IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 188/CAC/SEP20
196/CAC/NOV21

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA — **APPELLANT**

AND

IRWIN & JOHNSON — **FIRST RESPONDENT**

KARAN BEEF PTY LTD — **SECOND RESPONDENT**

Heard virtually on 13 January 2022 by Judges Victor, Modiba and Manoim concurring.

Date judgment handed down electronically: 2 August 2022

ORDER

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1. Condonation is granted for the late filing of the appeal.
2. The appeal is dismissed.
3. The Commission is ordered to pay the first respondent's costs including the cost of two senior counsel.

4. The Commission is ordered to pay the costs of the postponement including the cost of two counsel.

JUDGMENT

Victor J

Introduction

[1] At the heart of this matter lies the proper approach to the interpretation of s 4(1)(b) the Competition Act (the Act)[1]. This appeal concerns an agreement concluded between two parties involved in the beef burger industry, and whether that agreement constitutes cartel behaviour that divides the market in contravention of s 4(1)(b)(ii) of the Act.

[2] Section 4(1) in relevant part provides:

"4. Restrictive horizontal practices prohibited

(1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if—

(a) …

(b) it involves any of the following *restrictive horizontal practices*—

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services; "*

[3] A Manufacturing Agreement was concluded between Irvin & Johnson Limited (I&J) and Karan Beef (Pty) Limited (Karan). Alleging that the Manufacturing Agreement contravened s 4(1)(b)(ii), the Competition Commission (the Commission) referred the matter to the Competition Tribunal (Tribunal). The question before the

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[1] No 89 of 1998 as amended

Tribunal was, and remains the same before this Court, whether the Manufacturing Agreement between the parties is prohibited on the basis that it is in contravention of s 4(1)(b)(ii). The parties have brought to the fore two diametrically opposed positions on the proper approach to the interpretation of the section. According to the Commission, a consideration of an agreement on its face suffices. Accordingly, and because the Manufacturing Agreement, on its face, amounted to prohibited conduct, the Tribunal wrongly dismissed the complaint when it held that s 4(1)(b) requires a process of "characterisation" of the conduct prior to the interpretation and application of the Act. The Commission submits that the Tribunal should have held that on a proper construction of s 4(1)(b), no characterisation process is mandated or permissible. I&J's primary submission was, and remains, that an interpretative exercise is necessary to ascertain the true meaning of an agreement, including its characterisation, before a contravention of s 4(1)(b)(ii) can be found. I&J also submits that the principle of characterisation has been correctly applied in respect of s 4(1)(b), and that this Court ought thus to dismiss the Commission's appeal.

[4] The question is therefore whether the strict application of the *per se* rule (outright prohibition) in s 4(1)(b), requires strict enforcement without regard to the true meaning of an agreement and whether this accords with a constitutional approach to statutory interpretation.

[5] A further question that arises is whether the restricted scope of presumptive illegality of the *per se* rule precludes a consideration of the true agreement between the parties and a proper interpretation of the context, language, purpose, the undisputed facts, and the conduct of the parties when implementing the impugned agreement.

The parties

[6] The appellant is the Competition Commission (the Commission) a statutory body established in terms of the s 19(1) of the Act.

[7] The first respondent is Irvin & Johnson Ltd (I&J) a distributor of inter alia beef burger patties.

[8] Karan Beef (Pty) Ltd (Karan) is the second respondent, a manufacturer of frozen beef burger patties. Karan settled the Commission's claim against it and is not a litigant in these proceedings.

Factual background and litigation history

[9] On 18 February 2013 the Commission initiated a complaint against feedlot owners[2] who were members of the South African Feedlots Association. The Commission alleged that the Feedlots had entered into an agreement to fix the price at which weaner calves are sold. On 14 June 2017, during that investigation the Commission raided the offices of Karan and discovered a written Manufacturing Agreement concluded between Karan and I&J in the year 2000. It also found an unsigned Amending Agreement drafted in 2002. It was on the basis of these documents that the Commissioner proceeded to initiate a complaint against the respondents for alleged market division in contravention of s 4(1)(b)(ii).

[10] One of the core issues was that the Amending Agreement introduced a non-compete clause. The relevant clauses in the purported amended Manufacturing Agreement read as follows:

> "4. Amendment of clause 3 of the Manufacturing Agreement
>
> 4.1 The parties agree to amend clause 3 of the Manufacturing Agreement by deleting clause 3.12 therefrom and replacing it with the following clause:
>
> "3.12. Karan shall not manufacture, market or produce any products that are the same or similar to the contract products or any other processed beef products other than those specifically provided for herein. Karan is permitted to manufacture certain processed beef products that are similar to the contract products on behalf of customers in the Food Service Trade provided that Karan enters into separate manufacturing

[2]The main purpose of feedlots is to help the animal reach a certain weight as efficiently as possible.

> agreements with each of such customers, which agreements shall specifically provide for the manufacture of such products in accordance with such customer's manufacturing specifications and recipes and which recipes and specifications shall not have been developed by either Karan or I&J and such products shall be packed under such customers' own trademarks."

[11] The nub of the initiation statement concerned the following particular portion of the above non-compete clause 3.12

> "Karan shall not manufacture, market, or produce any products that are the same or similar to the "contract products" or any other processed beef products that it manufactures for I&J."

[12] Contract products are defined as "the various products listed in Annexure A and B attached to the Manufacturing Agreement, to be produced by Karan for I&J in terms of this agreement."

[13] The Manufacturing Agreement also provides that Karan would manufacture certain products that are similar to "contract products" but of different recipes which it will supply only to restaurants, delicatessens, fast food outlets and caterers.

[14] The other critical clause according to the Referral is clause 3.13 which reads as follows.

