IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO.: 78/CAC/Jul08
CT CASE NO.: 103/CR/Dec06

In the matter between :

CLOVER INDUSTRIES LIMITED	**FIRST APPELLANT**
CLOVER SA (PTY) LIMITED	**SECOND APPELLANT**

and

THE COMPETITION COMMISSION	**FIRST RESPONDENT**
PARMALAT (PTY) LIMITED	**SECOND RESPONDENT**
LADISMITH CHEESE (PTY) LIMITED	**THIRD RESPONDENT**
WOODLANDS DAIRY (PTY) LIMITED	**FOURTH RESPONDENT**
LANCEWOOD (PTY) LIMITED	**FIFTH RESPONDENT**
NESTLÉ SA (PTY) LIMITED	**SIXTH RESPONDENT**
MILKWOOD DAIRY (PTY) LIMITED	**SEVENTH RESPONDENT**

AND

CAC CASE NO.: 81/CAC/Jul08
TRIBUNAL CASE NO.: 103/CR/Dec06

LADISMITH CHEESE (PTY) LTD	**APPELLANT**

and

THE COMPETITION COMMISSION OF SA	**FIRST RESPONDENT**
CLOVER INDUSTRIES LIMITED	**SECOND RESPONDENT**
CLOVER SA (PTY) LTD	**THIRD RESPONDENT**

PARMALAT (PTY) LTD	**FOURTH RESPONDENT**
WOODLANDS DAIRY (PTY) LIMITED	**FIFTH RESPONDENT**
LANCEWOOD (PTY) LIMITED	**SIXTH RESPONDENT**
NESTLÉ SA (PTY) LIMITED	**SEVENTH RESPONDENT**
MILKWOOD DAIRY (PTY) LIMITED	**EIGHTH RESPONDENT**

Judgment
DELIVERED ON : 12 November 2008

Patel JA:

INTRODUCTION

[1] On the 19th September 2007, we heard an appeal from Clover Industries Limited (first appellant), Clover SA (Pty) Limited (second appellant) and Ladismith Cheese (Pty) Limited (third appellant). I shall refer to all three parties collectively as the appellants. When I refer to the first and second appellants, I shall collectively refer to them as Clover. The third appellant will be referred to as Ladismith. I refer to the other respondents where necessary by their abbreviated names as cited in these proceedings.

[2] The appellants appealed against the dismissal by the Competition Tribunal ("Tribunal) of their first *in limine* point. Clover also brought a review application challenging the dismissal by the Tribunal of these *in limine* points. I shall further advert to these *in*

limine points herein below. Both the appeal and the review applications were dismissed with costs, such costs to include costs of two counsel where two counsel were employed. The court undertook to furnish reasons for the dismissal later. These are the reasons.

[3] On 7 December 2006, the First Respondent, the Competition Commission ("the Commission") referred the following complaints about alleged prohibited practices to the Tribunal in terms of Section 50 of the Competition Act 89 of 1998 ('the Act"), namely :

(a) Price fixing through information exchange in contravention of Section 4 (1) (b) (i) of the Act.

(b) Clover, Parmalat, Woodlands and Nestle are party to milk and exchange and supply agreements which constitute contravention of Section 4 (1) (b) (i) or Section 4 (1) (a) of the Act.

(c) Clover and Parmalat are party to exclusive supply agreements with milk producers which constitute a contravention of Section 8 (d) (i) , Section 8 (c) or Section 5 (1) of the Act.

(d) Woodlands and Milkwood engaged in fixing of retail prices and market allocation in contravention of Section 4 (1) (b) (i) or Section 4 (1) (b) (ii) of the Act.

(e) Clover and Woodlands engaged in direct or indirect fixing of prices or trading conditions through price and volume arrangements in contravention of Section 4 (1) (b) (i) of the Act.

(f) Clover, Parmalat and Woodlands engaged in a surplus milk removal scheme in contravention of Section 4 (1) (b) (i) of the Act.

[4] Before the Tribunal, Clover raised three points *in limine* in respect to complaints 1, 2, 3 and 5 whilst Ladismith made common cause with Clover on the first point *in limine*. All three *in limine* points were argued before and dismissed by the Tribunal.

