judgment para [52] Record vol 9 p 924 line 26 – p 925 line 5.

¹⁴SCA judgment para [53] Record vol 9 p 925 lines 6 – 13.

¹⁵SCA judgment para [54] Record vol 9 p 925 lines 14 – 23.

failed to seek an amendment, thereby risking the effect that any decision on the margin squeeze case would be found wanting.¹⁶

3.4. ‘In 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.’¹⁷

4. The Commission, an organ of state¹⁸ with prosecutorial powers¹⁹ now turns to this Court to challenge as unconstitutional the judgment

¹⁶SCA judgment para [55] Record vol 9 p 925 line 24 – p 926 line 7.

¹⁷SCA judgment para [57] Record vol 9 p 926 line 18 – p 927 line 2.

¹⁸S 19(1) of the Competition Act establishes the Commission. The Commission is independent and subject only to the Constitution and the law (Competition Act s 20(1)(a)). The Commission is an organ of state within the contemplation of s 239 of the Constitution in that it exercises a public power and/or performs a public function in terms of a statute.

¹⁹In Tribunal proceedings, the Commission acts as a prosecutor in the public interest and the proceedings before the Tribunal are akin to a criminal prosecution. In terms of s 21(c) of the Competition Act, the Commission is required to investigate and evaluate alleged contraventions of the statute; under s 21(g) it may refer matters to the Tribunal, and appear before the Tribunal as required by that statute. S 49B(3) of the Competition Act obliges the Commission to investigate a complaint. Section 50(2)(a) provides that the Commission must refer a complaint to the Tribunal if it determines that a prohibited practice has been established.

See, *inter alia*, *Simelane & Others NNO v Seven-Eleven Corporation SA (Pty) Ltd & Another* [2001 – 2002] CPLR 13 (SCA); *Sasol Chemical Industries(Pty) Ltd v Competition Commission et al* [2009] 1 CPLR 233 (CT) para 43; *Astral Operations Ltd and another v Competition Commission of SA* [2010] JOL 25518 (CT) at para [21]; *Omnia Fertilizer Ltd v Commission; In re Commission v Sasol Chemical Industries (Pty) Ltd & others* [2008] JOL 22197 (CT) at para.[21]; *Woodlands Dairy (Pty) Ltd v Competition Commission* Case no 105/2010 [2010] ZASCA 104 , judgment of 13 September 2010.

The proceedings before the Tribunal may be civil in form, but they are criminal in effect, for the consequences that may flow from them are so punitive as to negate the intention of the legislature that they should not have that quality. See generally the discussion in *Director-General, Department of Labour v Win-Cool Industrial Enterprises (Pty) Ltd* [2007] 9 BLLR 845 (LC). In consequence of a finding that a respondent has contravened certain sections of the Competition Act, the Tribunal is entitled to levy upon such a respondent an administrative fine amounting to 10% of the turnover of that respondent in its preceding financial year (Competition Act s 59(2)) and/or order divestiture of a firm’s shares, interests or assets (Competition Act s 60(2)).

of the SCA.²⁰ Senwes opposes the application for leave to appeal on the basis set out in its answering affidavit²¹ and dealt with below.

THE ISSUES

5. The Commission's main contention is that the Tribunal has the ability to 'consider and adjudicate any potentially prohibited conduct that arises in the course of [a] referral' made to it.²² Its stance is said to be justified by 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'.²³ The referral, so submits the Commission, includes 'any information placed before the Tribunal by the Commission prior to the hearing of the matter'.²⁴ In an alternative argument, it argues that the offending conduct, which it says was the differential between farmers and traders, was sufficiently identified in the referral affidavit to have called upon Senwes to have answered to a charge that it had engaged in a margin squeeze and for the Tribunal to have made a finding in respect of it.²⁵ If it cannot convince this court of the correctness of any of

²⁰Commission application for leave to appeal, including NoM and FA Record vol 9 pp 930 – 970.

²¹Senwes AA Record vol 10 pp 1032 – 1054.

²²Commission heads of argument para 1.3.1 p 4.

²³Commission heads of argument para 1.2.1 p 3.

²⁴Commission heads of argument para 1.3.2 p 4.

²⁵Commission heads of argument para 1.3.3 p 5.

these contentions, it seeks an order referring the ‘margin squeeze’ complaint back to the Tribunal for a hearing and determination.

6. Senwes submits that, even if this application for leave to appeal triggered a constitutional issue worthy of consideration by this court (which is denied), the application must still be dismissed. The Commission’s submissions in this application are wrong in law and unsustainable on the facts, as appears at least from the judgment of the SCA, in which the reasoning is (with respect) set out in compelling terms.

7. Senwes’ main submissions are as follows -

- 7.1. The Commission’s reliance on its pleadings concerning the price differential between farmers and traders is ill-founded. This differentiation could have no conceivable bearing on the alleged difference in treatment afforded to third party traders as compared to Senwes’ own internal trading division. This differentiation might cognizably have founded a margin squeeze complaint, but no such complaint could ever be based on the difference in the way farmers and traders were treated by Senwes.

- 7.2. The statutory regime regulating complaint investigation and referral procedures makes it quite clear that the complaint provides the foundation for an inquiry by the Tribunal and a

finding by it. The decided cases make it clear that the enlargement of the referred case by reliance upon material that has not been made the subject of a complaint, has not been investigated and has not been referred, is impermissible under the statute.

THE TEST FOR LEAVE TO APPEAL TO THIS COURT HAS NOT BEEN MET

8. In seeking leave to appeal against the decision of the SCA, the Commission acknowledges that it has the duty to demonstrate that its application is concerned with a constitutional issue²⁶ that warrants consideration by this Court in the public interest.²⁷
9. In mounting its challenge, the Commission faces formidable obstacles.
- 9.1. Properly considered, the application for leave to appeal is concerned with matters of fact rather than law. More specifically, we submit that the Commission's application raises no cognizable issue of constitutional law and, even if it did, the determination of the issue by this Court would not be in the public interest. The Commission appears to forget that this Court has a special role to play in the context of our judicial

²⁶Commission application for leave to appeal FA para 80 Record vol 9 p 965 lines 18 – 19.

²⁷Commission application for leave to appeal FA para 83 Record vol 9 p 967 lines 13 – 14.

system. Being a court created to determine constitutional issues of pressing public concern,²⁸ its jurisdiction is not to be invoked when, as here, the issues are ones of pleading and fact wholly peculiar to the instant case and outside the scope of legitimate constitutional scrutiny.

9.2. Compounding the problem is the fact that the Commission has at no previous stage sought to raise a constitutional issue in this case. If parties were allowed to raise constitutional matter for the first time in this Court, the effect would be to undermine the role of the SCA and to undercut the principle of finality in litigation.

10. A perusal of the Commission's application reveals that no specific provision of the Constitution is invoked: the Commission contents itself with an argument that rests on the broad principle of legality.²⁹

10.1. It seems to treat the principle as an umbrella under which a constitutional case can willy nilly be brought. The true position, it is submitted, is that the principle operates *residually* to embrace those isolated cases in which, by reason of a *casus*

²⁸ Section 167(3)(b) of the Constitution. See also, *inter alia*, *S v Bierman* 2002 (10) BCLR 1078 (CC); *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 11; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (6) BCLR 527 (CC).

²⁹ Commission Application FA para 81.1 Recordvol 9 p 966 lines 3 – 6.

omissus, a matter properly concerned with our constitutional order has not been specifically regulated.

10.2. Aggravating the problem is the fact that the Commission nowhere explains precisely how it contends that the principle of legality has been breached. No serious effort is made to explain how the SCA, in carefully considering the pleadings and the facts, failed to discharge its duty to act lawfully. The skirting of the issue is not the product of inadvertence or inattention but flows from the conceptual deficiencies at the very centre of the case that the Commission seeks to mount.