> "The parties record that prior to the commencement of this agreement. Karan manufactured and marketed the products referred to in Annexure B for its own account. Karan undertakes that with effect from the commencement of this agreement or such later date as I&J may advise Karan of which shall not be later than the date of commencement of full production as envisaged in clause 3.20, *it will cease to produce and market the products referred to in Annexure B for its own account* and does hereby grant to I&J an exclusive fully paid up licence to manufacture the products referred to in Annexure B and their specification and formulation referred in Annexure C for the duration of this agreement. Karan undertakes that it shall only manufacture such products as and when requested thereto by I&J, for and on behalf of I&J, in terms of this agreement for the duration of this agreement. At the termination of this agreement such aforesaid licence shall immediately terminate, and Karan shall be entitled to continue

> manufacturing the products referred to in Annexure B for its own account and I&J shall have no right to the specification and formulations of such products."

[15] The Commission submitted that by allocating customers and specific types of goods to themselves, the parties divided the markets, which contravenes s 4(1)(b)(ii). According to the Commission, the Manufacturing Agreement, read together with the Amending Agreement, was plainly designed to eliminate competition between Karan and I&J. The complaint was put in the following terms:

> "It is alleged that the respondents [I&J and Karan] have an agreement and/or are engaged in a concerted practice to divide markets by allocating specific types of goods or services in the market for the supply of processed beef products. The conduct amounts to a contravention of section 4(1)(b)(ii) of the Act."

Referral to the Competition Tribunal

[16] On 24 October 2018, the Commission referred its complaint to the Competition Tribunal. The issue before the Tribunal was the same as that which is presently before this Court, namely whether the Manufacturing Agreement concluded between Karan and I&J contravened s 4(1)(b)(ii) of the Competition Act. According to the Commission, the respondents were competitors in the market for the supply of processed beef products, but by concluding the Agreement, the respondents had agreed to not compete, that Karan would cease to produce processed frozen beef products for its own account and would instead utilise its capacity to produce products for I&J. In short, they had agreed to allocate the markets between them and the Manufacturing Agreement, and subsequent Amended Agreement, was the conduit. Ultimately, the Commission complained that their conduct was of a collusive nature in contravention of the Competition Act.

[17] Karan did not wish to oppose the relief sought by the Commission and concluded a consent agreement with the Commission in which it admitted to contravening s 4(1)(b)(ii) and agreed to pay an administrative penalty of R2,7 million. This

agreement was made an order of the Tribunal on 26 September 2018. I&J, however, opposed the alleged contravention, and defended the charges.

[18] According to I&J, it was not in a horizontal relationship with Karan but a vertical one and the Manufacturing Agreement was simply a good faith commercial agreement. Karan had taken a unilateral decision to refrain from the production of processed beef products for third parties even prior to the initial Manufacturing Agreement. On the basis that Karan already sought to exit the market for the production and supply of beef products, the Manufacturing Agreement and its subsequent amendment could not be said to have had the effect of dividing the market or precluding certain of Karan's operations. Insofar as the Amended Agreement was concerned, this was never implemented and was never signed, as such, it could not have violated the section.

[19] Finally, I&J submitted that even if any contravention of the Act had taken place, the conduct would be time-barred in relation to s 67(1) of the Act, because the Commission's complaint was initiated three years after the alleged conduct had ceased.

[20] The Tribunal stated that what the Commission was asking it to do was to look no further than the two agreements to arrive at a conclusion that Karan and I&J were competitors in a horizontal relationship and were engaged in market division as prohibited by s 4(1)(b)(ii). It disagreed with that contention. Whilst the Tribunal found that Karan and I&J were in a horizontal relationship at the time the Manufacturing Agreement was concluded, it held that the simple fact that two competitors conclude an agreement does not necessarily, without more, lead to a finding of collusion or violation of s 4(1)(b).

[21] The Tribunal found that not all agreements between competitors necessarily contravene s 4(1)(b), and there are many instances in which competitors conclude *bona fide* commercial arrangements which may have the effect of impacting their commercial activities. In particular the dicta of the Supreme Court of Appeal in *ANSAC* clearly

provides that in alleging that conduct contravenes s 4(1)(b), the conduct must be properly characterised to see if it falls within the ambit of the section.[3]

[22] On the basis of this, the Tribunal concluded that it was obliged to look further than the Commission would have it. It found that—

> "an agreement on the face of it cannot, without more, propel mere suspicion into a finding of collusion. What needs to be demonstrated is whether the agreements between the parties can be characterised as having as their object or purpose participation in a cartel to divide markets as contemplated under section 4(1)(b)(ii)."

And this, it found, involves asking whether the conduct of the parties, properly *characterised*, is the kind of conduct that is prohibited under the section. The Tribunal, therefore, approached the Manufacturing Agreement through a process of *characterisation*, in terms of which it considered the nature of the agreement, the context in which it was concluded, as well as the circumstances and past conduct of the parties.

[23] The Tribunal noted that the "central piece of evidence relied on by the Commission" to put the Manufacturing Agreement in the category of practices prohibited outright under s 4(1)(b)(ii) was clause 1.4:

> "Karan is desirous to terminate the manufacturing of processed frozen beef products for its own account and utilise its core skills in feedlots, abattoirs and processing of chilled and fresh beef and the processing of frozen beef products to manufacture the contract products for and on behalf of I&J on the terms and conditions set out in this agreement."

[24] The Tribunal considered this clause through the lens of characterisation, which meant it could take note of all the evidence contextualising it. Having characterised the agreement, the Tribunal concluded that the conduct of the parties did not amount to the

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[3] *American Natural Soda Ash v Competition Commission* [2005] ZASCA 421 (SCA) (*ANSAC*).

type of conduct prohibited by s 4(1)(b). The Tribunal emphasised that cartel conduct is the most egregious form of conduct to competition and consumers, and the Commission had failed to demonstrate that the Agreements met the required threshold. The Tribunal dismissed the Commission's complaint.

