IN THE COMPETITION APPEAL COURT

REPORTABLE
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In the matter between:

SASOL OIL (PTY) LIMITED **Appellant**

and

NATIONWIDE POLES CC **Respondent**

JUDGMENT: 13 DECEMBER 2005

DAVIS JP:

Introduction.

Appellant was found guilty by the Competition Tribunal ('the Tribunal') of a breach of section 9(1) of the Competition Act 89 of 1998 ('the Act') The Tribunal found that appellant was a dominant firm in the creosote market. Appellant was found to have sold creosote to its customers at prices that differed according to the amount purchased. In terms of section 65(6)(v) of the Act the Tribunal declared that a prohibited practice had occurred as is contemplated in this section.

Appellant now appeals against the decision of the Tribunal.

The Factual Background.

Appellant is a major subsidiary of the Sasol group of companies. It is responsible for the marketing of Sasol's liquid fuels and lubricants. The process by which the synthetic fuel is produced releases a by-product of tar which is then utilized as a feed-stock for the production of a range of other products manufactured through Sasol's carbo-tar division. The carbo-tar division comprises a number of business units corresponding to the range of products generated from the tar feedstock including wood preservatives, black disinfectants and surface coatings. The wood preservative, creosote is produced by Sasol and utilized by its customers for a range of different purposes, including the treatment of wood poles.

In August 2002 Mr James Foot, who had acquired control of respondent, became aware that appellant was charging respondent a higher price for purchases of creosote than that which was charged to its competitors. Respondent is a small pole producer and treatment plant in the Eastern Cape. It produces pine building and fencing poles primarily for the vineyard market. Mr Foot approached appellant for a price list which was eventually furnished. The price list confirmed his suspicion that the price charged for creosote, which was supplied to respondent, was higher than that which was levied on competitors such as Woodline, a large pole manufacturer in the Eastern/Western Cape which was respondent's most important competitor.

Appellant's policy prompted respondent to submit a complaint to the Competition Commission, in terms of section 49B(2)(b) of the Act. On 12 November 2003, the Commission issued a notice of non-referral in respect of the complaint. On 3 December 2003, respondent referred the complaint itself, in terms of section 51(1) of the Act, for adjudication by the Tribunal. According to the concise statement of the complaint, respondent alleged that the appellant was engaging in prohibited conduct in contravention of section 9 of the Act in that it –

> "…is a dominant supplier, selling, in equivalent transactions, goods of like grade and quality to different purchases and discriminating by way of <u>price or discount allowed</u> between those purchasers. Further, that this discrimination is likely to have the effect of substantially lessening or preventing competition" (Emphasis added.)

The price list which was applicable from 1 July 2004 until 30 June 2005 was as follows:

PRICE LIST AS FROM 1	**JULY 2004**
VOLUME TONS/ANNUM	**SAK K [WAX-ADDITIVE CREOSOTE]**
0 -450	2417
451- 1000	2270
1001 – 2500	2188
2501 – 3600	2143
3601 – 5500	2118
> 5500	2071

From this table, it is apparent that the base price for wax-additive creosote is R2417.00 per ton. A discount was offered for purchases over 450 tons per annum. For example, a customer purchasing between 3601 and 5500 tons per annum would pay R2118 per ton.
The impugned pricing system appeared to work as follows:
Every three months appellant examined the purchases made by each customer. Appellant then determines a price in terms of its pricing structure by reference to the purchasing volumes of the previous three months. The three month purchasing record was then analysed and each customer was then placed into a category which determined the price to be paid for creosote. Eighty two per cent of customers bought between 1000 – 3600 tons annually, while 5% of customers bought up to 450 ton.

The identification of the relevant market was keenly debated before the Tribunal. This issue became less relevant in the appeal. Suffice it thus to describe the issue by reference to the South African Wood Preservatives Association summary of the need for wood preservatives:
'As with most industrial grown timber, South African pine and eucalyptus are not durable and are subject to attack from fungus and termite. That is why it is necessary to 'treat' timber with wood preserving chemicals if you require confidence in its performance.
The main chemicals used in this country are CCA ('Copper Chrome Arsenate') and creosote. CCA gives the timber a greenish look whilst creosote leaves the timber pole black. Other chemicals used are Boron and TBTOL (Tributylltinoxide Lindane). PCP has been removed from the market-place because of its damaging environmental properties.'
Two wood preservatives appear to be in common use in South Africa, creosote and CCA, together with a few low-volume chemicals. Together they constitute the market for wood preservatives.

Appellant produces a creosote product called SAC K which includes a wax-additive and which is impregnated into the timber usually using a vacuum process. The other major producer of creosote was Suprachem which is part of the ISCOR group (now part of the Mittal Group). The Tribunal rejected both the appellants contentions that the relevant market included all creosote and CCA and respondent's contention that there was a defined market for SAK K. It held that the relevant market was that of creosote. Furthermore it held that appellant enjoyed more than 45% of the creosote market and was therefore dominant in the market.

The Tribunal then held that appellant's volume based discount constituted price discrimination in terms of section 9 of the Act because the practice substantially prevented or lessened competition in the downstream market where respondent was located. It is to the reasoning for this conclusion that we now proceed.

The Tribunal's Determination.
In order to examine the Tribunal's determination, s9 needs to be analysed.

Section 9 provides as follows:

Price discrimination by dominant firm prohibited.

1) An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if –

a) it is likely to have the effect of substantially preventing or lessening competition;

b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

c) it involves discriminating between those purchasers in terms of –

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) payment for services provided in respect of the goods or services.

(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment-

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor, or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including –

(i) any action in response to the actual or imminent deterioration of perishable

any goods

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or

(vi) a sale in good faith in discontinuance of business in the goods or services concerned.'

Once the Tribunal found that the relevant market was for creosote and that the evidence established that appellant's share of the creosote market exceeded 45%, then in terms of section 7 of the Act appellant was presumptively dominant. The Tribunal analysed the evidence and held that, in any event, appellant was, in fact dominant in the relevant market.