11. In a broad sense, every decision that fails to comply with the requirements of the law potentially constitutes an infringement of the dictates of legality, but the doctrine of legality recognized by this Court is by no means so all-encompassing.³⁰ So much is clear from *S v Boesak*,³¹ in which this Court rejected the notion that an accused's conviction can become unconstitutional for no better reason than that it is unsupported by the facts tendered in evidence. From this and similar decisions, it is clear that –

³⁰On the Commission's argument as advanced in this application, every single finding of the Tribunal raises a constitutional issue, for the 'legality of any exercise of public power is a constitutional issue'. See Commission Application FA para 81.1 p 37.

³¹2001 (1) SA 912 (CC).

- 11.1. in an application for leave to appeal to this Court the objection must, first, have its source in some error or misdirection that, in part at least, comprehends an issue of law and, secondly, must be bound up with consequences that are manifestly constitutional - *both* requirements must be satisfied; and
 - 11.2. in addition, the error complained of must pertinently arise for determination in the appeal: if the case can be disposed of on the facts alone or by the application of a principle of law that in no immediate sense implicates the Constitution, this Court will not engage with the supposed error of constitutional law, for it is by the by.
12. In the present case the SCA judgment can only generate two potential issues. The first is that the SCA misconstrued the true effect of the pleadings when it came to the conclusion that the margin squeeze case fell outside the scope of the pleadings. The resulting error, if error it be, is axiomatically one of fact. As such, it can produce no constitutional complaint and so no basis for a constitutional appeal. We can, in consequence, put this question aside.
13. The second issue is whether the Tribunal, and the courts that thereafter reviewed its decision, could lawfully have travelled

beyond the issues pleaded in the referral without exceeding their statutory mandate. The Commission says that it can.

14. The basis of this contention is that these competition authorities have a roving commission to inquire into whatever they think appropriate since they operate within an inquisitorial jurisdiction.

15. Whether this contention is correct is, we concede, at least partly an issue of law.

15.1. However, the issue is reached only if –

15.1.1. the inquisitorial process was, as a fact, invoked by the Tribunal,

and

15.1.2. the process was as a fact, utilized in accordance with a proper understanding of the dictates of natural justice (which is, of course, what every instance of due process, whether inquisitorial or adversarial, requires).³²

15.2. If one or other of these requirements remains unsatisfied, the issue falls short of constituting a constitutional issue deserving the attention of this Court. If they are both satisfied, however, it

³²*Media Workers Association of South Africa and Other v Press Corporation of South Africa Ltd ('Perskor')* [1992] 2 All SA 453 (A).

still by no means follows that the issue is of a constitutional nature.

16. In the present instance, the existence of the Tribunal's inquisitorial powers is not in issue; rather it is that the Tribunal's election to adjudicate upon unpleaded matter *without* invoking its inquisitorial powers and *without* giving due notice to Senwes that it intends to do so.³³

16.1. It follows that the appeal based on the failure to recognize the existence of inquisitorial powers, which the Commission itself describes as being 'the heart of the application for leave to appeal to this Court',³⁴ is foreclosed at the level of fact.

16.2. There is no issue of law to decide and, in particular, no issue of constitutional law.

16.3. In addition, no issue of public interest is triggered by the SCA in the absence of the use of inquisitorial powers by the Tribunal in the circumstances of the case.

17. Senwes submits that the Commission enjoys no prospects of success in bringing a generalized application concerned with the rights and powers of the Tribunal that has no specific resonance in the present case. Simply put, the Commission cannot upset the finding of the

³³Senwes AA in application for leave to appeal paras 20 - 21 Record vol 10 p 1043 line 12 – p 1044 line 17.

³⁴Commission FA in application for leave to appeal para 11 Record vol 9 p 935 lines 16 – 17.

SCA that Senwes, being entitled to fair treatment as it was, was entitled to be formally told of the charges against it.

18. Given the nature of the case now being brought by the Commission, it appears that no serious challenge is mounted to the internal coherence of the SCA judgment. The Commission's point of complaint is that the SCA framed its reasons and conclusions within a set of parameters that were altogether too narrow.³⁵

18.1. The SCA, so the Commission argues, was wrong to treat the issues as delineated by the exchange of pleadings in the way mandated by the principles of adversarial process; what it should have done was to recognize that the Tribunal, which undeniably enjoys inquisitorial powers, has the power to establish the issues for itself and then determine them on the basis of its own assessment of the evidence.

18.2. In the Commission's view, the SCA, by taking the 'wrong' approach, committed a misdirection of constitutional magnitude that calls out for correction in the public interest.

19. Senwes accepts that the Tribunal can, in the exercise of its statutory powers, invoke and utilize an inquisitorial process in order to arrive

³⁵Commission FA in application for leave to appeal paras 18 – 19 Record vol 9 p 938 line 7 – p 940 line 20.

at a conclusion. This power is, however, subject to the overriding principles of due process.

- 19.1. Where, as here, the Tribunal proceeds in a manner that is classically adversarial, the parties are entitled to expect compliance with the conventional prescripts of such a process and regulate the presentation of their case accordingly.
- 19.2. If the Tribunal wishes to switch into inquisitorial mode, it must, if it is to satisfy the requirements of due process, signal its intention to do so; then take care to ensure that the parties, confronted with an unfamiliar mode of enquiry, understand what is expected of them; and then proceed in scrupulous compliance with the dictates of the process not being invoked.
- 19.3. The Tribunal cannot utilize the adversarial mode, where issues are defined by the exchange of pleadings and then, without warning, develop a quite separate case under the aegis of its inquisitorial powers. Yet this is precisely what the Commission now suggests the Tribunal was entitled to do and should be taken to have done.³⁶

³⁶This much appears from Commission FA in application for leave to appeal para 19 Record vol 9 p 939 line 13 – p 940 line 20.

20. If Senwes is wrong in this submission, this case is still not one in which leave to appeal should be granted.

20.1. There is no suggestion that the Competition Act, by empowering the Tribunal to select between the adversarial and inquisitorial process in the discharge of its duties, is in some way unconstitutional. What the Commission complains of is the fact that, in the application of the statute, the courts have held the Tribunal to the process selected by it – to wit, the adversarial mode of proceeding.

20.2. Senwes submits that this does not engage a constitutional issue, and that most certainly it does not constitute a violation of the principle of legality on which the Commission locates its plea for leave to appeal. Ultimately the issue entails placing the proper construction of the Competition Act within the matrix of the principles of *audi alteram partem*, which are established in common law and not the subject of challenge in this case.

21. If this is wrong and a constitutional issue is found to have been triggered, the public interest is still not served by forcing Senwes back into court in order to ventilate the question.

- 21.1. Cases in which a prosecutorial body³⁷ like the Commission might, on appeal, legitimately complain of non-compliance with the due process requirements of the statute must be rare.
 - 21.2. In criminal law, a failure to comply with due process provides a basis upon which an accused can overturn a conviction, but gives the state a right to proceed once more against the accused only if the deficiency in the proceedings is so egregious as to justify the conclusion that the trial was a nullity.³⁸
 - 21.3. The public interest reprobates the notion that the State can, by using its vast resources at whim, prosecute appeals against accused persons simply because it is dissatisfied with the result so far. This is *a fortiori* so when the error must be, not simply one of law, but one of constitutional law.
22. In short, no cognizable issue of constitutional law arises in the present case or, at any rate, no such issue arises that might warrant a consideration of an appeal by a prosecutorial body in the public interest.