[25] The 2002 Unsigned Agreement provided that Karan was allowed to sell beef burgers to food service customers. The relevant clauses in the purported amended Manufacturing Agreement read as follows:

> **"4. Amendment of clause 3 of the Manufacturing Agreement**
>
> 4.1 The parties agree to amend clause 3 of the Manufacturing Agreement by deleting clause 3.12 therefrom and replacing it with the following clause:
>
>> "3.12 Karan shall not manufacture, market or produce any products that are the same or similar to the contract products or any other processed beef products other than those specifically provided for herein. Karan is permitted to manufacture certain processed beef products that are similar to the contract products on behalf of customers in the Food Service Trade provided that Karan enters into separate manufacturing agreements with each of such customers, which agreements shall specifically provide for the manufacture of such products in accordance with such customer's manufacturing specifications and recipes and which recipes and specifications shall not have been developed by either Karan or I&J and such products shall be packed under such customers' own trademarks."

[26] The Commission submits that the conduct referred to above, amounts to dividing up the market and is alleged to have commenced in 2000 and was ongoing. In essence the allegation is that the parties divided the markets by allocating customers and specific types of goods to themselves which contravenes s 4(1)(b)(ii) of the Act.

Parties' submissions before this Court

Commission's submissions

[27] Before this Court, the Commission argues that the Tribunal got it wrong. It avers that the Tribunal erred in law and in fact, by characterising the Manufacturing agreement and finding that it was not in contravention of s 4(1)(b). The Commission

emphasises that when a trade practice undermines a competitive economy and restricts the freedom of consumers to select the quality and variety of goods and services, then such an agreement is prohibited by s 4. The Commission submits that textually, once the feature of the prohibition is found in the agreement, the operation of s 4(1)(b) is triggered, and no further enquiry is needed. In this case, because the wording of the Manufacturing Agreement amounted to a *per se* contravention of s 4(1)(b)(ii),[4] there was no need to *characterise* the Agreement. Thus, the Tribunal erred. It also erred in considering the intentions of the parties, as intention is not applicable to circumstances where the plain text and language of the Manufacturing Agreement is unambiguous.

[28] The Commission avers that the Tribunal ignored the fact that the parties were in different segments of the market for the manufacture and supply of frozen beef products *by virtue of the agreement*. The Commission submits that the Tribunal should have found that, *but for* the Manufacturing Agreement, the relationship between the parties was that of competitors in a horizontal relationship. According to the Commission, Karan did not unilaterally elect to exit the market. The Manufacturing Agreement made sure of it, which demonstrates that the Manufacturing Agreement egregiously contravenes s 4(1)(b) because it caused the market to be divided. Thus, the Tribunal erred when it concluded that the Manufacturing Agreement did not breach s 4(1)(b): the parties were in a horizontal relationship, and together they made an agreement with the effect that Karan exited the market in favour of its competitor, I&J. In other words, competition was eliminated, and market allocation was evident.

[29] The Commission also avers that there is an important distinction between s 4(1)(a) and s 4(1)(b), which distinction was elided in the reasoning of the Tribunal. S 4(1)(a) of the Act prohibits an agreement between firms in a horizontal relationship if the agreement "has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision […] can prove that any efficiency or other pro-competitive gain resulting from it outweighs that

[4] Under the *per se* rule, the wording of an agreement is presumed to violate competition law, regardless of any other factor such as an explanation of a competitive benefit.

effect." This means that, as distinct from s 4(1)(b), s 4(1)(a) is concerned with *effects* – it is about weighing the anti-competitive effects of an agreement as against its pro-competitive benefits. The Commission emphasises that s 4(1)(b) is concerned with whether or not an agreement between firms in a horizontal relationship falls under one of the sub-categories in s 4(1)(b). There is no reference to the word "characterisation" in s 4(1)(b) and therefore, the Tribunal should not have embarked on a characterisation exercise. Accordingly, it was a waste of time and resources to embark upon an investigative process in order to make any further determinations on reasonableness, efficiency or pro-competitive gain. What the Tribunal did, was to conflate the two provisions. The Commission submits that the Tribunal conflated s 4(1)(a) and s 4(1)(b), which constituted an error in law.

[30] The Commission relies on *ANSAC*, in which the Supreme Court of Appeal did not seek to change the provisions of s 4(1)(b) by introducing a separate statutory test on characterisation. The Commission emphasises that *ANSAC* explained the clear distinction between the prohibitions in s 4(1)(a) and those in s 4(1)(b):

> "It is clear from its juxtaposition with section 4(1)(a) that section 4(1)(b) is aimed at imposing a '*per se'* prohibition: (i) in other words, in which the efficiency defence expressly contemplated by sub para (a) cannot be raised. The reason for the blunt terms of sub para (b) is plain. Price fixing is inimical to economic competition and has no place in a sound economy. . . All countries with laws protecting economic competition prohibit the practice without more. . . Once the conduct complained of is found to fall within the scope of the prohibition, that is the end of the enquiry. There is no potential for a further enquiry as to whether the conduct is justified (an enquiry of the kind that is envisaged by section4(1)(a), and evidence to that end is not relevant, and thus inadmissible. It is this finding that the Competition Appeal Court upheld, and it is clearly correct."[5]

[5] *ANSAC* above id 3 at para 37.

[31] The Commission insists that following *ANSAC*, and *Dawn Consolidated Holdings,*[6] the process of characterisation is unnecessary in our competition jurisprudence and thus, the incompatibility of the Manufacturing Agreement with s 4(1)(b) can be concluded without any characterisation enquiry. In particular, the Commission seeks to demonstrate that the thrust of the Tribunal's reasoning on characterisation was to look at the *effect* of the Manufacturing Agreement on competition and the subjective belief of the parties to the Agreement. This, of course, was within the purview of s 4(1)(a), *not* s 4(1)(b).