The Tribural was then required to examine whether appellant's practice of price discrimination
is likely to have the effect of substantially preventing or lessening competition. The Tribunal interpreted the section thus: '[S]ubsection 9(1)(a) invites the complainant to establish a competitive relevance to his complaint but does not require proof of some standard of harm as contended for by Sasol. When the legislature asks 'is it likely' it is asking us to situate the complaint as one relevant to competition. When it asks 'substantial' it invites us to distinguish of trivial effect from the weightier.'

Applying this approach to the evidence, the Tribunal concluded that the discount structure for the sale of creosote exhibited a material differentiation between the most and least favoured customers. Creosote constituted a significant input cost for firms such as respondent which competed in the treated poles market against rivals who benefited from the price discrimination. Furthermore, the Tribunal concluded that it was likely that the complainant and firms similarly situated in the market as well as new entrants would be less effective competitors as a result of this pricing practice, particularly in a market where small firms, absent price discrimination, could be effective competitors to their larger rivals.

Turning to section 9(1)(b) of the Act, the Tribunal found the concept of 'equivalent transactions' means transactions having the same or similar effects. The Tribunal found that the transactions under scrutiny had the same or similar economic effect. As appellant chose not to avail itself of the defences as provided for in section 9(2)(a) – (c), it was unnecessary for the Tribunal to deal with this subsection.

In summary, the Tribunal concluded:
'[I]n the period in question Sasol was a dominant firm whose conduct meets the test required in establishing prohibited price discrimination. Sasol has not provided a justification for its conduct that meets the requirements of section 9(2). Sasol has thus contravened section 9 of the Competition Act. From the evidence placed before us we are able to conclude that the prohibited price discrimination occurred between April 2001 and August 2004'.

Appellant's Case on Appeal.

Mr Unterhalter, who appeared together with Mr Gotz on behalf of appellant, concentrated his argument on the manner in which the Tribunal sought to interpret section 9(1) of the Act and to apply its interpretation to the facts of the present dispute. Although the concept of 'equivalent transactions' in section 9(1)(b) was debated and appellant did not abandon its appeal regarding the Tribunal's finding of dominance, the meaning and scope of section 9(1)(a) proved to be the critical dispute on appeal.

Mr Unterhalter submitted that section 9(1)(a) did not require proof of actual harm to consumer welfare. To the extent that the Tribunal had characterized his submission as requiring proof of actual harm, he contended that it had misconstrued his argument.

The use of the word 'likely' is subsection (a) of section 9 revealed that the legislature had a probabilistic enquiry in mind. Accordingly, Mr Unterhalter contended that what must be shown was the likelihood of substantial harm to competition, not actual harm to consumer welfare. In his view, the words employed in section 9(1)(a) bore the same meaning as they do in other provisions of the Act most notably in sections 12 and 12A in which the same words are to be found.

When considering mergers in terms of section 12 A the Tribunal is enjoined to determine whether or not the merger 'is likely to substantially prevent or lessen competition'. On the principle that the legislature could not have intended the same words to bear a different meaning in two provisions of the same Act, Mr Unterhalter urged for the acceptance of the conclusion that the enquiry mandated by section 9(1)(a) should be no different from that which the Tribunal engaged when considering the likely effect of a merger on competition. In the context of a merger, the Tribunal does not determine whether the merger should be prohibited by simply asking whether transaction has 'competitive relevance'. In particular, Mr Unterhalter referred to section 12 A(1)(b) of the Act which provides that the Tribunal, when considering a merger must ‘determine whether the merger can or cannot be justified on substantial public interest ground by assessing the factors set out in subsection (3)’. One of the factors to be assessed is the effect that the merger will have on ‘the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive’.

Thus, Mr Unterhalter submitted that the legislature had made it very clear that ‘the ability of small businesses to become competitive’ was a public interest consideration as distinct from being a question as to whether particular conduct was likely to have the effect of ‘substantially preventing or lessening competition’. Accordingly, it followed that the words ‘likely to have the effect of substantially preventing or lessening competition in the Act as employed in section 9(1)(a) could not be read to mean ‘likely to impair the ability of small businesses to become competitive’. The manner in which S12A had distinguished between an examination into the lessening of competition from a public interest inquiry afforded clear support for a similar interpretation of S9(1)(a).

Mr Unterhalter then turned to the manner in which the Tribunal had applied this interpretation of section 9(1) to the evidence. He submitted that the Tribunal had erred in finding that appellant’s volume based discount pricing was likely to substantially prevent or lessen competition. The Tribunal should have found that there was no such likelihood. In particular, it had erred in not recognizing the robust commercial presence of a large number of small firms using creosote, whose presence had been sustained over the period of operation of appellant’s pricing structure. There was, he submitted, no clear evidence of market exit.

Furthermore the appellant’s volume based discount, resulted in an overall (maximum) cost differential of between 3.6% to 3.8% which Mr Unterhalter submitted did not constitute a substantial disadvantage. Accordingly, a commercial disadvantage of this nature was not likely to substantially lessen or prevent respondent’s ability to compete with its rivals. Mr Unterhalter submitted that respondent had the ability to respond to the appellant’s pricing by switching to other suppliers of wood preservatives. In particular, he referred to the evidence given by Mr Foot before the Tribunal in which the following questions were put to him by Mr Unterhalter: ‘What I am putting to you is that you are able and we don’t need to go any further than this for our purposes and certainly for these proceedings, that you are able to sell product as a competitor of Woodlines. You do sell product and you are able to do so in the Western Cape, which appears to be your principal market.’ He answered all these questions in the affirmative.

Mr Unterhalter also referred to a report which was produced by Genesis Analytics (Pty) Ltd on behalf of the appellant and which formed part of the evidence before the Tribunal. In its report, Genesis claimed that there was some thirty-four timber treaters and agents in South Africa, ten of whom offered both CCA and creosote as wood preservative, twelve which offered only CCA and seven only creosote. The Genesis report claimed that small players plan and do on occasion gain access to the volume discounts by engaging in collective purchasing. Smaller players may well enjoy compensating cost advantages when compared to larger competitors, such as a lower cost base. Many competitors who had switched to alternative sources of supply from Suprachem and the various CCA suppliers appeared to be entirely unaffected by appellant's price structure. The Genesis report also claimed that the number of small firms in the market had not declined significantly in the last 5 years.

On the basis of this evidence Mr Unterhalter submitted that it could not be concluded that appellant's volume based discount was "likely to have the effect of substantially preventing or lessening competition" in the market.