THE APPEAL - THE FIRST POINT *IN LIMINE*

[5] The appellants contended before the Tribunal as they did before us, that the complaint underlying the complaint referral in this matter was submitted to the Competition Commission (the "Commission") as a complaint in terms of Section 49B (2) of the Act by way of a letter from a dairy farmer, a Mrs Malherbe which embodied the complaint received by the Commission on or about 10 June 2004. According to the appellants' such complaint was required to be investigated within one year, the time period stipulated in Section 50 (1) of the Act. On expiry of the one year period , the Commission must be regarded as having issued a notice of non-referral of such complaint in terms of Section 50 (5) of the Act. Accordingly, the Commission was not lawfully entitled

to refer the complaints embodied in Malherbe's letter to the Tribunal for determination. In essence the appellants argued that the Commission referred the complaint outside the time frames provided for in the Act and as a result the matter has prescribed.

[6] The Commission, whilst denying that they received any letter directly from Mrs Malherbe, argued that, at best, Malherbe's letter was a mere catalyst for a full investigation initiated by the Commission into the milk industry in South Africa. In other words contrary to the contentions that the Commission acted in terms of Section 49B(2), the Commission had 'self initiated' an investigation in terms of Section 49B (1) and hence and in terms of Section 50 (1) the Commission was not time barred.

RELEVANT LEGISLATIVE PROVISIONS

7.1. In section 1 (1) (iv) *complainant* is defined to mean a person who has submitted a complaint in terms of section 49B (2) (b).

7.2. Section 49B – Initiating a complaint

(1) The commissioner may initiate a complaint against an alleged *prohibited practice*.

(2) Any person may –

(a) submit information concerning an *alleged prohibited* practice to the Competition Commission, in any manner or form; or

(b) submit a complaint against an alleged *prohibited practice* to the Competition Commission in the *prescribed* form.

(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.

(4) At any time during an investigation, the Commissioner may designate one or more persons to assist the inspector.

7.3. Section 50 – Outcome of complaint

(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must –

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a *prohibited practice* has been established; or

(b) in any other case, issue a notice of non-referral to the *complainant* in the *prescribed* form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2) (a), it –

(a) may –

(i) refer all the particulars of the complaint as submitted by the *complainant*;

(ii) refer only some of the particulars of the complaint as submitted by the *complainant*; or

(iii) add particulars to the complaint as submitted by the *complainant*; and

(b) must issue a notice of non-referral as contemplated in subsection (2) (b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

(4) In a particular case –

(a) the Competition Commission and the *complainant* may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph (a), the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

[8] In my view, on the first point *in limine*, the Tribunal has meticulously analysed the legislative framework within which the

complaint is located. Similarly the Tribunal's finding that Mrs Malherbe had no intention to be a complainant in terms of Section 49B (2) (b)**,** based as it is on a detailed analysis of the so-called complaint**,** and the circumstances under which it was received by the Commission cannot be faulted. The Tribunal's conclusion is consistent with both the letter and the spirit of Section 49B and Section 50 of the Act. The Tribunal has set out the letter in full together with a translation in English. I am in agreement with the Tribunal that the Malherbe letter constituted nothing more than the submission of information and therefore the time frames referred to in Section 50 (2) do not apply. The Tribunal was correct in coming to the conclusion to which it did without relying on the supplementary affidavits wherein the intention of Mrs Malherbe is set out. I similarly do not find it necessary to decide on the admissibility of the further affidavits on which the Commission relies for its contention that Mrs Malherbe did not wish to be a complainant in terms of the Act.

[9] Clover has classified the letter written by Mrs Malherbe to the Commission as a complaint in terms of Section 49B (2) on the basis that Section 49B of the Act contained as it is in Part C ("Complaint Procedures") of Chapter 5 ("Investigation and Adjudication Procedures") of the Act which is headed "initiating a complaint". In my view these provisions of the Act are designed to enable information alternatively complaints of uncompetitive behaviour to be investigated by the appropriate authorities and where a case is found to be present to be referred to the Tribunal for determination. It cannot be gainsaid that Section 49B is the only provision in the Act which gives imprimatur for the process of

investigation consequent upon a complaint to be commenced by the Commission alternatively the commission itself initiating a complaint against an alleged prohibited practice.