[32] In any event, the Commission continues, the Tribunal applied the principle of characterisation incorrectly. The preamble to the Act prescribes its purpose as being "to provide for markets in which consumers have access to and can freely select, the quality and variety of goods and services they desire", and to "restrain particular trade practices which undermine a competitive economy." The Commission submits that even if regard is paid to nature and context, the Manufacturing and Amended Agreements unequivocally fall within that which is prohibited by the principles set out in the preamble and s 4(1)(b). The Tribunal was wrong in its evaluation of the evidence: a correct evaluation of the evidence should have led the Tribunal to conclude that the impugned conduct was in breach of s 4(1)(b)(ii).

I&J's submissions

[33] I&J submits that the central issue in this appeal is the determination of the true meaning of the Manufacturing Agreement, and once that is done there can be no presumption of illegality. I&J argues that since *ANSAC*, conduct and agreements between parties must be characterised to assess whether they truly fall within the ambit of what the Legislature intended to prohibit. This is firmly entrenched in South African competition law jurisprudence, and the Tribunal correctly characterised the conduct to see if it fell within the ambit of s 4(1)(b)(ii).

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[6] *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission* [2018] ZACAC 2.

[34] I&J submits that clause 1.4 of the Manufacturing Agreement is inconsistent with presumptive illegality. Clause 1.4 must be interpreted objectively to determine its *sensible* meaning in the context of the document as a whole and the circumstances attendant upon its coming into existence. In making this submission, I&J refers to the proper interpretation of contracts based on the well-known principles espoused in *Natal Joint Municipal Pension Fund*.[7]

[35] In contradistinction to the Commission, I&J argues that the jurisprudence, as set out by the Competition Appeal Court in *SAB*[8] is clear: there must be proper characterisation of agreements that have both horizontal and vertical elements.[9] Similarly, it was recognised in *Dawn Consolidated Holdings* that commercially reasonable ancillary restraints ought not be treated as automatically violating s 4(1)(b)(ii) without further enquiry.[10]

[36] I&J point out that where two competitors conclude an agreement, this does not automatically mean that there is collusion, or a contravention of the absolute prohibitions listed in s 4(1)(b). I&J points out that this is consistent with competition jurisprudence in United States antitrust law and the European Union's competition law. Consideration must be given to the distinction between agreements involving competitors that are so inimical to competition that they cannot be justified on any basis, and those where pro-competitive justification is appropriately countenanced.

[37] According to I&J, upon properly characterising the Manufacturing Agreement, which means looking to its context and nature, it is clear that it does not constitute collusive conduct. Karan had unilaterally evinced an intention to terminate manufacturing beef patties for its own account because it had deemed that doing so would be unsustainable. Thus, but for the conclusion of the Manufacturing Agreement,

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

[8] *Competition Commission v South African Breweries* [2014] CPLR 339 (CAC) (*SAB*).

[9] Id at para 38.

[10] *Dawn Consolidated Holdings* above n 6 at para 28.

Karan would have ceased beef patty production altogether in the early 2000s,[11] I&J might have concluded a Manufacturing Agreement or, in the absence of identifying a suitable contract manufacturer, might have exited the market for the supply of frozen beef burger patties. I&J argues that the true economic relationship between it and Karan was that of a supplier and customer, being a vertical relationship by using the manufacturing services of Karan. Karan, with its access to raw product and with existing and installed production equipment and capacity could produce products for I&J, a company that enjoyed excellent access and distribution capabilities to the markets, an aspect not enjoyed by Karan. The Manufacturing Agreement constituted the combination of complementary competencies of Karan and I&J respectively, and enabled Karan to stay in production. The fact that Karan could not have continued to manufacture products absent the Manufacturing Agreement because it could not do so profitably, is key.

[38] I&J submits that the Commission has not discharged the burden of showing that the Manufacturing Agreement was so obviously a collusive arrangement which harmed consumer welfare, such that it warrants sanction as a prohibition in terms of s 4(1)(b)(ii). I&J argues that the Manufacturing Agreement was not an agreement of the kind that competition law seeks to prohibit as a matter of course. And, the evidence of the Commission's own witnesses contradicts its argument that the Manufacturing Agreement was the result of a scheme between Karan and I&J.

[39] I&J points out that the incorrect Annexure B was attached to the Manufacturing Agreement and this created the incorrect impression that Karan could no longer supply beef patties in its own name.

Analysis of the evidence surrounding the conclusion of the Manufacturing Agreement

[11] This was confirmed by Mr Pretorius during his testimony.

[40] The following excerpts are relevant in describing how the commercial exigencies of the parties dovetailed and led to the conclusion of the Manufacturing Agreement and Karan's decision to exit the distribution market:

> **"Mfundo (on behalf of the Commission) :** okay so you agreed in 2000 with I&J that you are going to cease doing the frozen?
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> **Arnold Pretorius (of Karan)**: correct, going to cease the supply of this particular product to the retail chain stores because it doesn't work out.
>
> **Arnold Pretorius:** (*quoted are various excerpts from his evidence at the interrogation stage)* We were desirous to carry on only with the business that we can do it by ourselves and handle properly. Karan was sort of very anxious to get out of that part of the business because they couldn't handle it themselves. They had to handle it through a third party and that didn't work out at all. That is the part that we know how to do. He stated that the only thing he knew was that Karan Beef decided to stop their business through the chain stores because they couldn't handle it properly themselves. They handled it through a third party, and it was just a disaster, it was not an economical proposition. Can I tell you in short which I am telling you under oath? I am telling you what the real intention was. Not whether we could do this or that, what the real intention was. *The real intention under oath, is that the business did not work for us. We couldn't do it. Either I&J had to take it from us if they are interested or we would have stopped. It didn't work for us."*

[41] It was clear from the various accounts of witnesses including the version presented by Mr Simonsen of Karan, who was employed after the commencement of the Manufacturing Agreement was concluded, that Karan was going to exit the distribution market and retain the manufacturing side of the business. This was also consistent with the version presented by Karan to the Commission when it pleaded guilty to contravening s 4(1)(b) (ii).