Turning to section 9(1)(b) of the Act, Mr Unterhalter submitted that, in evaluating whether transactions are equivalent in terms of section 9(1)(b) of the Act, recognition ought to have been given to the quantity purchased by customers of appellant. He submitted that if the quantities purchased were sufficiently large, resulting in qualitative differences, then a large transaction could not be compared to a small purchase and certainly could not be regarded sensibly as an equivalent transaction. There was nothing in the wording of section 9(1)(b) that would have precluded a consideration of the quantity purchased when assessing whether sales were equivalent transactions.

In this connection, he found support in the judgment in **Platinum Holdings (Pty) Ltd v Victoria and Alfred Waterfront (Pty) Ltd** (case number 428/2003), where the SCA, considering whether the appellants had made out a cause of action under section 9 of the Act, said at paragraph 20 – 21.

> 'An action by a dominant firm cannot be price discrimination unless it relates to sales in what are called 'equivalent transactions', of goods or services of like grade and involves discriminating between purchasers in terms of price. There is no evidence suggesting that the leases to major retailers at the Victoria Wharf are transactions that could in any relevant way be regarded as equivalent to the leases for the kind of small shops occupied by the appellants.

Moreover, the appellants, in the half-hearted comparison they sought to draw between the rental levels for major tenants and for other, smaller, retailers, only brought into the comparison the basic monthly rent per square metre paid by each category of trader without any indication of what a major tenant's turnover rental might be. Even if leases with major stores were to be regarded as equivalent to leases with shops occupying one hundred square metres or so, there is no evidence of what total rental income per square metre the respondents derive from each and therefore no hope that on these facts any kind of price discrimination might be demonstrated.'

Respondent's Submissions on Appeal.

Mr Foot who appeared on behalf of respondent hotly contested appellant's interpretation of section 9(1). He submitted that in the interpretation of section 9, the defences set out in section 9(2) played a crucial role in the interpretation of the whole of section 9. In his submission, section 9(2) represented a closed list of exceptions and had to be seen as a subset of section 9(1), as the exceptions permitted a dominant firm to raise of a series of defences to actions which would otherwise be prohibited by section 9(1). Section 9(1) must therefore be interpreted to encompass at least those matters required to be proved under the reverse onus in section 9(2).

Mr Foot submitted that the purpose of section 9(2)(a) was to provide an economic defence to price discrimination, including the practice of volume discounts. He also contended that section 9(1)(c)(ii) did not appear to discriminate between the forms of discounts given or offered. Accordingly, all discounts, rebates or allowances appear to be treated in the same way. He contended that a volume discount, if treated as a blanket exception to the provisions of section 9(1), would significantly weaken the section and effectively render section 9(2)(a) a nullity. He submitted that section 9(1) was intended to prohibit unjustified volume discounting by a dominant supplier, subject to the other requirements of that section being proved.

Mr Foot argued that the 3.6% to 3.8% difference in total cost occasioned by appellant's pricing policy had a significant impact on respondent's business. In the presence of a highly competitive downstream market, it was probable that a difference of this magnitude would be sufficient to cause those favoured to change their pricing structures in the event of their advantage being withdrawn. Mr Foot submitted that, as respondent operated at a significant disadvantage in the presence of unjustified price differentials, it was unlikely that it could continue to trade indefinitely.

Evaluation.

As already noted, by the time this matter was heard on appeal, the dispute had distilled to a few key questions, the crucial one being the interpretation and application of section 9(1)(a)

It is to the determination of this issue that we now turn.

Section 9(1)(a) of the Act – the Tribunal's approach.

The Tribunal's interpretation of Section 9(1)(a) of the Act can be summarized thus: Chapter 2 deals with prohibited practices. These are to be found in the following sections: section 4 which deals with restricted horizontal practices, section 5 with restricted vertical practices; section 8 with abuse of dominance, and section 9 with price discrimination. Each prohibition contained in ss 4, 5 and 8 deal with two types of prohibited practice; Firstly there are a number of specifically identified acts that are prohibited, such as a number of horizontal practices in terms of section 4(1)(b), the prohibition of minimum resale price maintenance in terms of section 5(2), a number of identified abuses of dominance in terms of section 8(a)(b) and (d) while section 9 specifically prohibits price discrimination by a dominant firm. There are also general categories of acts the effect of which is to undermine competition. These are to be found in ss 4(1)(a), 5(1) and 8(c).

Where a named anti-competitive act is concerned, the onus is imposed upon the complainant only to establish the elements of the act. With regard to section 9, sub paragraphs (1) (a) to (c) provide the elements, all of which have to be proved in order for price discrimination to constitute a prohibited act. Once the dominance of the seller of goods or services is established and the elements of the act are found to exist, price discrimination is prohibited unless one of the justifications listed in section 9(2) can be proved. The legislature intended section 9(1)(a) to create a legal means by which small enterprises in particular, would have a remedy against conduct that might exclude them from access to a market or limit their ability to compete on the merits in that market. For this reason, section 9(1)(a) provides that a complainant may establish a competitive relevance to its complaint which does not require proof of a standard of harm as contended for by appellant. When the legislature asks, is it 'likely' it is asking the court to enquire as to whether the complaint is relevant to competition in the applicable market. When it asks is it 'substantial', it invites the court to distinguish the trivial effect from the weighty.

Mr Unterhalter sought to counter this approach with the argument that each of the provisions in chapter 2 of the Act required that a complainant established a certain 'element'. The requirement that a complainant establish 'the substantial lessening or preventing of competition in the market', should be regarded as one element of the prohibited conduct which had been identified in those sections. Section 9(1) sets out the elements for the prohibited practices that a complaint must prove. This was in no way different, for example, from section 4(1)(a) which required a complaint to prove (a) the existence of an agreement (b) that the agreement was between competitors of the firm and (c) that the agreement had the effect of substantially preventing or lessening competition in the market. Furthermore a test of competitive relevance could not be justified in terms of the precise wording employed by the legislature namely 'likely to have the effect of substantially preventing or lessening competition'.