[10] Thus**,** as far as the first *in limine* point is concerned, the issue is whether what was submitted to the Commission by Mrs Malherbe when she accused the milk processors of "kartelvorming", constituted an allegation of a prohibited practice and whether the Commission was obliged to investigate and in so doing bring the investigation process to a conclusion within one year. The further issue is whether any information of any prohibited practice necessarily translates not only into an obligation on the part of the Commission to investigate the matter but to do so within one year.

[11] In my view¸ Clover's submission that the only difference between subsection (a) and (b) of Section 49 (B) (2) is that subsection (a) provides for an informal manner of making a complaint to the Commission (in any manner or form) whereas subsection (b) provides a formal manner for doing so in the prescribed form is not consistent with the overall scheme and purpose of the Act. I am mindful of the fact that this Court in *Glaxo Wellcome (Pty) Limited and Others v National Association of Pharmaceutical Wholesalers and Others* Case No 15/CAC/Feb 02 stated that:

> "Section 49B provides for the initiating of a complaint. This may be done in any manner or form or in the prescribed form. The wording of Section 49B is worth noting in that it is not prescriptive as to how a complaint may be initiated. This theme runs throughout the complaint procedures, the object being to enable complaints to be lodged without the

> need for procedures that are too technical and/or formalistic."

The case is however distinguishable in that irrespective of the manner and the language in which the complaint served before the Commission, the party who completed the document was clearly intent on being a complainant and hence a party to the litigation .

The Tribunal was correct when it stated:

> "However, our tolerance of informality as to the manner in which a particular complaint is articulated does not extend to interpreting every articulation of a grievance, every submission of information, as tantamount to the initiation of a complaint as contemplated by Section 49(B)(2)(b)".

At best Mrs Malherbe's letter can only be interpreted as an articulation of a grievance alternatively a submission of information.

[12] I am in agreement with the Tribunal that "a 'complaint' is a juristic act necessary to bring alleged anti-competitive conduct within the ambit of the statute's formal procedures with Sections 49 and 50 being the first steps on the process". To this end the legislature has defined a 'complainant' to mean a person who has submitted a complaint in terms of Section 49B (2) (b). We therefore do not need to search for a dictionary definition of the word complainant save to say that the definition of a 'complaint' must be given a contextual meaning and not just an ordinary grammatical interpretation whereby every expression of dissatisfaction by a

member of the public would be considered a complaint. Not only did Mrs Malherbe not use any prescribed form but she disavowed any intention of being a complainant. In an e-mail dated 4 December 2004, to Mr Liebenberg of the Commission, Mrs Malherbe stated that she did not want her identity to be revealed. She clearly wanted to remain anonymous. Exhibit "B" supports the conclusion that she did not submit a 'complaint' which meets the requirements of Section 49B (2) (b) as opposed to the mere submission of 'information' as contemplated by Section 49 (2) (a). To hold otherwise would stifle the very purpose of the Act in that it will inhibit persons who perceive a behaviour or practice to be a violation of the Act from laying information before the Commission in fear of being brought into litigation when the information is supplied merely for the purpose of initiating and investigating a complaint. To hold otherwise will also disallow the Commission from entertaining information accompanied by a request for anonymity.

[13] Further Clover's and Ladismith's argument must fail since the legislature has used different words in Section 49B (2) (a) and (b). In subsection (a) the legislature is concerned with the submission of information whereas in subsection (b) reference is made to the submission of a complaint in the prescribed form. The difference in language in these two subsections taken together with the definition of complainant can have no other plausible meaning than that employed by the Tribunal. The legislature intended the complainant not only to control the initiation but, by using the prescribed or any other form, would not only enjoin the Commission to investigate a complaint but if found to be a

violation of the Act would allow a complainant to be a party to any litigation. This interpretation is consistent with the accepted canons of interpretation, namely:

> "It is a general rule in the construction of a statute that a deliberate change of expression is prima facie taken to import a change of intention". (See *Barrett NO v Macquet 1947 (2) SA 1001 (A)* at 1012; *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Company Limited* 1947 (2) SA 1269 (A) at 1279).