³⁷ In Tribunal proceedings, the Commission acts as a prosecutor in the public interest and the proceedings before the Tribunal are akin to criminal prosecution. See, *inter alia*, *Simelane & Others NNO v Seven-Eleven Corporation SA (Pty) Ltd & Another* [2001 – 2002] CPLR 13 (SCA); *Sasol Chemical Industries (Pty) Ltd v Competition Commission et al* [2009] 1 CPLR 233 (CT) para 43 para; *Astral Operations Ltd and another v Competition Commission of SA* [2010] JOL 25518 (CT) at para [21]; *Omnia Fertilizer Ltd v Commission*; *In re Commission v Sasol Chemical Industries (Pty) Ltd & others* [2008] JOL 22197 (CT) at para [21]; *Woodlands Dairy (Pty) Ltd v Competition Commission* Case no 105/2010 [2010] ZASCA 104, judgment of 13 September 2010.

³⁸ *S v Moodie* [1961] 4 All SA 547 (A); *S v Ramalope* [1995] 4 All SA 116 (A).

RELEVANT FACTS

23. Senwes is a public company that *inter alia* stores grain for reward and trades grain for profit.³⁹ It was once a farmers' cooperative and it still retains the close connection with farmers⁴⁰ who constitute the majority of its shareholders⁴¹ and who make use of Senwes' services to store their grain.⁴²

23.1. In its capacity as a firm that offers grain storage and handling facilities ('storage services'), it provides the service both to farmers and to grain traders, in competition with other providers of storage services.⁴³

23.2. In its capacity as a grain trader, Senwes buys grain from farmers and others, trades such grain on the South African Futures Exchange ('SAFEX') and/or sells it to other traders or to millers,⁴⁴ on a nationwide basis.

24. At the time relevant to these proceedings, Senwes levied upon *all* users of its storage services a daily charge⁴⁵ that was equal to the daily rate for storage used by SAFEX in each given year,⁴⁶ although

³⁹ Senwes AA para 7.2 Record vol 2 p 157 lines 17 – 19.

⁴⁰ Senwes consolidated witness statement para 3.1, Record vol 8 p 778 lines 21 – p 779 line 2.

⁴¹ Tribunal decision para [4], Record vol 1 p 2 lines 7 – 8; Senwes consolidated witness summary para 3.1 Record vol 8 p 778 line 22 to p 779 line 2.

⁴² Senwes consolidated witness summary para 2.2.4, Record vol 8 p 774 lines 6 – 8.

⁴³ Senwes AA para 7.1 Record vol 2 p 157 lines 10 – 13. For historical reasons, the competition within its area of operation is limited: Tribunal decision paras [50] – [54] Record vol 1 p 13 line 23 to p 15 line 5.

⁴⁴ Senwes AA para 7.2 Record vol 2 p 157 lines 14 – 16.

⁴⁵ Senwes consolidated witness summary para 4.4.1, Record p 452 lines 21 – 22.

⁴⁶ Tribunal decision para [16], Record vol 1 p 5 lines 15 – 16.

farmers who delivered grain produced by them to the silos, received the benefit of a so-called 100-day cap.⁴⁷ A farmer who stored grain produced by him, paid the daily rate for the period up to a hundred days, but storage for the balance of the season was then provided free of charge.⁴⁸

25. The reasons for giving this benefit to farmers were historical and bound up with Senwes' desire to keep their goodwill,⁴⁹ but was also aimed at maximizing the exploitation of Senwes' storage capacity⁵⁰ in circumstances where the provision of storage services counted as the most important component of its business.⁵¹
26. Before 2003 traders were also given the benefit of the cap,⁵² but they were, in the view of Senwes, using the free storage opportunistically in a way that led to 'selecting against' Senwes and that favoured competing providers of storage.⁵³
27. Where Senwes buys grain from farmers, it offers a price for such grain that is calculated with reference to the prevailing SAFEX price.⁵⁴ In offering a price to the farmer, it considers a number of

⁴⁷ Senwes consolidated witness summary para 4.4.2 Record vol 8 p 781 lines 1 – 3; Senwes consolidated witness summary para 4.9 Record vol 8 p 783 lines 11 – 19.

⁴⁸ Tribunal decision para [30], Record vol 1 p 8 line 25 to p 9 line 1.

⁴⁹ Senwes consolidated witness summary para 3.3.1 Record vol 8 p 780 lines 1 – 7.

⁵⁰ Senwes consolidated witness summary para 4.9 Record vol 8 p 783 lines 15 – 16.

⁵¹ Senwes consolidated witness summary vol 8 p 773 lines 14 – 18.

⁵² Tribunal decision para [32] Record vol 1 p 9 lines 11 – 23.

⁵³ Tribunal decision para [181] Record vol 1 p 46 lines 19 – 23; para [185] Record vol 1 p 47 lines 19 – 20.

⁵⁴ Tribunal decision para [16] Record vol 1 p 5 lines 16 – 17; Tribunal decision para [18] Record vol 1 p 6 lines 6- 8.

relevant factors, including the location of the grain, the potential for selling the grain, and such like. Provision is made for a margin or commission.⁵⁵ Farmers, who are interested in receiving the best possible price, negotiate with any number of grain traders and tend to ‘shop around’.⁵⁶

28. Ultimately, traders (including Senwes’ trading division) sell grain purchased from farmers (and other sources). Grain may be sold to other traders, but the aim of traders is to secure tenders from millers on so-called ‘mill-door contracts’.⁵⁷ The mills require supply of grain over the course of the year, and because storage capacity at the mills is limited, all required grain cannot be purchased at harvest time and stored at the mills.⁵⁸ Mill-door contracts secure for the millers supply of grain at appropriate times by a limited number of trusted suppliers (the traders).⁵⁹
29. Traders who tender for mill-door contracts generally seek to make the maximum possible profit whilst aiming to offer the best price to the miller, thereby securing its custom. Senwes is no different from other traders in this regard, and the prices charged for grain in mill-door contracts reflect the ability to negotiate an appropriate price.

⁵⁵ Tribunal decision para [18] Record vol 1 p 6 lines 8 – 9.

⁵⁶ Senwes consolidated witness summary para 2.2.4, Record vol 8 p 774 lines 3 – 4.

⁵⁷ Tribunal decision para [35], Record vol 1 p 10 lines 18 – 21.

⁵⁸ Tribunal decision para [37], Record vol 1 p 11 lines 1 – 5.

⁵⁹ Tribunal decision para [37], Record vol 1 p 11 lines 1 – 14.

30. In a complaint lodged with the Commission on 2 December 2004, CTH Trading (Pty) Ltd ('CTH') complained that Senwes engaged in price discrimination and refused it access to an essential facility.⁶⁰ It explained that Senwes breached s 9 of the Competition Act by 'unlawfully discriminating between clients in relation to the storage fees levied upon the storage of grain'.⁶¹ Its complaint related to an alleged difference between the storage charge levied upon farmers who sold their grain to Senwes and those who did not.⁶² The complaint of access to an essential facility related to Senwes' access to information on grain held by it, to which third party traders did not have access.⁶³ CTH also alleged in its affidavit that Senwes' practices in relation to production loans created an opportunity for it to coerce farmers into selling their grain to Senwes.⁶⁴ A proper reading of the complaint makes it clear that CTH's complaint was concerned with the ability of traders to purchase grain from farmers, and the alleged negative effect that Senwes' practices had on competing traders who wished to purchase grain from farmers. This is borne out by the allegation that 'the marketing strategy employed

⁶⁰Form CC1, annexure SM1 to complaint referral Record vol 2 p 111.

⁶¹Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2p 117 lines 3 – 6.

⁶²Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 117 line 11 – p 118 line 2.