The question thus arises: does a test of 'competitive relevance' do justice to the wording of the section? The Tribunal sought to bolster its interpretation by reference to comparative law as well as to the purpose of the Act contained in section 2 thereof. In this regard the Tribunal sought to adopt an approach to price discrimination which was not entirely dissimilar to that of the United States. It is to that jurisdiction that we now turn

United States Law.

In the United States the prohibition of price discrimination is contained in the Robinson-Patman Act of 1936. The critical section of the Robinson Patman Act, being section 2(a) thereof, reads thus:

> 'It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and <u>where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly</u> in any line of commerce, <u>or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' (our emphasis).</u>

Section 2(a) of the Robinson Patman Act therefore prohibits the seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality where the effect of discrimination 'may be substantially to

1) lessen competition….in any line of commerce;
2) tend to create a monopoly in any line of commerce;
3) injure, destroy or prevent competition <u>with any person</u> who grants or knowingly receives the benefit of the discrimination, or with the customers of either of them'

There are notable differences between this formulation and that of section 9 of the Act for the wording employed in the Robinson Patman Act clearly is different from that used in section 9. In addition, the Robinson Patman Act is not restricted to dominant firms. The Robinson Patman Act contains a number of express or implied exceptions to the prohibitions contained in section 2(a). Here there are similarities to the defences contained in section 9(2) of the Act. Section 9(2)(a) of the Act, is a provision to section 2 (a) of Robinson Patman contains a cost justification defence whereby it is permissible to employ price differentials that 'make only due allowance for differences in the cost of manufacture, sale and delivery resulting from the differing methods or quantities' in which the commodities are sold or delivered. Thus, a seller may charge different prices for different purchases if this is justified by savings in the seller's cost relating to manufacture, sale or delivery.

In similar fashion to section 9(2)(c) of the Act, a further proviso in section 2(a) of Robinson Patman permits price differences that constitute a response to 'changing conditions effecting the market or the marketability of the goods concerned' such as the deterioration of perishable goods, the obsolescence of seasonal goods or the need to conduct distress sales, under the supervision of a court. Similar to s 9(2)(b), section 2(b) of Robinson Patman creates a defence to liability in terms of section 2(a) by permitting price differentials that represent a good faith effort to meet the competition of one or more other firms. The rule is that firms should be able to lower their prices in order to match the prices of their rivals without violating section 2(a). See **United States** v **United States Gypsum Co.** 438 US 422 at 451 (1978).

Furthermore, the seller can defend itself against allegations that there has been a violation of section 2(a) by contending that the lower price was 'functionally' available to the allegedly disfavoured purchaser even though that purchaser presumably had not taken advantage of it. **FTC** v **Morton Salt Company** 334 US 37 at 42 (1948)

Mr Foot urged the court to adopt the approach of the majority judgment in **Morton Salt**, supra, the textual differences between the Robinson-Patman Act and section 9 notwithstanding. It therefore becomes necessary to examine this judgment in some detail. In **Morton Salt,** the company had sold its Blue Label table salt to customers which included wholesalers and large retail chain stores according to a standard quantity discount system which was available to all. Prices ranged from $1.60 to $1.35 per case. Five companies had bought sufficient quantities to obtain the price of $1.35 per case. These companies could buy in these quantities because they operated large chains of retail stores in various parts of the country. As a result of the lower price, they had been able to sell Blue Label table salt at cheaper prices than wholesale purchasers could reasonably sell the same brand of salt to independently operated retail stores, many of whom competed with the local outlets of the five chain stores.

The Federal Trade Commission had issued a cease – and – desit order against respondent to terminate its alleged unlawful price discrimination. The dispute was eventually heard by the United States Supreme Court. Of particular relevance to the present case is the Supreme Court's approach to section 2(a) of the Robinson Patman Act. The Supreme Court held that "the Robinson Patman Act was passed to deprive the large buyer of such advantages except to the extent that the lower price could be justified by reason of a seller's diminished costs due to quantity, manufacture, delivery or sale, or by reason of the sellers good faith effort to meet the competitors' equally low price'. (at 43) The majority then went on to say: 'we think that the language of the Act and the legislative history showed that Congress meant by using the words 'discrimination in price' in S2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods that he had charged one or more of the purchaser's competitors' (at 45).

The majority of the court held that, in determining the effect of price discrimination, the 'Act was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots'. (at 49). It went on to hold that only a reasonable possibility of harm to competition needed to be shown to trigger the operation of the Act. The majority held that

> 'it would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is "a reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell these goods to the competitors of these customers.' (at 50).

The majority decided ‘this showing’ was sufficient to justify ‘our conclusion that the Commission’s finding of injury to competition were adequately supported by evidence’. (at 50 – 51). The minority judgment of Jackson J cautioned against the adoption of this test :
The Robinson Patman Act itself, insofaras it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.
On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings affected by quantity sales, to give a discrimination advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods, made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should be, be passed down the line to the consumer. I think the Court’s disposition of this case pretty much sanctions an obliteration of the difference between discounts which the Act would foster and those it would condemn’ (at 58-59).

The textual differences between the Robinson-Patman Act and section 9 notwithstanding, both respondent and the Tribunal adopted the approach that section 9 of the Act was passed with the same concerns and purpose that motivated the enactment of the Robinson Patman Act in 1936 and was articulated by the majority of the US Supreme Court in **Morton Salt**.

Small business and section 2 of the Act.

A second important part of the Tribunal’s approach to S9(1)(a) was to have recourse both to the preamble to the Act and section 2(e) thereof, in order to emphasise that a purpose of the Act was the promotion of small business. In this regard the Tribunal referred to the explanatory memorandum to the Act which set out the intention of the legislature as being, **inter alia**, to support small and medium sized enterprises through the instruments and principles of the Act. The Tribunal found that

> ‘the legislature prescribed price discrimination perpetrated by dominant firms because of the threat it poses to its victims, these being a competitive and accessible market structure and the small firms that animate it, potentially robust, though still slender,

> saplings (sic) that will not take root in the face of treatment that is manifestly inequitable relative to that accorded these better resourced competitors. This then is why section 9 has been carved out of the general abuse of dominance provisions: it is uniquely concerned with the structural impact of abuse of dominance and it is recognized that its victims are most likely to be small customers'.