[42] It could not be disputed by the Commission that both Karan and I&J came to their decision independently. In particular, that Karan would exit the distribution of its beef patties and I&J would exit the beef patty market unless it could find a manufacturer. From the undisputed facts and based on what emerged from the

interrogation, the evidence presented and the cross-examination it is clear that Karan did not exit the distribution market because it signed the Manufacturing Agreement.

[43] A further chronological consideration in relation to the time bar procedural issue is that it was common cause that by 2014 the Manufacturing Agreement between I&J was terminated by Karan. It repurposed its facility and I&J found a new manufacturer.

Issues for determination

[44] A central issue in this appeal is whether the Commission has proved the s 4(1)(b)(ii) contravention based solely on the face of the Manufacturing Agreement and the unsigned Amended Agreement. Ancillary questions that arise include: whether it is possible to look beyond the face of the Manufacturing Agreement and consider its character, circumstances and nature to ascertain whether the Manufacturing Agreement amounted to allocating customers and dividing up the markets; whether the Tribunal erred in law and fact in *characterising* the Manufacturing Agreement and the Amended Agreement; and whether the Tribunal erred in its finding that the Manufacturing and Amended Agreements did not amount to a contravention of s 4(1)(b). In sum: can a court look beyond the agreement itself? Did the Tribunal do so correctly? And is the Manufacturing Agreement one that is prohibited by s 4(1)(b)(ii)?

[45] A final consideration is whether the Commission's claim against I&J exceeded the limitation of actions as provided for in s 67(1) of the Act, which is a procedural time bar provision. A complaint in respect of a prohibited practice may not be referred to the Tribunal if the prohibited practice ceased more than three years before the complaint. The Commission did not seek condonation to extend the time bar which is permissible under certain circumstances.[12] This issue will be addressed in due course.

[46] Before dealing with the merits of the appeal however, it is necessary to deal with some preliminary issues raised by I&J.

[12] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC) (*Pickfords*).

Preliminary issues

Condonation

[47] I&J raised a point in limine and submitted that the late filing of the complete record timeously by the Commission and the heads of argument should result in the matter being struck from the roll. The Commission did not seek condonation when these documents were filed late. We have considered the submissions and must note our disproval of the cavalier manner in which the Commission has dealt with the procedural formalities required in processing an appeal. This does unfortunately demonstrate a disregard for the CAC court rules. We take the view, however, that having regard to the issues and the importance of finalising this appeal, we do not strike the appeal from the Roll.

Costs for earlier postponement

[48] The question of costs of an earlier postponement also loomed large. Hundreds of pages were exchanged on this issue. In the end the Commission conceded that it was liable to pay the costs of the earlier postponement and tendered costs on the party and party scale for the postponement. Clearly the costs must include that of two counsel.

The findings of the Tribunal

[49] The Tribunal records, the '*central piece of evidence relied on by the Commission'* to put the Manufacturing Agreement in the category of practices prohibited outright under s 4(1)(b)(ii) was clause 1.4:

> '*Karan is desirous to terminate the manufacturing of processed frozen beef products for its own account and utilise its core skills in feedlots, abattoirs and processing of chilled and fresh beef and the processing of frozen beef products to manufacture the contract products for and on behalf of I&J on the terms and conditions set out in this agreement.*'[13]

[13] *See Tribunal decision Vol 1 p24 para 98.*

[50] The Tribunal found in the light of the case law in *Ansac* that not all agreements between competitors would contravene s 4(1)(b) and there are many instances in which competitors conclude bona fide commercial arrangements. In particular the dicta in *Ansac* clearly provides that in alleging that conduct contravenes s 4(1)(b), the conduct must be properly characterised to see if it falls within the ambit of the section. *Ansac* clearly sets out the approach which ought to be followed.

[51] The Tribunal applied the twofold enquiry to this case. This enquiry can be pursued in any order. Firstly, there must be a definition of the scope of s 4(1)(b) which must be determined through statutory interpretation. The other leg of the enquiry is a factual enquiry to identify whether or not the conduct in issue falls within the terms of the prohibition. It then went on to analyse in great detail the nature of the conduct and concluded that the conduct properly characterised in the Manufacturing Agreement did not divide the market or its customers for anti-competitive reasons.

Competition Jurisprudence and the proper approach to interpretation of the Manufacturing Agreement

[52] Prior to applying the law to the facts in this case, it is important to consider the current jurisprudence relating to the proper application and interpretation of s 4(1)(b)(ii). This, because a key question before this Court is whether it suffices to undertake a simple face-value assessment of the Manufacturing Agreement when determining whether it violates s 4(1)(b)(ii), or whether it can go beyond the text of the Manufacturing Agreement and "characterise it" – consider context and character – as the Tribunal did.

[53] S 4(1)(b)(ii) places an outright, or *per se*, prohibition on market division. And for good reason. As described in the book, *Principles of Competition Law in South Africa*, the authors referred to work of Neuhoff,[14] cartel conduct occurs when competitors decide to co-operate or collude with one another rather than to compete.[15]

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[14] Neuhof M et al, *A Practical Guide to the South African Competition Act* (2006) at 62.