⁶³Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 118 line 10 – p 11 line 15.

⁶⁴Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 122 line 16 – p 123 line 15.

by the trading division of Senwes is directed at applying friction at every point where a *producer transacts with a third party trader rather than with Senwes itself*.⁶⁵ When CTH sought to summarise its complaint, it explained that Senwes' strategy was 'to make it as expensive as possible for *producers to deal with third party traders and to make it as attractive as possible for producers to deal with Senwes*'.⁶⁶

31. In the course of complaining about the adverse effect of the alleged differentiation between producers who sold their grain to Senwes and those who did not, CTH made the allegation also that traders, who previously enjoyed a 'capped tariff', were now made to pay the daily tariff, which is more expensive,⁶⁷ but this was by the by: there is not a single allegation in the complaint concerned with any difference between the storage rate charged to traders and that charged to Senwes' internal trading division, nor with the effect on the ability of traders to sell grain to millers after storage of their grain in Senwes' silos for a period exceeding 100 days.
32. The Commission proceeded to investigate the complaint. In its referral to the Tribunal, the Commission located this case on the

⁶⁵ Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 152 lines 2 – 5. Emphasis supplied.

⁶⁶ Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 152 lines 5 – 7. Emphasis supplied.

⁶⁷ Affidavit of JA Wasserman, annexure SM1 to complaint referral Record vol 2 p 147 lines 2 – 5.

basis of alleged abuses of dominance, including price discrimination and an inducement not to deal with competitors.⁶⁸ Under these headings, it asked the Tribunal to abolish the price differential,⁶⁹ saying that traders were being driven from the market. The referral had in common with the complaint that it was concerned with the alleged differentiation between producers who sold their grain to Senwes and those that sold their grain to third party traders.⁷⁰ In this context, passing reference was made to the fact that traders were compelled to store their grain at the more expensive daily rate,⁷¹ but no comparison was drawn with the storage rates levied upon Senwes' own storage division, and the consequent ability of traders to sell grain to millers after having stored grain in Senwes' silos over a period exceeding 100 days. In relation to its charge under s 8(c), the Commission complained that the 'practice of charging differential tariff fees for storage' had an exclusionary effect on traders competing in the grain trading market.⁷² The 'differential fees' in question were not described, but given the allegations contained in the remainder of the referral affidavit, read with the

⁶⁸ Form CT1(1) – Referral of complaint by Commission dated 20 December 2006, Record vol 2 p 90. The Tribunal (Tribunal decision para [42] Record vol 1 p 12 lines 9 – 10) reconstructs this to state: 'Distilled to its essence the Commission's case against Senwes comprises two forms of abuse, an "inducement" abuse and a "margin squeeze" abuse'. This is not in line with the NoM, Record vol 2 pp 92 – 94.

⁶⁹ NoM prayers 1 – 3, Record vol 2 p 92 line 16 to p 93 line 1.

⁷⁰ The complaint under this head is described in full in the complaint referral affidavit Record vol 2 p 106 line 4 – p 107 line 21.

⁷¹ Complaint referral affidavit para 23 Record vol 2 p 106 lines 15 – 17.

⁷² Complaint referral affidavit para 30 p 108 lines 10 – 14.

complaint that was attached to the referral, can be taken to have referred to the alleged differentiation between:

- 32.1. producers who sold their grain to Senwes and those who did not; and/or
 - 32.2. producers and traders.
33. In common with the complaint lodged by CTH, not a single allegation contained in the complaint referral was concerned with an alleged difference between the manner in which Senwes charged its own trading division and the manner in which it levied charges upon third party traders.⁷³
34. The Commission's Notice of Motion,⁷⁴ as well as the supporting affidavit,⁷⁵ made it clear that it was the fact of the differential that was the point of complaint. What the Commission claimed was an order prohibiting Senwes from making a distinction between *producers and traders* in its storage tariffs. Since the differential could be abolished by equalizing up, equalizing down, or setting tariff (provided it was undifferentiated) at some other point, it was obvious, at least to Senwes, that the level of the tariff in absolute terms was not the basis of the complaint. As a result, there was no scope under this head for mounting a case based on the fact that, in

⁷³The SCA observed in para [20] of its judgment that the 'referral was in line with, though substantially narrower than, the original complaint'. See Record vol 9 p 913 lines 3 – 10.

⁷⁴ Record vol 2 pp 92 – 94.

⁷⁵ Record vol 2 pp 95 – 110.

absolute terms, competing traders were being charged too much, and thus no basis for a claim based on margin squeeze.⁷⁶

35. From the outset, Senwes struggled to understand the case that was being brought against it. Farmers and traders do not compete with each other, for farmers operate in the upstream market for the production of grain whereas traders operate in the downstream market in which the grain, having been produced, is bought and resold for ultimate use in milling.⁷⁷ In order to clarify the nature of the complaint, therefore, Senwes requested particulars⁷⁸ and, when they proved un-instructive,⁷⁹ invited the Tribunal to enrol an exception,⁸⁰ the terms of which were carefully framed.⁸¹
36. In moving the application to except, Senwes denied that the differential could ever produce the effects contended for and, more generally, that it can constitute a contravention of the Competition

⁷⁶ The Commission formally prosecuted a case concerned with the level of an input price, not a case concerned with the spread between a wholesale and retail price, thereby falling short of the definition of a margin squeeze proffered by the General Court in *Deutsche Telekom*.

⁷⁷ Senwes AA paras 13 – 15 Record vol 2 p 159 lines 1 – 13.

⁷⁸ Annexure B to FA in application for leave to except: Letter from Hofmeyr Herbststein & Gihwala to Commission Record vol 3 pp 213 – 214. In para 3.1.3 (Record vol 3 p 214 lines 8 – 10), Senwes pertinently asked on what basis the Commission contended that there had been a violation of the Competition Act.

⁷⁹ FA in application for leave to except para 8 Record vol 3 p 203 lines 9 – 11.

Annexure C to FA in application for leave to except: Commission's response to Senwes' interrogatories, Record vol 3 pp 215 – 218. In para 1.2 (Record vol 3 p 216) the Commission contended that the request was not relevant in light of its stance on market definition.

⁸⁰ NoM application for leave to except Record vol 3 pp 197 – 199, in particular prayer 1 (Record vol 3 p 198 lines 1 – 3).

⁸¹ Annexure A to FA in application for leave to except: Notice of exception Record vol 3 pp 205 – 212.

Act.⁸² It made the point that traders and farmers cannot be brought into comparison for the purposes of competition analysis since they fall into separate categories as commercial actors: producers supply their grain to traders and traders take the product from producers, and neither competes with the other. Since all traders are charged equally for grain storage, traders can never be said to be excluded from the market by reason of a differential between them and non-traders and, in consequence, there could never be an exclusionary result such as is contemplated by s 8(c).⁸³ These submissions were entertained by the Tribunal with a resigned indifference that showed a greater respect for form than a genuine willingness to listen, and the application was dismissed out of hand and without reasons.⁸⁴ It is noted that the Commission, in answering the application, had insisted it had framed with the necessary precision the case that Senwes was required to meet⁸⁵ and refrained from dealing with the merits of Senwes' contentions in the proposed exception.⁸⁶ What the Commission did not do, was to allege any relevance of the differential between farmers and traders to a complaint based on traders' ability to compete with Senwes when trading with millers.

⁸² FA in application for leave to except para 10 Record vol 3 p 203 lines 16 – 21; notice of exception paras 14 – 19 Record vol 3 p 210 line 1 to p 211 line 7.

⁸³ Notice of exception paras 17 – 19 Record vol 3 p 211 lines 1 – 7.

⁸⁴ Order: application for leave to except Record vol 3 p 250.