In this way, the Tribunal employed the preamble, and section 2(e) of the Act to give interpretative content to section 9(1)(a) and render the latter congruent with one of the purposes of the Act, namely the promotion and protection of small and medium sized enterprises. Hence its test of 'competitive relevance' was designed to construct as a low threshold for small firms to negotiate where a dominant firm was engaged in price discrimination.

It is to these two considerations that we now turn.

The reliance on Robinson Patman Act.

The enforcement of the provisions of the Robinson-Patman Act fall under two categories, primary line enforcement and secondary line enforcement. Most of the controversy concerning the Act appears to relate to secondary line enforcement. Primary line enforcement addresses discrimination that threatens to injure competition between sellers. The classic case arises where a seller charges a high price in the geographic market where it has monopoly power and a below-cost price in a geographic market where it faces competition. The seller can use the excess profits from the market in which it has monopoly power to subsidize its losses in the competitive market, a strategy that may allow it drive out competitors and acquire monopoly power in that market as well.

Secondary line enforcement addresses discrimination that threatens to injure competition between buyers. In the classic case, a large buyer induces a price reduction that is neither justified in terms of cost savings nor made available to smaller competing buyers. The large buyer uses its unjustified advantage to deprive the disfavoured buyers of business or profits, driving some of them out of business. If the evidence meets the requirements of the Act and there is no defence which is shown to exist, both the discriminating seller and the inducing buyer are liable. (see section 2(a) and 2(f) of the Robinson-Patman Act).

In **Brooke Group Ltd.** v **Brown and Williamson Tobacco Corporation** 509 US 209 (1993) at 224 the Supreme Court ruled that primary line discrimination cannot violate the Robinson-Patman Act unless it meets the requirements for predatory pricing under the Sherman Act, namely below-cost pricing and recoupment. The court held that primary line enforcement has the same objective as other anti-trust laws, that is to promote consumer welfare and not to engage in the protection of small business as the criterion for the evaluation of its primary line precedent and for the fashioning of legal rules for the primary line defence. (at 221). Secondary line enforcement has frequently targeted relatively small sellers who find difficulty in defending themselves against price discrimination. Secondary enforcement can therefore create a more level playing field, a point emphasized in **Morton Salt,** supra.

Significantly, in **Coastal Fuels of Puerto Rico**, **Inc** v **Caribbean Petroleum Corporation** (79 F. 3d 182 at 191 – 193 (1st Cir), cert denied 117 S. Ct 294(1996)) the First Circuit concluded that the judgment in **Brooke group**, supra did not establish that actual injury to competition must always be shown in secondary line cases and, accordingly, did not by implication overrule **Morton Salt,** supra.

In the **American Antitrust Institutes Working group on the Robinson-Patman Act** (July 1, 2005) the following comment appears with regard to legislative reform of secondary line enforcement:

> 'We do not believe it will be fruitful or constructive for the Commission to recommend repeal or radical revision of the Robinson Patman Act. Instead, we recommend that the Commission propose three major forms. These changes would bring the Act more in line with the other anti trust laws without abandoning its fundamental purpose. Indeed, they would refocus secondary line price discrimination cases on their original objective – protecting small firms from price differentials that

reflect a large firm's buying power rather then cost savings. More generally, they would put the Act on a sounder economic footing, differentiating more clearly between anticompetitive and pro competitive uses of the Act while preserving its ability to halt discrimination that poses a substantial and unjustified threat to small business or consumers.' (at 7).

At this point, it is useful to extend the examination of comparative law to the European Union. Article 82 (2)(c) of the EC Treaty gives as an example of an abuse of dominance: 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.'

Article 82(2)(c) appears to be directed at discrimination which distorts competition in a downstream market, as a consequence of which the purchaser of a product of a dominant firm is the subject of discrimination and thereby is unable to compete effectively with other undertakings at its level of the market. See **Corsica Ferries Italia Srl** v **Corporazione dei Piloti del Porto di Genoa** 1994] ECR I -1783; **Whish Competition Law** (5^{th} ed) at 710 - 721.

Significantly, in the case of **Hoffmann-La Roche and Co AG** v **Commision of the European Communities** [1979] ECR 461 the European Court held that for behavior to be abusive within the meaning of Article 82 it had to have 'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.' (at para 89) The court held that it was unlawful for a dominant undertaking to tie a customer to an exclusively purchasing commitment and that

'The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies either under the terms of the agreements concluded with these purchases or unilaterally, a system of fidelity. Rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements - whether the quantity of its purchasers be large or small – from the undertaking in a dominant position'. (at para 89)

This proposition was developed by the court in **NV Nederlandsche Banden Industrie Michelin** v **Commission** [1983] ECR 3461 at para 70 where the court held:‘

> ‘Article 82 covers practices which were likely to affect the structure of a market, where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders performance, have the effect of hindering the maintenance or development with the level of competition still existing on the market’.

Although these **dicta** dealt with different forms of pricing disputes than that confronting this court, the conceptual approach may be helpful in the interpretation of section 9(1)(a) and in particular, the question of a ‘substantial preventing or lessening of competition’. These **dicta** were articulated within the context of an approach to competition law which certainly dominated the jurisprudence of the European Union until recently, namely that competition laws protect the competitive structure and dynamic of the market. The legislation protects openness of and access to markets, and the right of market actors not to be fenced out by dominant firm strategies that are not based on competitive merits.’ (Eleanor Fox ‘What Is Harm To Competition? Exclusionary Practices and Anti Competitive Effect’ (70) **Anti Trust Law Journal** 372 at 392). Fox contends thus: ‘Article 82 still prohibits abuse of dominance, not just its creation and maintenance. I find no reason to believe that EC Law will abandon its concern that dominant firms may use their power to appropriate advantages for themselves at the expense of competitors, nor to abandon its vision of harm to competition that regards open market, access on the merits, and <u>safeguarding of the market mechanism as mainstays of healthy competition’</u>. (at 405) (our emphasis).

Viewed accordingly, the Tribunal, was correct to emphasise the importance placed by the legislature on the prohibition of price discrimination as set out in section 9 of the Act. This legislative purpose supports an interpretation which prevents the erosion of the competitive structure of the South African market. This approach, as seen above, also finds comparative support. Further, the fact that price discrimination was afforded a specific treatment and not placed in section 8 under the broad doctrine of abuse of dominance is significant. Manifestly, the Act is concerned with actions by a dominant firm, as defined, which charges discriminatory prices to purchasers of its goods and services, where the effect of such practice is likely to substantially prevent or lessen competition in the market under consideration.