[15] Luke Kelly, David Unterhalter, Isabel Goodman, Patrick Smith and Paula Youens , *Principles of Competition Law in South Africa* (Oxford University Press, 2016).

"Cartels harm other businesses and consumers by artificially raising prices and reducing output and choice."[16] Cartel conduct is therefore the antithesis of a healthy and competitive market which renders it deserving of strict censure.

[54] Bearing this in mind, it is not surprising that *per se* offences refer to those agreements which do not require any adverse competitive effects to actually be established for the offence to be proved. And, on this basis, the Commission correctly argues that s 4(1)(b) does not require any enquiry into the effects on the market, the implementation of the Manufacturing Agreement or anything more. According to the Commission, however, s 4(1)(b) entrenches the *per se* rule, *without more*. Yet, on a proper construction, it must be so that the Legislative intent behind s 4(1)(b) is that it is only where the impugned agreement is so clear in its offence as to be unambiguous, that no further enquiry will be necessary.

[55] When construing agreements, there is not always a bright line demarcating where the boundaries of hardcore cartel conduct ends and legitimate horizontal commercial arrangements begin. Explicit horizontal cartel agreements are obviously looked at unfavourably, and the prohibition against them must be enforced with vigour. However, there is much debate between legal and economic commentators about the boundary between hardcore cartels and horizontal agreements. Niels et al[17] emphasise that the line between hardcore cartels and other horizontal agreements must be drawn carefully, lest competitive commercial conduct be inadvertently squashed. Ultimately, what is important is that in making a *per se* assessment, one must not lose sight of the substance and purpose of competition law.

[56] The idea that a court can look to the context of the agreement to properly construe it, is not as outrageous as the Commission suggests. Even in the determination of what constitutes an agreement, South African competition law provides for a degree of

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[16] Id at 85.

[17] Niels et al, *Economics for Competition Lawyers* (2 ed, Oxford University Press, 2016) at 235.

flexibility and contextualisation. In *Netstar*, this Court explained that in terms of the Competition Act the term "agreement" is wide.[18] This Court stated that an agreement arises from the *actions and discussions of parties* directed at arriving at an agreement that will bind them either contractually or by virtue of moral persuasion or commercial interest. The agreement can be in the form of a contract, which is legally binding, or an arrangement or understanding that is not, *but the parties must regard it as binding upon them* for it to fall within the contemplation of the Competition Act. There has to be some consensus, and the statute requires a "form of arrangement that the parties regard as binding upon both themselves and other parties to the agreement."[19] And in the absence of such an arrangement, "there is no agreement even in the more extended sense embodied in the definition."[20]

[57] It is evident from the wide ambit given to interpretations of what constitutes an agreement, that a purely textual, or face-value, analysis is not the proper approach. A facial analysis only continues to be applicable in cases of hardcore cartelism where the wording of the agreement is so clear as to bring it unambiguously, within the ambit of the s 4(1)(b) prohibitions. Ultimately, agreements are conceived within a specific context and it would be relevant to take that context into account when applying the presumption of illegality test where the situation is not one of hardcore and unambiguous cartelism.

[58] On this score, I&J urged this Court to take into account accepted legal principles of rectification in the law of Contract. This is the principle that where parties have reduced their contract to writing but the writing does not accurately reflect the agreement between them or what they intended, either party may approach the court for rectification of the written instrument.[21] If rectification is recognised in contract law,

[18] *Netstar (Pty) Ltd v Competition Commission South Africa* [2011] ZACAC 1; 2011 (3) SA 171 (CAC) at para 25.

[19] Id.

[20] Id.

[21] *Dormell Properties 282 CC v Renasa Insurance Company Ltd* [2010] ZASCA 137; 2011 (1) SA 70 (SCA) at para 52.

there is no reason why this principle cannot apply in the context of Competition Law. It follows therefore, that a mere consideration of the face of the agreement is insufficient. I&J points to the further principle accepted in our law of rectification that it is possible to construe the agreement even when the document accurately reflects the words chosen by the parties but the effect of those words is not what they intended.[22] All this to say that consideration must be given to the incorrect attachment to the Manufacturing Agreement: Annexure B.

[59] This Court in *Stuttafords*,[23] held that one can look beyond the wording of a minute recording agreement and also consider the intentions and conduct of the parties to establish whether there was an agreement within the meaning of s 4(1)(b). Accordingly, this Court has passed the mark of mere facial analysis as being sufficient when considering the *per se* prohibition. It follows therefore that, where I& J contends that the incorrect Annexure B was attached to the Manufacturing Agreement and this was not what was intended, it would be irrational to simply press ahead and ignore relevant facts.

[60] I&J referred this Court to the trite principle recognised by this Court in *Gold Fields*[24] that the law should give effect to substance over form and that the intention of the parties to a transaction will be determinative of its nature. As already stated, the meaning of an agreement is wider than the literal meaning of the language of the contract. The CAC has confirmed that the "*test therefore is not what the contract purports to arrange but what constitutes the intention of the parties to the agreements in question*."[25] Already, this Court has accepted the assessment of an intention in a contract and this opens an enquiry into an assessment of a *per se* contravention. This approach must be viewed in the context of where the terms of the agreement are not a glaringly obvious contravention.

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[22] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* [2001] ZASCA 95; 2001 (4) SA 1315 (SCA) at 1328.
[23] *Competition Commission v Stuttafords Van Lines Gauteng Hub (Pty) Ltd* [2020] 2 CPLR 548 (CAC) (*Stuttafords*).
[24] *Gold Fields Ltd v Harmony Gold Mining Co Ltd* [2005] 1 CPLR 74 (CAC) at para 88.
[25] Id.