The Tribunal was accordingly correct in dismissing the first point *in limine*. The appeal on the first *in limine* point must thus fail.

THE REVIEW APPLICATION

[14] I now turn to the review application brought by Clover arising from the dismissal by the Tribunal of the second and third *in limine* points. These *in limine* points relate to the conditioned leniency granted to Clover by the Commission. In brief, the Commission granted Clover immunity for its involvement in the milk balancing scheme (which forms the basis of complaint six) and denied Clover immunity for the surplus removal scheme (which is the basis of complaint three). In terms of the conditioned leniency agreement Clover is obliged to co-operate with the Commission in the investigation and prosecution of complaint 6 against the respondents who have been cited in these proceedings. I might mention that Clover also pinned its colours to the mast of the review boat apropos the first *in limine* point in case it lost the appeal on this point.

[15] In its review application, Clover seeks to review and set aside the Tribunal's decision insofar as it relates to the dismissal of the second and third *in limine* points but also seeks an order from this Court dismissing the complaint referral, alternatively directing that the referral of the third and fifth complaints may not proceed as against Clover. Further in the alternative Clover seeks an order remitting the matter back to the Tribunal subject to appropriate directions as to the further hearing of the matter.

[16] Clover seeks this relief pursuant not only to this Court's power to review and set aside the Tribunal's decision, but also pursuant to this Court's jurisdiction to review the process before the Tribunal and to determine whether an action taken or proposed to be taken by the Commission or the Tribunal is within their respective jurisdictions as provided by Section 62 (2) (a) of the Act. Clover also enjoins us in the exercise of our review powers to determine any constitutional matter arising in terms of Section 62 (2) (b) of the Act. In essence, Clover submits that as a result of the Tribunal's dismissal of Clover's *in limine* points, the process before the Tribunal was procedurally and substantively unfair and would result in both the Commission and the Tribunal acting beyond their jurisdiction. Clover accordingly brings the review application in terms of Section 37 and Section 62 (2) of the Act read with Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") and Section 6 of the Promotion of Administrative Justice Act (No. 3 of 2006) ("PAJA") as well as where applicable, the common law.

[17] I do not propose to deal with the first *in limine* point since as I am of the view that for the reasons canvassed above, the appeal and the review on the first *in limine* point must fail. I am satisfied that the dismissal of the first *in limine* point was not in terms of Section 6 (2) (1) of PAJA "materially influenced by an error of law" or for that matter the dismissal by the Tribunal is reviewable on the further grounds set out in Section 6 (2). The Tribunal's dismissal of the first *in limine* point was not only rational and justifiable in terms of the reasons given by the Tribunal but the Tribunal's interpretation of the word "complaint" in Section 49 (2) (b) of the Act is correct.

[18] I therefore will focus on the second and third *in limine* points. As pointed out earlier Clover's second and third *in limine* points is based on a corporate leniency agreement concluded between the Commission and Clover on 3 February 2006 ("the CLP agreement").

[19] I set out in brief the background to the CLP agreement. Following upon investigations launched by the Commission into Clover's practices as a processor of milk and milk products, Clover applied to the Commission for corporate leniency in a written application dated 21 October 2005. This application, in essence, was based on a detailed statement by Mr Robert Wasseloo, the then Chief Executive Officer of the second applicant. This leniency was sought for Clover's role in participating in a milk balancing scheme over the past few years before the CLP agreement. On

further information being provided, the Commission granted Clover conditional immunity on 20 December 2005. The document containing the terms and conditions of the conditional immunity is found as Annexure "HR3" of the papers.

[20] It is necessary to set out in full the essential provision of the CLP agreement.

"1. It is confirmed that upon formal acceptance of the terms and conditions set out in this document, Clover will be granted conditional immunity from prosecution before the Competition Tribunal for its involvement in cartel activities concerning the collusion with other role players in the milk industry regarding 'surplus removal' of milk, that resulted in price fixing in contravention of Section 4 (1) (b) of the Competition Act (Act 89 of 1998, as amended).

2. It is further recorded that the application by Clover for immunity regarding its internal prohibition on producers not to off sell 'c – quota' milk was unsuccessful and will still form part of the original investigation as a possible abuse of dominance by Clover.