In this regard the remarks of the chair of the Korean Competition Advisory Board, Kyu-UcK Lee (cited by Fox at 407) are of particular relevance: ' In a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are used and protected through import restrictions. This will give rise to public dissatisfaction since the game itself has is not been played in a socially acceptable, fair manner'.

These policy considerations notwithstanding, section 9(1)(a) must be interpreted in terms of the words employed by the legislature to give effect to this purpose. The wording of section 9(1)(a) may be open textured but a court is still required to engage with the text and justify the meaning. As Mr Maenetjie, who appeared as **amicus** upon the invitation of the Court and to whom the court is indebted for his assistance, contended, there is nothing in the text of section 9 which shows that the purpose of the section was to protect small enterprises as opposed to protecting the competitive process or, in the words of the Tribunal "the underlying competitive structure of the market" He submitted that it was doubtful that section 2 of the Act which sets out the purposes of the Act justifies departure from the ordinary meaning of the words used in section 9(1)(a).

Section 9(1)(a) manifestly does not require proof of actual harm to consumer welfare. The use of the word 'likely' connotes a probabilistic inquiry. The key question is probalistic of what? Mr Unterhalter relied on the minority judgment in **Morton Salt** to answer this question, namely the test to be employed was a reasonable **probability** of harm to competition.

But the majority judgment applies a test, which as already noted, is sensitive to the purpose of the Act in general and section 9 in particular. Once a supplier has been proved to be dominant in the market and engages in discriminatory pricing practice, the test is whether there is a "reasonable possibility" in that may be adversely affected by a practice under which the dominant firm sells its goods at a cheaper price to some customers at the expense of others. By adopting this interpretation of section 9(1)(a), an integrity can be accorded to the words employed by the legislature and the result is to give a tangible effect to the objectives of section 2 of the Act; in particular the protection of small and medium sized enterprises, as well as the treatment that is given in the Act to the prohibition of price discrimination. The evidence relevant to section (1) (a).

The evidence relevant to the application of section 9(1)(a).

The critical piece of evidence which respondent presented to persuade the Tribunal that the appellant's discount schedule was likely to substantially prevent or lessen competition was the effect of this practice on respondent's own cost structure. Respondent asserted that, because it did not obtain the price enjoyed by the largest volume purchasers of creosote, its cost was some 3.5% to 4% higher than it otherwise would be. It would appear to be common cause, particularly as it emerges from the evidence of appellant's expert witness, Mr Malherbe, that respondent did suffer an overall increased cost of between 3.6% to 4% as a result of the difference between the price at which it procured creosote compared to prices charged to its larger rivals.

Furthermore, respondent contended that there was evidence that, in the poles market in which entry values were low, this price differential contributed to a limitation of entry of new and small entrants and hampered their ability to survive.

The Tribunal's determination placed considerable emphasis on the evidence, as to the manner in which the 'twilight treaters' had been dealt with by appellant. Twilight treaters are small firms which are not able to purchase creosote by way of a lorry load as is done by both respondent and larger customers. They purchase creosote in drums supplied by retailers who acquire supplies from appellant. The Tribunal concluded that appellant's large customers had placed pressure on appellant to increase the price of drum loads in order to limit access as well as the growth of these micro producers. Accordingly, it was contended by respondent that the practice, at the very least, provided a ground for a reasonable inference that the large customers had a clear interest in suppressing competition from established small producers. A price differential had been employed to ensure that this downstream market was controlled by the large producers and that entry barriers should be high. Accordingly, the practice of price differentials had an effect on the entry into the market and thus affected competition.

This conclusion was, to some extent, supported by the evidence of Mr van Wyk manager, fuel manufacturing, for appellant. The following paragraph from his evidence under cross examination is instructive:
'A twilight treater is a guy that puts a drum in his backyard, he buys some creosote and he dips a product and he sells it as a treated pole. So in one year the pole rots and then the whole industry's name is down the drain. So they are trying to get those guys out of the industry, but then the industry came to us and said but you're promoting the twilight treaters, because you're selling in drums to the co-ops. So the twilight treater can come back and buy from the co-op and treat, if you can call it treat it or dip it or whatever, and sell it against our customers. And they requested us to increase the price drastically so that it doesn't make it economical for that buy (sic) to buy creosote. It's too expensive for him to do his twilight treating. So that's one reason the market requirement or they asked us to do it. It is to prevent the twilight treaters to be active in your market.'

This appeared to amount to a concession that appellant was prepared to assist its large customers by discouraging micro-producers of downstream products. Later in his evidence, Mr van Wyk testified that the twilight treater is actually an illegal operator: 'They operate against all the laws, because SABS 0255 is a legal requirement at this point in time. So actually they are against the law. So it's not that we are trying to get them out of our prices. They shouldn't be there. They are not allowed to be there'. However, when questioned by the Chair of the Tribunal, Mr van Wyk conceded that there was a request from the industry that 'the products that we sell in drums' should be subjected to an increased price.

This reaction by appellant against the twilight treaters notwithstanding, figures placed before the Tribunal as provided by the South African Wood Preservative Association indicated the existence of a fairly robust and diverse market. From this information it appears that there were more than 30 timber treaters and agents in South Africa, of which ten offered both creosote and copper chrome arsenate ('CCA'), twelve of which offered CCA only and seven only creosote. The report also indicated that ten firms out of the approximately 34 fell into the smallest category of purchasers of creosote but had continued to do business throughout the relevant period.

Mr Malherbe, of the Genesis Group, was questioned by Mr Unterhalter as to the impact on competition in the downstream market in which respondent operated. He testified as follows:

> 'Well in the research that we did for this paper, we spoke to a number of competitors to Nationwide and indeed we spoke to 8 competitors, all of whom said that they had served or sold in or marketed to the viticulture industry. And in fact, it's not necessary to define competition in this market to limit yourself to the viticulture industry, but we thought this was appropriate, and this was a large number of firms, we thought. And what was interesting was that 4 of them offer both CCA and creosote poles, 2 of them offer CCA alone and 2 of them offer creosote alone.
>
> Certainly that particular subset of firms indicated to us that there was a fair amount of competition in the market. And then the SAWPA website itself lists some 34 timber treaters and agents in South Africa and we understand that, in fact, the total number of such treaters recognized by SAWPA is, in fact, significantly larger. This is also I think an indication that there is a large degree of competition in the market and Mr Foot, in his affidavit, I think characterised this market as a competitive market.'