[61] So, can we consider the context and nature of the Manufacturing Agreement when measuring it against s 4(1)(b)(ii), as the Tribunal did? When interpreting contracts, the starting point is always to consider the plain, ordinary, grammatical meaning of the words in question.[26] However, the *locus classicus* on legal interpretation, *Endumeni*, explains that we must go further:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[27]

[62] The irrefutable import of *Endumeni* is that a solely literal approach to legal interpretation has been emphatically rejected. Likewise, *Capitec* emphasised that we are enjoined to consider context, language and purpose together, and to avoid a mechanical approach to interpretation:

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[26] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 47.

[27] *Endumeni* above n 7 at para 18.

> "It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined."[28]

[63] The rules of interpretation, which have now crystallised, demonstrate that a purely textual approach has been jettisoned. In other words, we have moved from a textual to a contextual approach to interpretation. This has been confirmed most recently by the Constitutional Court, which stated that interpretation is a "unitary" exercise to be approached holistically: simultaneously considering the text, context and purpose.[29] It is a legal craft which entails giving meaning to an agreement whilst applying judicial logic.[30] These are the principles that must be adopted to ensure that the end result of the assessment of an agreement upholds the rule of law. It follows therefore, that the context in which the Manufacturing Agreement was concluded is essential to a proper assessment of whether it contravenes s 4(1)(b)(ii). On the basis of *Endumeni*, the Manufacturing Agreement must be interpreted *objectively to determine its sensible and business-like meaning within the context of the document as a whole and the context in which it came into existence.*

[64] Other jurisdictions that do have the per se rule but do not have a similar s 4(1)(b) provision, such as the United States of America, have developed a body of Judge made law referred to as the rule of reason when interpreting an impugned agreement in order to mitigate the harsh effects of section 1 of the Sherman Act 1890. The rule of reason involves a comprehensive consideration of the nature and scope of the impugned agreement, and essentially, it means that the courts have to test the legality of the agreement by means of an enquiry.

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[28] *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) (*Capitec*) at para 25.

[29] See *Chisuse* above n 25 as cited in *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at fn 45.

[30] Moosa Fareed, 'Understanding the "Spirit, Purport and Objects" of South Africa's Bill of Rights' (2018) 4 *Journal of Forensic Legal & Investigative Sciences Category: Forensic science* 1.

[65] A solely literal approach to legal interpretation has been emphatically rejected in United States anti-trust law jurisprudence.[31] A strict literal reading could lead to false positive of a contravention and would result in virtually every agreement being a contravention. The U S anti-trust law has accepted the rule of reason test which takes into account a number factors and it is only in the most obvious *per se* contravention that there is no further enquiry.[32] It must' lack …any redeeming value'.[33] This approach correlates with the proper interpretation of s 4(1)(b) of the Act. Whilst the majority in recent Supreme Court favour the rule of reason test the interpretation of the per se rule continues to elicit dissonance. [34]

[66] Again turning to another example of an absolute prohibition in international competition law is that of the European Union. Section 101(1) of the TFEU (Treaty of the Functioning of the European Union) prohibits certain agreements akin to the per se rule but on the other hand in terms of s101(3) it exempts certain agreements. Therefore, looking at international competition law it is clear that upon a proper reading of section 101(1) read together with section 101(3) of the TFEU there is no room for a literalist approach to the what our jurisprudence defines as the per se rule. Section 101 contains both a prohibition and an explicit basis for exemption. The per se rule in the European Union is dealt with very differently but it is noteworthy that the strict interpretation of the per se rule is mitigated by s 101(3) of the TFEU.

[67] The rigidity of a purely textual approach might lead to perverse consequences for the Commission. Colluding parties might draft clauses that sanitize their real collusive arrangement. The concept of an agreement in the Act is widely defined

[31] This literalist approach to language has never been part of US anti-trust law see *Texaco Inc v Dagher* U.S. 1,5 (2006)
[32] *Leegin Creative Leather Products Inc. PSKS Inc* .No 06480. June 28,2007 majority opinion
[33] *Northwest Wholesale Stationery Inc. Pacific Stationary &Printing Co* 472 US284,289 (1985).
[34] *National Collegiate Athletic Association v. Alston*, 2021 and *Ohio v. American Express Co.* 138 S.Ct. 2274 (2018.) In considering a contravention of the Sherman Act in both cases, the majority in the Supreme Court favoured the Rule of Reason approach rather than a per se approach. Commentators opine that the Court continues to be willing to recognise and apply well-attested and accepted new methodologies in economic science to enrich antitrust law. In the latter case Justice Breyer in a dissent concurred in by inter alia Justices Ginsberg and Sotomeyer preferred to keep closer to the application of the per se rule.

suggesting it goes much further than the purely textual to the substance of the relationship between the parties. Rigidity in interpreting agreements would also lead to the exclusion of new methodologies in economic science. [35]

[68] I find that the Manufacturing Agreement is replete with clauses that are sensible and business-like having regard to the nature of the relationship the parties contracted for. Interbrand competition remained as will be seen from a proper interpretation of the Manufacturing Agreement and confirmed in the email exchanges referred to below. The relationship in this case really demonstrated that the parties were in a vertical relationship of manufacturer and distributor and remained competitive at Interbrand level.