⁸⁵ AA in application for leave to except, Record vol 3 pp 221 – 236, in particular para 15.2 (Record vol 3 p 228 lines 17 – 22) and para 21.2 (Record vol 3 p 223 lines 18 – 19).

⁸⁶ AA in application for leave to except para 2, Record vol 3 p 222 lines 19 – 21.

The Commission's position refutes its belated extensive interpretation of the complaint referral, which required Senwes to 'read into' the complaint the margin squeeze abuse.

37. Concerned at the way the matter was proceeding, Senwes applied for procedural relief designed to ensure that the issues were being properly articulated and ventilated.⁸⁷ It sought an order directing that the factual disputes between the Commission and Senwes be finally delineated at a pre-hearing conference.⁸⁸ The company proposed that the factual disputes be resolved so that the expert witness statements could provide a proper response to the issues being raised.⁸⁹ The passage of the proceedings was such as to make it impossible for Senwes to pursue these suggestions, but following the exchange, no one involved in the case could have been under any misapprehension about Senwes' continuing unhappiness with the vague and embarrassing quality of the case being mounted.
38. When witness statements were exchanged, it became clear that the Commission intended to mount an attack based on a set of contentions that travelled significantly beyond the pleadings. We point out here that witness statements in this matter were exchanged simultaneously, and the Commission initially withheld its expert

⁸⁷ NoM application for procedural relief, Record vol 3 pp 251 – 254.

⁸⁸ NoM application for procedural relief prayer 5, Record vol 3 p 252 lines 8 – 10.

⁸⁹ FA in application for procedural relief para 16, Record vol 3 p 261 lines 1 – 5.

witness summary, forcing Senwes to bring an application to compel production of such expert statement.⁹⁰ There was no directive given that allowed Senwes to respond to the witness statements filed on behalf of the Commission at any stage after this.

39. In an effort to place the matter back on to a proper footing, Senwes prepared a schedule of objections reciting the issues pleaded and identifying those parts of the witness statements that were objectionable.⁹¹ At the start of this schedule, Senwes recorded that ‘the only alleged practices of Senwes for consideration by the Tribunal were ... differentiation in silo costs depending on whether the producer sells its produce to Senwes or not; and differentiation in silo costs depending on whether the party storing grain is a trader or a producer.’⁹² Traversing the factual witness statements, the schedule pertinently raised objections to the introduction of evidence relating to the difference between how Senwes treated itself and how it treated other parties⁹³ and, in particular, objected to the expert witness statement on the grounds that it relied on ‘evidence on alleged abuses that have not been referred’.⁹⁴ In the schedule, Senwes made it absolutely clear that it declined to engage with

⁹⁰ See Record vol 3 p 312 line 5; Record vol 3 p 274 line 17 and vol 3 pp 275 - 281.

⁹¹ Record vol 5 pp 538a – 557.

⁹² Schedule of objections para 7, Record vol 5 pp 541 – 542.

⁹³ See, for example Record vol 5 p 545, p 546, p 548, p 552, p 554, p 555 and p 556 (in each instance this objection is raised in the first column of the schedule, under the heading ‘Evidence on Conduct or Practices not Referred’).

⁹⁴ Schedule of objections para 13, Record vol 5 p 557.

matters not pleaded. In this context, it should be noted that the Commission's expert witness admittedly relied on conduct not referred to the Tribunal for consideration in coming to the conclusion that a margin squeeze was in existence.⁹⁵

40. The Commission's opening address was in line with the complaint referral: at the moment that the Commission was called upon to summarise the case before the Tribunal, its counsel explained carefully that the Commission relied on the section 8 and section 9 complaints set out in the pleadings.⁹⁶ What is patently absent from the opening address was the reliance by the Commission on any complaint that related to the alleged abuse of dominance by Senwes through squeezing the margins of competitors. Not a single word was uttered to suggest that the hearing would be concerned in any way with the difference between the price that Senwes offered itself for storage and the price that was offered to third party traders in respect of storage, and the consequence of that for the ability of traders to compete in the downstream market for the supply of grain to millers.

⁹⁵See, for example Record vol 6 p 635 line 6 – p 636 line 3. See also Record vol 6 p 643 line 3 – p 648 line 20, where the witness admits taking into account administration fees, silo certificate costs and other charges to come to a conclusion on margin squeeze, although complaint on such charges were not referred to the Tribunal.

⁹⁶Commission's opening address, Record vol 6 p 560ff.

41. Nevertheless, Senwes' objection to an enlargement of the issues was repeated in the opening address of Senwes' counsel.⁹⁷ In the course of taking the Tribunal through the Schedule, Senwes' counsel made it clear that the company would treat the objections now being raised as applicable to all the evidence tendered despite them, and would not burden the record by raising an objection each time irrelevant facts were placed before the Tribunal.
42. In response to the objections, both in writing and oral, the Commission and the Tribunal remained passive. The Commission seemed to take the view that it was under no duty to frame its case properly and the Tribunal gave no indication to Senwes' counsel that the Tribunal would be willing to deal with the matter not pertinently pleaded. It certainly gave no indication to Senwes that it ought to launch an application if it wished to exclude reliance on the margin squeeze claim.⁹⁸
43. Despite the objection raised in the schedule and in Senwes' opening statement, counsel for Senwes was unable to avoid making a number of interventions at points when the failure to keep within the pleaded

⁹⁷ Senwes opening address Transcript, CB vol 6 p 568 line 20 to p 574 line 2, I particular CB vol 6 p 569 lines 13 – 15; CB vol 6 p 573 lines 19 – 20.

⁹⁸ The Tribunal, in para [282] of its decision (CB vol 1 pp 74 – 75) suggests that Senwes ought to have made an application to exclude reliance on the enlarged case if it sought to avoid answering it.

case became egregious.⁹⁹ Nevertheless, the Tribunal acknowledged that ‘for the most part when a trader traversed margin squeeze issues, the cross-examiner signalled an unwillingness to engage the issue.’¹⁰⁰ Given Senwes’ stance, it made no effort to place evidence before the Tribunal tending to show how the cost to it of storage compared with the charge for storage levied on competing traders and Senwes mounted no defence against an allegation that it had engaged in a margin squeeze. No one sitting in the hearing could sensibly have formed the view that Senwes was submitting to the improper enlargement of the issues that was occurring.

44. Importantly for present purposes, the Tribunal, at no stage during the hearing, directed Senwes to respond to allegations concerning a complaint that Senwes’ own trading division benefitted improperly in its dealings with millers from a beneficial storage rate offered to it, as compared to third party traders. The Tribunal did not dismiss Senwes’ objections, raised as they were in document form, and it certainly did not forewarn Senwes that it intended to adjudicate on that complaint, in the face of objection, on the basis of its inquisitorial powers under the Competition Act. The Commission now says that the Tribunal *did* act inquisitorially and that it

⁹⁹ Tribunal decision para [297], CB p 78, which notes that Keyser was cross-examined on issues pertinent to the margin squeeze case. See Transcript Record vol 17 pp 1163 – 1642; p 1617.

¹⁰⁰ Tribunal decision para [297], CB p 78 lines 6 – 7.

questioned witnesses on the margin squeeze abuse.¹⁰¹ Of course, the questioning of witnesses by the Tribunal alone does not render a process that is inquisitorial, and the questioning of a respondent's witnesses¹⁰² most certainly cannot be regarded as adequate warning of a case that such a respondent has to meet.

45. Ultimately, the decision of the Tribunal was based on a comparison between the positions, not of traders and farmers, but of Senwes *qua* trader and traders generally. This, we stress, was never the pleaded case, but was the case conjured up by the authorities for which support was found in stray threads of evidence (which we submit did not even support a finding that Senwes engaged in a 'margin squeeze' as defined by foreign competition authorities).