There was an assertion from Mr Foot that smaller treatment plants have exited the market. However, the evidence to support an exit pattern from the market was not at all clear and does not justify the assertion. For example, one firm cited as an illustration of a compelled exit, Plett Timbers had switched from Creosote to CCA and thus was not forced out of the market by reason of appellant' s price structure In another case, Klaradyn, the change in purchasing pattern had been caused by a change of ownership, and in the case of Outeniqua, the firm had relocated its premises there was no proof that appellant's pricing structure had been the cause thereof. Dr Roberts, respondent's expert conceded that he had no evidence as to why firms have left or 'whether they've left or for what reason'.

The role of Suprachem.

The inquiry into the effect of any eradication of appellant's price discount system does, in part, depend upon the role and behaviour of its competitors, the largest of which was Suprachem.

Respondent argued before the Tribunal that the relevant market was the wax additive creosote produced exclusively by appellant. This argument was rejected by the Tribunal which held that the relevant market was creosote (as opposed to wax additive creosote) Given this now uncontested finding, there was another producer, Suprachem.

The following table produced by appellant's expert, Genesis with regard to changes in sales figures for creosote, CCA and another product called Boron between 2001 – 2003 is helpful in assessing the market share of the two large producers:

Sasol's Changes in Sales Figures (in 000 m3)

	CCA	**Boron**	**Suprachem**	**Sasol**
2001	133	2	163	210
2003	190	7	184	152
Absolute Change	57	5	21	-58
Percentage Change	43%	250%	13%	-28%

Appellant used these figures to show that there had been a rise in both the demand for CCA (43%) and for creosote supplied by Suprachem (13%) whilst its own product had suffered a 28% decline over the same period.

These figures were treated with some scepticism by the Tribunal:

'Not all of the Suprachem/ICC were disclosed in discovery, and it seems that Sasol estimated the export figures for 2000 and 2001 based on the proportion of creosote that Suprachem/ICC exported in 2002. Sasol argued that export sales were removed from these "estimated" sales figures for 2000 and 2001. We agree with the complainant's contention that, because we do not have hard evidence of what Suprachem's 2000 and 2001 export creosote exactly were, there is no way to deduce exactly what Suprachem's local sales of creosote were in 2001'.

This conclusion may well be correct with regard to the determination of whether appellant was the dominant firm in the market. However the dispute about growth in the market, notwithstanding the table reveals the existence of an extremely significant supplier of creosote other than appellant.
Mr van Wyk told the Tribunal that he had experience of customers who had bought SAC K(appellant's creosote product) and then moved to Suprachem. He explained this decision as follows:

> 'Yes, because what is also interesting is because of the addition of wax, we thought that the market would really move in that direction, but it didn't happen. If you look at the production of SAC K, the input cost is more expensive than the SAC 100 because of the wax component. … But if you look at the market share of SAC K and SAC 100 we didn't see the grow (sic) into the SAC K market because our biggest customers still buy both products. So its not that the market sees it as being the best product and everybody is going for SAC K'.

Dr Roberts was cross-examined about Suprachem's role in the market. He conceded that Suprachem could attract customers away from appellant and that appellant had indeed lost market share. His evidence was directed to the effect that appellant had remained a price setter and appellant's market price was, in his view derived from profitability as opposed to 'volumes and absolute terms'. But his evidence provided no indication as to how Suprachem would respond, in the event that appellant could no longer pursue its discount policy.

It appeared from the evidence of both Mr van Wyk and Dr Roberts that Suprachem's present pricing policy had no relevance to the formulation of appellant's pricing policy. Mr van Wyk sought to explain appellant's pricing policy. Mr van Wyk testified that in 2001 appellant announced that it would switch from utilizing the tar feedstock generated by the production process at its Sasolburg plant to the feedstock produced at its Secunda plant. The Sasolburg plant was designed to produce petrol and diesel from the gas stream and not from the raw tar stream. The process generated 50 000 tons of the tar feedstock annually. By contrast, the Secunda plant was designed so that the total tar stream could also be converted to a diesel stream. An annual tar stream of 50 000 tons is produced, all of which was to be utilized in the production of liquid fuel. The implications of this development for this case was that the Secunda plant was not set up to use the tar stream to produce tar based products like creosote. Further, as liquid fuel could be produced from this tar stream, the value to be obtained from petrol and diesel had to be compared to the potential return on creosote. Thus, within a three to four year period tar by-products would be priced at the fuel equivalent price.

It appeared from Mr van Wyk's evidence that appellant knew more or less 'what a customer's consumption would be and then he is given a price applicable to the volume on the pricing list. This price will apply for the following three months. Mr van Wyk then went on the explain 'After three months we re-evaluate the price and we see those who fall in that bracket. If he does, he carries on, otherwise you make adjustments. So every three months he sets the price, his future price for three months at least and then you re-evaluate the price. So there is an incentive for him to stay with you to achieve the low price for the short term at least, not in one year or we determine his price. He knows for the next three months that that will be his price, if he achieves the volumes'

When he was asked by the Tribunal 'if a customer says Suprachem has given me a better price; can you beat it, what do we say then? Mr van Wyk answered somewhat surprisingly: 'We don't deviate from this price, because we feel it is not ethical because it is an open policy. We are transparent So it's a choice for the customer'.

However credible that answer, there is little evidence on the record as to the conduct of Suprachem. Mr Foot urged that we assume, given the publication of appellant's price list, that Suprachem would conform its conduct and pricing policy to that of appellant. No evidence was, however, provided which indicated the manner in which Suprachem conducted or would conduct its pricing policy. Furthermore, Mr van Wyk testified that the total domestic market for creosote was some 32 – 33 000 tons, and that it was possible for Suprachem to produce some 40 000 tons of creosote. Dr Roberts conceded that 'Iscor is going to move or can move much more into creosote production'. Accordingly, Suprachem would have the ability to procure an additional segment of the market if appellant's pricing policy were prohibited. But there is no evidence as to how it might behave in the event that appellant could no longer maintain its discount policy.