3. The conditional immunity will be granted to Clover subject to all the provisions, requirements and conditions of the Commission's Corporate Leniency Policy (CLP), as well as the specific conditions set out below. By formally accepting the terms and conditions set out herein, Clover acknowledges that it is familiar with the contents of the CLP.

4. Clover shall provide the Commission with full and candid co-operation in order for the Commission to be put in a position to institute proceedings in respect of the cartel activity against the other participants. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal are completed. Failure to do so may

constitute grounds for the Commission to revoke the conditional immunity.

5. Clover must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to the cartel activity.

6. Clover must provide full co-operation with regard to details of former Clover employees who have knowledge of or are/were in possession of documentation relating to the cartel activities. Clover will request the employees to assist the Commission in compiling a statement under oath, setting out their knowledge in this regard and to testify in the Competition Tribunal if required.

7. Clover must provide full co-operation with regards to details and access to persons who are currently in Clover's employ and have knowledge or are/were in possession of information and documentation relating to the cartel activities. Clover will instruct the employees to assist the Commission in compiling a statement under oath, setting out their knowledge in this regard and to testify in the Competition Tribunal if required.

8. Clover must provide a statement of conduct by the CEO of Clover at the relevant time and/or any other person most knowledgeable with regards to the cartel, under oath, setting out the background, context and execution of the cartel as well as any other contravention of the Act that Clover was at any point in any time engaged in singly or complicit with other parties." (emphasis added)

[21] On 7 December 2006, the Commission filed its complaint referral against Clover and the other respondents in these proceedings. It was this referral which prompted the raising of the three *in limine* points. The first alternative of the second point rests on a factual level. Clover contends that the conduct alleged in the third

complaint formed an integral and indivisible part of the surplus removal scheme, which in turn forms the basis of the sixth complaint. Clover contends that because the conduct underlying the third complaint is "as a matter of fact" covered by the sixth complaint, and Clover has been granted immunity in respect of the sixth complaint, the third complaint should be dismissed against Clover.

[22] Clover further contends that since the second alternative is in essence that because the conduct alleged in the third complaint forms part of the conduct alleged in the sixth complaint, that it would be unfair and prejudicial for the Tribunal to adjudicate the third complaint against it in circumstances where Clover is obliged in terms of the CLP agreement to assist in the prosecution of the third complaint against itself.

[23] The third point *in limine* deals with the issue of fairness. It does overlap with the alternative to the second point *in limine*, but is broader. According to Clover, whether or not the conduct underlying the third complaint is an indivisible part of the sixth complaint, there is a factual overlap between the sixth complaint and the third and fifth complaints. Clover thus argues that it will be unfair for it to be prosecuted for complaints three and five when it is required to assist the Commission in respect of the prosecution of the sixth complaint. This would mean that in terms of the CLP agreement, it would be required to act simultaneously as accuser and accused in the same factual matter and in the same hearing. Accordingly, Clover would be prejudiced due to it being deprived of its right to put the Commission to the proof of its case and also

raise alleged difficulties regarding witnesses. These difficulties in the main would be that it would not be able to cross-examine witnesses called by the Commission as it would conflict with its duty of co-operation and further that the Commission would have the benefit of cross-examining witnesses from whom it had the benefit of co-operation from prior to the hearing.

[24] Sans the question of fairness and for the points *in limine* to succeed, it is necessary to determine as a matter of fact that the conduct in the third complaint is an indivisible and integral part of the conduct complained of in the sixth complaint and or in the alternative that there is meaningful factual overlap between the sixth complaint and the third and fifth complaints.

[25] In my view, this is a make weight argument on the part of Clover, since even if there is factual overlap as constrained for by Clover, it cannot now complain of any lack of fairness because, after a protracted negotiation and after being fully apprised of the facts it voluntarily entered into the CLP agreement and must now live with its consequences.

[26] In any event it is the Commission's contention that the third and sixth complaints are discrete contraventions of the Act and the C-quota scheme is not an integral and indivisible part of the Milk Balancing Scheme. Without dealing in detail with the nature of each of the complaints, since the Tribunal has already done so in its well reasoned judgment, the "significant factual" overlap in respect of the third and sixth complaints is disputed by the Commission. I am in agreement with the Tribunal's finding that the third, fifth

and sixth complaints are separate and distinct contraventions of the Act. I am further in agreement with the Tribunal that even if as Clover contends that the Milk Balance Scheme and the C-Milk Scheme are an integral part of the same conduct, then this is something that can only be decided upon after evidence has been led on the two schemes. This can only be appropriately decided at the trial before the Tribunal.