COMMISSION'S FIRST SUBMISSION: THE TRIBUNAL IS ENTITLED TO CONSIDER AND ADJUDICATE ANY POTENTIALLY PROHIBITED CONDUCT THAT ARISES IN THE COURSE OF A REFERRAL TO IT

Statutory framework

46. The Commission's contention that the Tribunal is entitled to consider and adjudicate upon any potentially prohibited conduct that arises in the course of a referral to it, must be evaluated against the statutory regime within which it operates.

¹⁰¹Commission heads of argument para 5.4 p 35.

¹⁰²Relied upon by the Commission in its heads of argument at footnote 72 p 35.

47. Section 49B(2) of the Competition Act provides for submission of information regarding an alleged prohibited practice or the submission of a complaint in respect of an alleged prohibited practice to the Commission. In its role as prosecutor, the Commission investigates and refers complaints to the Tribunal.¹⁰³

Section 50(2) of the statute prescribes that a complaint must be referred only if the Commission has *determined* that a prohibited practice has been established. This must mean that the Commission, at the moment of referral, ought to have completed its investigation and that it must be in possession of all of the material facts that it can rely on to prosecute the complaint.

48. The referral: The referral is made by way of a notice of motion, which embodies the prayers for relief, supported by a sworn affidavit that constitutes the statement of case.¹⁰⁴

48.1. Under the relevant rules of the two bodies, the affidavit is expected to set out the substance of the facts as well as the

¹⁰³In terms of section 21(c) of the Competition Act, the Commission is responsible to investigate and evaluate alleged contraventions of the statute; under section 21(g) it may refer matters to the Tribunal, and appear before the Tribunal as required by the Act. S 49B(3) of the Competition Act obliges the Commission to investigate a complaint. Section 50(2)(a) provides that the Commission must refer a complaint to the Tribunal if it determines that a prohibited practice has been established.

¹⁰⁴In terms of section 51(2), a referral to the Tribunal must be in the prescribed form. The Rules for the Conduct of Proceedings in the Competition Tribunal ('the Tribunal Rules') provides in Rule 14(1)(a) and Rule 15(1) for a referral in form CT1(1). Rule 15(2) prescribes that a complaint referral must be supported by an affidavit setting out in numbered paragraphs (a) a concise statement of the grounds of the complaint; and (b) the material facts or the points of law relevant to the complaint and relied on by the Commission.

cardinal issues in enough detail to give the respondent a sound understanding of the case being brought.¹⁰⁵

48.2. In competition matters, which (exceptions aside) are conceptually complex and entail a mass of both direct and expert evidence, the proper framing of the case is very important. If the principles of natural justice are to be satisfied,¹⁰⁶ it is vital that the respondent should know how to prepare for and meet the complaints levelled against it.

48.3. Section 50(3) recognizes as much. In stipulating that that the ‘particulars’ of a complaint are to be referred to the Tribunal for adjudication, the section makes clear that the complaint ought not to be framed in general terms, but must be described with particularity and thus precision. At the very least, the referral must set out the cardinal facts on which the Commission relies, describe the anti-competitive consequences of the conduct pleaded, locate the violation within the framework of the statute and specify the relief being claimed.

49. The reply: Tribunal Rule 16, which provides for an answer by a respondent to be filed, requires great precision in the formulation of opposition.

¹⁰⁵ See Tribunal Rule 15(2). In terms of section 52(2)(a) of the Competition Act, the Tribunal must conduct its hearings in accordance with the principles of natural justice.

¹⁰⁶ Section 52(2)(a) of the Competition Act obliges the Tribunal to conduct its hearings in accordance with the rules of natural justice.

- 49.1. The reply must contain ‘a concise statement of the grounds on which the complaint referral is opposed’, ‘the material facts or points of law on which the respondent relies’ and ‘an admission or denial of each ground and of each material fact relevant to each ground set out in the complaint referral’.
- 49.2. Tribunal Rule 17, in insisting that there must be ‘an admission or denial of each new ground or material fact raised in the answer’, stipulates that ‘the position of the replying party on any point of law raised in the answer’ must be set out.
50. Amending the referral: Tribunal Rule 18 sets out the procedure for the amendment of the complaint referral.
- 50.1. Sub-rule (1) comprehends the enlargement of the issues already pleaded and sub-rule (2) makes provision for the filing of additional documents in consequence of amendments by way of Rule 18(2).
- 50.2. Both provisions give recognition to the importance of a proper recital of the complaints in the referral. A party must know what case it has come to meet and, for the purpose, must be able to consult the referral in order to determine the precise scope of the charge against it.
- 50.3. Simple justice requires as much, and its demands are especially clamant in cases of anti-trust violations, where invariably the

issues are complex and the consequences of condemnation can be swingeing.

51. In short, the Tribunal has no power to enquire into and decide matters not referred to it. The Commission's submission to the contrary ignores the provisions of s 52(1) of the Competition Act, which limits the power of the Tribunal to the conduct of a hearing 'into every matter referred to it' under that statute.

The Commission's contentions

52. The Commission seems to believe that, because the Tribunal is permitted to conduct its hearings in an inquisitorial manner, the Commission is at liberty to make up its case as it goes along and the Tribunal is entitled to adjudicate on any matter before it, whether relevant to the complaint that had been referred to it or not. In effect, it contends that the extensive complaint investigation and referral procedures provided for in the Competition Act are emptied of content once the Tribunal is seized of a matter.
53. In support of this notion, reliance is seemingly placed on 27(1)(a) of the Competition Act. The provision, in dealing with the functions of the Tribunal, states that the body may 'adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited

conduct has occurred, and, if so, to impose any remedy provided for' in the Competition Act.¹⁰⁷

54. Reliance is also placed on the Tribunal's 'truth-seeking role'¹⁰⁸ and its 'public interest function',¹⁰⁹ which is said to confer upon the Tribunal 'investigative power'.¹¹⁰ Apparently these powers are to be taken to duplicate the functions conferred upon the Commission itself.
55. Unsteadily building on these foundations, the Commission argues that an administrative tribunal that is 'required to discharge its functions by taking a decision based on the facts before it'¹¹¹ can legitimately 'determine the ambit of the dispute before it and to ascertain which factors and evidence are relevant'.¹¹² It argues, further, that such a tribunal may 'inquire into the facts giving rise to the proceedings – including by questioning witnesses and calling for evidence'¹¹³ and that it must undertake a comprehensive investigation into the facts surrounding the dispute.¹¹⁴

¹⁰⁷Commission heads of argument para 3.2.2 p 16.

¹⁰⁸Commission heads of argument para 3.5 p 19.

¹⁰⁹Commission heads of argument para 3.6 p 19.

¹¹⁰Commission heads of argument para 3.6 p 19.

¹¹¹Commission heads of argument para 4.2 p 20.

¹¹²Commission heads of argument para 4.2 p 20.

¹¹³Commission heads of argument para 4.3.2.1 p 21.

¹¹⁴Commission heads of argument para 4.3.2.2 p 22, relying on the judgment in *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) para 107.

No jurisdiction to stray beyond pleaded issues

56. Senwes agrees with the Commission that the Tribunal, in the exercise of its functions, is entitled to have regard to the *facts relevant to the dispute before it*. It is for that very purpose that the Tribunal, based on the complaint referral and the answer filed in response thereto, must determine the ambit of the dispute that it has been called upon to adjudicate. But this, of course, does not mean that the Tribunal enjoys a roving brief to take into account every piece of information placed before it in order to develop, for itself, a charge that falls outside the ambit of the pleaded dispute.¹¹⁵
57. The Commission blithely suggests that the Tribunal's inquisitorial powers are to be adjudicated by reference to a combination of principles applicable to specific forms of inquisitorial proceedings under various statutes. This is simply wrong.¹¹⁶ The proper manner approach is encapsulated in *Mlifi v Klingenberg*:¹¹⁷

¹¹⁵The judgments relied on by the Commission in footnotes 36 and 37 of the heads of argument take the matter no further, for they are all concerned with the exercise of powers by specific administrative bodies and with questions of onus in such proceedings.