Conclusion.

It is now possible to consider the application of section 9(1)(a) to the available evidence. Given the interpretation which this Court has placed upon section 9(1)(a), subject to one important qualification, the question is whether there is a reasonable possibility that appellant's pricing structure is likely to have a substantial effect on competition in the downstream market where respondent is located. The qualification concerns the evidence required to answer the question. The majority judgment in **Morton Salt**, supra appeared to dispense with the need for independent evidence to show that 'which was self evident' (**Morton Salt**, supra at 50). This conclusion may well have been reached on the basis of the facts of the case. **Morton Salt** was a case about alleged foreclosure of small wholesalers. In essence, independently operated retail stores could purchase Morton Salt products from the big five at prices cheaper than those which could ever be offered by wholesalers. The wholesalers, as a consequence, could not have earned any margin on the sale of Morton Salt products and would <u>necessarily</u> have been forced to exit the market.

The determination of a reasonable possibility that appellant's pricing structures is likely to effect substantially the competition in the downstream market cannot rest on an inherent effect of appellant's pricing policy without any recourse to evidence which could demonstrate that the impugned is capable of having, or likely to have an anti-competitive effect in the relevant market.

This approach to evidence has already been set out by this Court, albeit within the context of s 12 A(1), in **Mondi Ltd/Kohler Cores & Tubes** v **Competition Tribunal** (2003) l CPLR 25(CAC) at para 38 as follows:

> 'The test is not whether a merger necessarily prevents or lessens competition but whether it is likely substantially to so prevent or lessen competition. As this Court observed in **Schumann Sasol) (South Africa) (Pty) Ltd v Price's Daelite (Pty) Ltd…**the decision required by S12A(1) must be made on evidence which is available to the Tribunal. In other words, the Tribunal cannot base its decision upon 'speculation of a kind which cannot be attributed to any evidential foundation placed before the Tribunal'. But the prohibition against unjustified speculation should not be confused with the need for a predictive judgment. The section enjoins the Tribunal to forecast a likely possibility; that is, it makes

a predictive judgment, based on evidence which has been placed before it'.

The evidence supports the conclusion that the respondent is able to compete and continue to operate in the relevant market. This conclusion was confirmed by Mr Foot. It was also clearly shown that the relevant market was one where small firms can effectively compete against their large rivals. There is however insufficient evidence as to the nature of the cost structures of these small firms which presently compete in the market, evidence which would indicate the impact, if any, of the discount structure upon their ability to continue to operate as effective competitors. There was no evidence as to the manner in which small firms seek to adapt to the market and inconclusive evidence as to whether there has been any exiting from the market, pursuant to the operation of appellant's discount structure. Furthermore, there is insufficient evidence as to the nature of Suprachem's operation, its pricing policy and its capacity or willingness to respond to a changing pricing structure, evidence which is relevant to engaging in the probabilistic enquiry mandated by section 9(1)(a) in the event that appellant was prevented from continuing to employ its present pricing structure.

In summary, the only clear evidence made available to the Court reveals that there is an increased cost burden imposed upon respondent, in the order of between 3.6% to 4% as a result of the discount policy employed by appellant. Were this Court to have been provided with evidence as to the operations of the remaining small competitors in the market, the nature and scope of the Suprachem operation, it may have been able, on a balance of probabilities, to conclude that there is a reasonable possibility that appellant's pricing structure is preventing or lessening competition from taking place within the market in which respondent operates.

Mr Unterhalter submitted that, were the price structure presently operated by appellant to be set aside as being a violation of section 9 of the Act, the average price of creosote in all probability would increase as appellant would seek to recoup its loss of profit that would flow as a consequence of supplying smaller purchasers at the lower price. Accordingly, he submitted that it would be against the welfare of the consumers for the Tribunal's decision to be upheld. Consumer welfare is of paramount concern in the context of competition law. In this case this Court, possesses almost no information regarding Suprachem, or the behaviour of respondent's competitors and the subsequent impact on the downstream market. Mr Unterhalter submitted that the Tribunal's decision may enhance a possibility of collusion between Suprachem and appellant; on the other hand, it is possible that the pricing structure would remain similar to that which presently operates and accordingly not prove to be to the detriment of the consumer.

On the evidence, this Court is not able to conclude that there is a reasonable possibility that competition has been significantly prevented or lessened. Putting the evidence in the best possible light for respondent, respondent suffers a disadvantage by way of an additional cost of purchases of creosote pursuant to appellant's pricing policy. However, competition law does not protect the competitor, it protects competition. Evidence which goes no further than suggesting that one competitor may be prejudiced is insufficient to bring the impugned conduct within the scope of section 9(1)(a).

It is to be regretted that this case was litigated without the benefit of the Competition Commission and its investigative powers. In the result, the only evidence placed before the Tribunal was that of the respondent which clearly had limited access to the industry. The evidence produced does not justify the conclusion reached by the Tribunal.

Our decision does not seek to minimize the particular weight which the legislature has given to price discrimination nor to the need to ensure that small and medium businesses are able to use the Act to protect their ability to compete freely and fairly. When the evidence is read holistically, however, it appears that the Tribunal based its conclusion that appellant's conduct substantially prevented or lessened competition almost exclusively on an evidentially unjustified conclusion that the price differential assists in limiting the entry of new and small entrants and their ability to thrive. There was no reliable evidence regarding small business in the creosote market nor of the manner in which appellant's major competitor would react to an altered price structure.

For these reasons, the requirements of section 9(1)(a) of the Act have not been met and the complaint must therefore fail. It is unnecessary to canvass the further question relating to section 9(1)(b). The appeal succeeds. The Tribunal's determination is set aside and replaced with the following: The complaint is dismissed.

Mr Foot represented respondent in what is an important case for competition law. Mr Unterhalter did not therefore press the issue of costs and accordingly there will be no award as to costs.

DAVIS JP

. **SELIKOWITZ JA & MHLANTLA AJA concurred.**