[27] In my view, it is simply not possible on the basis of the affidavits and annexures before us for us to decide, in the absence of any evidence being led, to make the factual finding that Clover seeks to make. The Tribunal is thus the proper forum.

[28] In any event, the CLP agreement is conditional. Clause 4 read with clause 12 of the CLP agreement are clear in statement. Clover is obliged to fully and honestly cooperate until such time as proceedings in the Tribunal are completed, and any failure on Clover's part may constitute grounds for the Commission to revoke the conditional immunity.

[29] I am in agreement with Counsel for the Commission in the review application, that the factual issue must accordingly be decided against Clover for the following reasons:

(i) Firstly, there is a factual dispute on the papers which cannot be resolved in Clover's favour by virtue of the well settled rules for the resolution of factual disputes in motion proceedings. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A);

(ii) Secondly, the invitation by Clover to us to resolve the factual issue is premature and, in any event, would impermissibly usurp the powers and functions of the Commission and Tribunal. (See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 48.

[30] I now turn to the question of fairness. The Constitution in terms of s 33(1) and s 34 guarantees the right to administrative action that is procedurally fair and further provides for disputes to be adjudicated in a "fair public hearing" before a court or tribunal. Further section 3 (1) of PAJA provides for procedural fairness in respect of administrative action that materially and adversely affects the rights and legitimate expectations of persons. It is obvious that proceedings before the Tribunal must be procedurally fair since s (1) (2) (a) of the Act provides that the Act must be interpreted in a manner that is consistent with the Constitution.

[31] Fairness must indeed be decided on the circumstances of each case. (See s 3 (2) (a) of PAJA, *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) para 13, *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 18 and *MEC, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) para 76).

[32] In my view, the facts of this case do not render the circumstances that Clover finds itself in to be unfair. The CLP agreement makes it

quite clear precisely on what the Commission was prepared to grant Clover conditional immunity and in respect of and what would still form part of the original investigation. It was with full knowledge that the Commission still intended to investigate a possible abuse of dominance by Clover based on the sales of C-quota milk that Clover entered into the CLP agreement. It is clear form the CLP document that the Commission regarded the conduct underlying the third complaint as separate and distinct from the conduct underlying the sixth complaint. Clover no doubt was aware of this. Clover must have been aware that it might well find itself in a position of having to cooperate with the Commission on one complaint referral and face prosecution on another.

[33] Clover was at liberty to challenge the restricted immunity that the Commission was prepared to offer to it. Despite being represented by a strong legal team it did not do so. Any potential prejudice that Clover will suffer can be overcome by Clover renewing its application at the trial for a separation of the relevant complaints. This option is still available to Clover at the trial. Therefore, and at least at this stage, the alleged prejudice which Clover contends it will suffer in having to "act as accuser and accused" is at best speculative and hypothetical. Without being uncharitable or cynical what Clover is seeking to do is to take all the benefits from the CLP agreement while at the same time use the agreement as a shield to prevent it from having to deal with the other complaints.

[34] I am in agreement with the Tribunal's finding that:

> "At this point in time preparations are still at an early stage with witness statements yet to be filed. In our view it would

> be premature for us to determine questions of fairness at this stage of the proceedings. It is only at a later stage that the prejudice that Clover would suffer can be fully ascertained and be effectively dealt with."

Clover is at liberty to take whatever steps it is later advised to take at the trial in order to overcome any prejudice which may be occasioned to it. The remaining in limine points therefore also fall to be dismissed.

[35] It is for the above reasons that the appeal and the review application was dismissed with the appropriate order for costs.

PATEL JA

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DAVIS JP AND MAILULA JA concurred.

DATE OF HEARING: **19 September 2008**

DATE OF JUDGMENT: **12 November 2008**

1st-2nd Appellants: CLOVER INDUSTRIES LIMITED and CLOVER SA (PTY) LIMITED

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