¹¹⁶ See footnotes 38 and 39 of Commission heads of argument p 21 and footnote 41 at p 22. Proceedings before the Tribunal are not private arbitration proceedings in which an agreement between the parties regulates the ambit of the facts that may properly be received by the adjudicator as was the case in *Lufuno Mphaphuli*. They are also not summary proceedings in which a body, acting inquisitorially, engages in questioning in a process that dispenses with the normal process of charge and plea, as was the case in *Baloyi*. These proceedings are not of an interlocutory nature on an issue that an adjudicator is statutorily obliged to consider, as are bail proceedings considered in *S v Dlamini*. A Tribunal hearing in consequence of a Commission referral informed by a lengthy investigation conducted by a specialist body that enjoys far-reaching powers of investigation is also not one to be equated with proceedings in the Equality Court, where the focus is on access to the judicial process for the poor and oppressed who are the victims of inequality, as was the case in *George v Minister of Environmental Affairs and Tourism*. Unlike the case in *Islamic Unity*, the Tribunal is not the body

‘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. The dismissal of a case on the basis of inadequate evidence would be seen to be a failure on the part of the Judiciary. *The Judge must manage the case from the outset* to ensure that it is run efficiently. He or she interviews the parties separately at an early stage of the proceedings, *discusses with them points they need to consider, advises them of their rights and duties*, determines what witnesses are to be called (and this may include witnesses the Judge wishes to call) and what documentary evidence is required, makes settlement proposals and decides when the matter is ripe for hearing. At the hearing the Judge plays an active role in the presentation of evidence and the questioning of witnesses and determines the order in which they testify.’

58. In the circumstances, Senwes submits that if the Tribunal elects to conduct its hearings in an inquisitorial manner, it must remain within the purview of the pleadings and, to this end, must ensure that the issues in the pleadings are carefully formulated and articulated. For this reason alone, it is submitted that the inclusion of a complaint that had not been referred to the Tribunal for adjudication may not be decided upon at the election of the Tribunal.¹¹⁸

In any event travelling beyond pleaded issues requires due process, especially notice

59. Even if it were true that the Tribunal could legitimately stray beyond the pleadings in the exercise of its inquisitorial powers, it would still have to communicate a clear intention to utilize the process. Due

charged both with investigating and making a decision, subject to the consideration of another adjudicative body.

¹¹⁷ At para [107] 702I – 703C.

¹¹⁸ In the *Ansac* decision, the Tribunal overstated the scope of its powers in coming to the conclusion that it was not to be ‘confined by the walls of opposing lawyers’ pleadings’.

process requires as much. The parties must know how they are going to be dealt with and be able to tailor the presentation of the case accordingly. Since the inquisitorial process permits the development of the case by the adjudicator, the lawyers, now playing a much-reduced role, are entitled to rely on the court to promote the interests of their clients and preserve them from procedural prejudice and abuse.¹¹⁹

60. The question therefore is not whether Senwes had ‘ample opportunity to deal with the margin squeeze issue and to place facts before the Tribunal to undermine the case’¹²⁰ that the Commission improperly sought to mount in the course of the hearing; rather, the question is whether the Tribunal properly notified Senwes that it would entertain the case so mounted.
61. Senwes denied that it had a duty to respond to the Commission’s case on the margin squeeze and the Tribunal gave it no intimation that, by invoking its inquisitorial powers, it would subvert Senwes’ stance.

¹¹⁹B Schwartz *Administrative Law* 2ed at 263.

¹²⁰Commission heads of argument para 5.5 p 36.

COMMISSION'S SECOND SUBMISSION: 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

Commission's contentions

62. What the Commission contends for, is that this Court ought to ignore the formalities associated with a referral as envisaged in the Competition Act, and that it must extend the meaning of 'matter referred to it' in s 52(1) of the Competition Act to include *all* matter placed before the Tribunal from the moment of referral until the commencement of the hearing.¹²¹ In making this point, the Commission emphasizes that the Tribunal 'ordinarily' requires parties to exchange witness statements and expert witness reports in advance of hearings before it.¹²²

The Commission relies on the filing of witness statements

63. Tribunal Rule 22(1)(c)(vii)(aa) envisages that the Tribunal may set a timetable for 'the exchange of summaries of expert opinions or other evidence that will be presented at the hearing', but this rule provides no basis for the conclusion that any witness summaries that are exchanged in consequence of it, ought to be treated as forming part of the complaint referral and it certainly provides no basis for the

¹²¹This is the natural implication of the argument that 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 and that witness statements may be used to 'amplify' a referral. See Commission heads of argument para 1.3.2 p 4.

¹²²Commission heads of argument para 3.4.3 p 19.

submission that ‘all’ information placed before the Tribunal prior to the hearing forms part of a complaint referral.

64. The Commission envisages a process in which the content of a complaint referral against a respondent remains a moving target until the moment that a hearing before the Tribunal commences.

64.1. The Commission seeks to place no limitation on the manner in which information that would have the effect of enlarging the complaint may come to the Tribunal prior to the hearing and provides for no moment where the respondent is given an opportunity to consider the precise ambit of the charges made against it, and to prepare a trial strategy based on the charges that are to be faced in the course of the hearing.

64.2. On the Commission’s version of events, a respondent must prepare to respond to any information that it has placed before the Tribunal, and must anticipate all of the manners in which such information may be said to constitute an allegation of anti-competitive conduct, irrespective of whether the Commission has made clear that it seeks to prosecute a complaint on the basis of the information received by the Tribunal.

65. The process contemplated is absurd. It has no basis in the statutory regime that places on the Commission the duty to investigate complaints and to refer them to the Tribunal only in the event that

anti-competitive conduct has been determined to exist.¹²³ It is also incongruent with the formalities associated with a referral, discussed more fully above.

66. The Commission argues for a system of referral in which it is allowed to play its cards close to its chest throughout the pre-hearing processes, and in which it is allowed to keep a respondent guessing at the nature of its case against such a respondent until as late as possible, thereby prejudicing the preparation of a defence.
67. That fairness is not served in this way is self-evident: generally speaking, fair administrative action is given effect to through ‘adequate notice of the nature and the purpose of the proposed administrative action’.¹²⁴ If one accepts the principle that a proper opportunity to be heard presupposes adequate notice of intended action, then the notice of impending action (here, the complaint referral affidavit) should specify the salient factors motivating the proposed action for, without this, the affected party ‘cannot hope to prepare his objections adequately’.¹²⁵
68. It must be remembered that the Tribunal process, as prescribed in the Competition Act and the Commission Rules and Tribunal Rules, envisages an essentially adversarial process, and therefore a

¹²³ Competition Act s 50(2)(a).

¹²⁴ Section 3(2)(b) of PAJA.

¹²⁵ Baxter *Administrative Law* Juta 1984 at 544 – 545.

respondent in Tribunal proceedings must be informed of the ‘substance of the prejudicial allegations’ against it¹²⁶ in a formal manner: the ‘*particulars* ... should be brought to his attention in order to enable him to meet the charge’ and the Commission must set out the material facts and points on which it relies for referral after completion of an extensive investigation.

Due process when issues enlarged by means of witness statements

69. Even if it were accepted that the Commission could, in certain circumstances, amplify its complaint referral through the filing of witness statements, the Tribunal ought to:

69.1. indicate clearly to a respondent against whom such an amplification operates, that the additional charge against such a respondent will be considered in the course of the hearing and that a finding based on such a charge may follow from the hearing, i.e. it must make clear to a respondent the specific ambit of the amendment of the allegations for which it gives leave; and

69.2. direct such a respondent to answer the charge so made or amended, and also direct it to lead evidence in relation thereto.

¹²⁶*Minister of Interior v Bechler and others; Beier v Minister of Interior and others* 1948 (3) SA 409 (AD) at 451.

70. Only in this manner will a respondent be forewarned of the points that it needs to consider in preparation for the hearing and it will be advised of its rights and duties in the hearing, as is contemplated in *Mlifi v Klingenberg*. If such a process is not followed, the Tribunal process will in each instance be subject to the criticism that it did not comply with the dictates of fairness and the imperative that it be conducted in accordance with the principles of natural justice.¹²⁷
71. In this context, Senwes places reliance on the cautionary sentiments expressed in *Middleton v Carr*¹²⁸ in relation to the treatment by a court of issues not raised on pleadings: ‘... *unless the Court is satisfied that the investigation has been full, ...injustice may easily be done if the issue is treated as being before the Court*. Generally speaking the issues ... should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought.’

COMMISSION’S THIRD SUBMISSION: THE CONDUCT FOUND BY THE TRIBUNAL TO HAVE CONSTITUTED THE PROHIBITED PRACTICE WAS SUFFICIENTLY IDENTIFIED IN THE COMPLAINT

72. The Commission’s contention that the Commission referred to the Tribunal for consideration a complaint that Senwes engaged in margin squeeze conduct in the grain market¹²⁹ is simply false.

¹²⁷ Competition Act s 52(2)(a).

¹²⁸ 1949 (2) SA 374 (A) at 385 – 386.

¹²⁹ Commission heads of argument para 2.1 p 5.

73. CTH complained of Senwes' practice of charging different prices to farmers and traders,¹³⁰ and this was the case referred. The complaint and the referral were concerned with the ability of traders to procure grain from farmers.¹³¹ Consistent with this, the Commission, in the complaint referral, sought an order that would prevent differential treatment between customers unless such differential treatment were justified under s 9(2) of the Competition Act.¹³²
74. The high-water mark of the Commission's submission that a complaint based on a differential between Senwes' treatment of its internal trading division and third party traders was contemplated in the complaint referral, is its bold assertion that, for 'purposes of this case, Senwes' trading division is a customer'.¹³³ This contention conveniently ignores that s 9 excepts price discrimination that relates to sales of services in transactions that are not equivalent. No case has been made out that transactions between divisions of a vertically integrated firm are equivalent to transactions with unrelated third parties.
75. In any event, even if the relief sought by the Commission, after the fact, can be read to include the intended creation of equality between

¹³⁰Commission heads of argument para 2.7 p 8.

¹³¹Commission heads of argument para 2.10 p 10, in which is quoted the extract from the Commission's referral affidavit para 26 Record vol 2 p 107.

¹³²Commission heads of argument para 2.11 p 10.

¹³³Commission heads of argument para 2.12 p 11.

Senwes' own trading division and third party traders, the complaint referral cannot be read to support such an interpretation, for it contains not a single reference to the differentiation in charges between these two classes of traders. Had there been such a reference, the Commission would, no doubt, have relied on it.¹³⁴

76. In its heads of argument, the Commission now suggests that the margin squeeze complaint was evident from a charge that traders could not compete with Senwes's trading division.¹³⁵ The submission is simply wrong, as is evident from the footnote, which places reliance on the witness statements of Commission witnesses, and not on the complaint referral.¹³⁶
77. To reconstruct the referral, as the Commission proposes to do,¹³⁷ does not assist it, and is completely at odds with the Tribunal's finding. Indeed, it shows that the Commission confuses the relevant facts in this matter: it contends that the charges paid for storage of grain *after* purchase from farmers influences the price at which they *purchase* the grain from farmers, and that Senwes can outbid its rivals in offering higher prices for grain. It can obviously never be correct to contend that a fee charged for services *after* the purchase from the farmer forecloses access to the farmer's grain. The

¹³⁴Commission heads of argument para 2.13. 1 p 11.

¹³⁵Commission heads of argument para 6.3.2 pp 40 – 41.

¹³⁶See, *inter alia* footnote 77 p 40 and footnote 80 p 41.

¹³⁷Commission heads of argument paras 6.3.5 – 6.3.11 pp 41 – 43.

Commission then says Senwes benefits, because the farmers from whom it purchases grain enjoy the benefit of a capped tariff *before* they sell the grain. Indeed, *all* farmers receive the benefit of the capped tariff, and therefore there is no additional benefit to Senwes. It relies on Senwes' internal charges, but these were not pleaded.

78. The Commission accepts, implicitly, that it had no information concerning Senwes' internal charges in its possession at the time that witness statements were filed,¹³⁸ and thereby axiomatically accepts the SCA's finding that it had not investigated the differentiation between Senwes' own trading division and third party traders.¹³⁹
79. In the circumstances, Senwes submits that the Commission's argument under this head must fail.

FOURTH SUBMISSION: SENWES SHOULD BE AFFORDED A FURTHER OPPORTUNITY TO RESPOND TO THE CASE AGAINST IT THROUGH A REFERRAL BACK TO THE TRIBUNAL

80. In accordance with the case law concerning referrals, if an investigation is not 'valid' (in the sense of travelling beyond the boundaries of the complaint upon which it is premised), the

¹³⁸ Commission heads of argument paras 2.13.1 and 2.13.2 p 11.

¹³⁹ SCA judgment para [41] Record vol 9 p 920 line 26 – p 921 line 4.

consequent referral must be set aside,¹⁴⁰ ‘unfortunate as the result may be in the circumstances’.¹⁴¹

81. It appears from the factual background provided above, that no complaint based on margin squeeze perpetrated through a differentiation in storage charges between Senwes’ own trading division and third party traders was contemplated in the complaint that founded the Commission’s investigation. In the circumstances, and in accordance with the case law of CAC and the SCA,¹⁴² no valid referral could have been made of such a complaint. See the decision of the CAC in *Netstar*:¹⁴³

“The tribunal’s jurisdiction is confined to a consideration of the complaint so referred and the terms of that complaint are likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person. Accordingly if the original ground for the complaint is that there was a prohibited agreement the Tribunal cannot determine it on the basis that there was a concerted practice or vice versa.”

82. If, for want of procedural rectitude, no valid referral of the facts underlying the margin squeeze complaint could have been made in the first round of proceedings, then it would be quite improper to require of Senwes now to respond to such a complaint in fresh proceedings pursuant to a referral back to the Tribunal.

¹⁴⁰*Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA), also reported at [2002] JOL 9808 (A), at paras [71] – [73]. See also *Woodlands* at para [43].

¹⁴¹*Woodlands* at para [43].

¹⁴²See, for example, *Woodlands (supra)*.

¹⁴³*Netstar (Pty) Ltd and others v Competition Commission and another* case no 99/CAC/May10; 98/CAC/May10 at para [26].

CONCLUSION

83. Senwes submits that the Commission has failed to meet the test for leave to appeal to this honourable Court and that, in any event, the Commission's appeal ought not to be sustained on its merits. Accordingly, Senwes prays for an order dismissing the Commission's application for leave to appeal with costs, including the costs incumbent upon the employment of two counsel.

MSM Brassey SC

MJ Engelbrecht

Respondent's counsel

Chambers, Sandton
21 October 2011