[69] It would be artificial to interpret the Manufacturing Agreement as being a per se contravention because of administrative convenience, meaning that the evidential enquiry ends once a literal application of the *per se* rule takes places. A purely literal approach to save on the administrative costs and resources of an enquiry for the Competition Commission in not having to prove a contravention is not sufficient of itself to justify the implementation of the per se rule. [36] This would lead to overlooking our stringent application of our constitutional approach to make sure that our important standards of competition law are applied. Whilst the per se test arising from s 4(1)(b) might suggest of an inflexible approach, in the light of ever changing ways of doing business this would be an incorrect statutory interpretation. A strict per se interpretation means inflexibility which quickly leads to absurd competition outcomes in the dynamic world of business. The US anti-trust jurisprudence sets a high standard when applying the per se rule such as stating a court must have considerable experience with the type of restraint in issue rather than 'formalistic line drawing'. [37]

[35] id
[36] *GTE Sylvania* ,433 U.S. at 50 dealing with vertical price restraints.
[37] *Leegin Creative Leather Products Inc. PSKS Inc* .551 U.S. 877,887 2007 majority opinion

[70] In this appeal therefore, it is important to properly understand the true economic relationship between Karan and I&J if the Manufacturing Agreement is to be properly construed. The synergies between them at the time of concluding the Manufacturing Agreement and the fact that it was the product of the parties bringing their respective capacities together must not be overlooked. To ignore these aspects of the Manufacturing Agreement would be to misconstrue the true nature of the parties' relationship and the subsequent Manufacturing Agreement. Indeed, I&J contends that if the purpose for concluding the Manufacturing Agreement is ignored then "the entire architectural edifice of the Agreement would be something which it isn't." The relationship between Karan and I&J is one of supplier and customer, where I&J acquired the manufacturing services of Karan.

[71] Considering several of the relevant clauses of the Manufacturing Agreement through the lens of an interpretative approach demonstrates that the Manufacturing Agreement does not amount to a division of the market contrary to s 4(1)(b)(ii). These clauses, which are outlined below, describe how I&J would work together with Karan to develop new products and packaging methods; that the product packaging would reflect both the I&J and Karan brand names; and that I&J was to hold the intellectual property (IP) rights to its own branded products and acquire the intellectual property rights to the Karan branded products. These clauses demonstrate the true nature of the economic relationship between Karan and I&J. There is another consideration. If no well-considered analysis of the Manufacturing Agreement is undertaken, it would misapply the true economic relationship between Karan and I&J – that of a supplier and customer, where I&J acquired the manufacturing services of Karan. A counterfactual analysis will question what the outcome would be having concluded the Manufacturing Agreement compared with the outcomes that would have been achieved if the Manufacturing Agreement had not been concluded. The answer is clear Karan would have exited the market and I&J might have found another manufacturer for the beef patties.

[72] For example, clause 1.3 of the Manufacturing Agreement provides that—

> "I&J is desirous to utilise the skills of Karan in the processing of chilled and fresh beef and the manufacture of frozen beef products to have the contract products manufactured by Karan for and on behalf of I&J on the terms and conditions set out in this agreement."

This clause describes the purpose of the Manufacturing Agreement and does not suggest a division of the market. The restraint in clause 3.12 operated no wider than the "contract products". It is not overinclusive, as the Commission asserts.

[73] Clause 3.1 records that I&J appoints Karan as its manufacturer on an exclusive basis in respect of—

> "Such of the contract products stated in Annexure A and B in accordance with the specifications set out in Annexure C, as amended from time to time.
> [and]
> Such further contract products as Karan may manufacture for I&J pursuant to the provisions of 3.2."

Again, this clause cannot be interpreted as amounting to collusive conduct or dividing up the market.

[74] Clause 3.15 of the Manufacturing Agreement provides that—

> "Insofar as Karan may have contractual commitments to customers to supply the products referred to in Annexure B for a period after the commencement date of this agreement, Karan cedes, makes over and transfers to I&J all its rights and obligations in terms of such agreements. Karan undertakes to produce such quantities of the products listed in Annexure B as it may be called upon by I&J to enable I&J to honour its obligations in terms of such ceded and assigned agreements."

[75] In terms of clause 3.18, Karan granted I&J exclusive rights to use its brands, except for the Karan logo.

[76] Clause 10 provides that—

> "The marketing of all contract products shall be the sole responsibility of I&J, and the nature and extent thereof shall be within the sole discretion of I&J."

[77] I&J explains that Clause 9.9 of the Manufacturing Agreement provides that Karan will cease to produce and market products referred to in Annexure B. It provides expressly that Karan "shall be entitled to continue manufacturing the products referred to in Annexure B for its account and I&J shall have no right to the specifications and formulations of such products." Again the spectre of the incorrect Annexure B arises.

[78] Clause 1.4 must be interpreted in such a way as to determine its sensible and business-like meaning. The Tribunal found that the clause plainly records Karan's unilateral intention to terminate manufacturing for its own account, and to focus on its core business. The Tribunal correctly found that its decision was achieved when it terminated the Manufacturing Agreement with I&J, and exited the market.

[79] These clauses, when read holistically, expose the true economic relationship between Karan and I&J as one of supplier and customer. According to I&J, the Commission argued the relationship was horizontal in nature, but loses sight of the true economic relationship between the parties as that of manufacturer and distributor.

Annexure B

[80] The incorrect Annexure B was attached to the Manufacturing Agreement when it was signed. This gave rise to the problem of interpreting the Manufacturing Agreement by distorting the true agreement between the parties. The import of the incorrect Annexure B means that, if read literally, Karan could not supply house branded products to the retail trade and no-name burger patties to the food services sector. However, the correct and true agreement was that Karan was not restricted from supplying all the products listed in Annexure B. This mistake led to the Commission relying on its understanding that Annexure B listed house brands meaning that the

restriction on Karan was manifest. This was the basis of the submission that the restraint on house brand products meant that Karan exited the market. It is clear from the case presented by I&J that it was not overinclusive and disproportionate because the parties did not intend to include the house brand products of Karan. That was a mistake.

[81] It is I&J's case that the essence of the Manufacturing Agreement was that Karan gave I&J an exclusive licence to produce Karan branded products; Karan undertook to manufacture for I&J all the I&J products, as well as any of the Karan branded products that I&J elected for manufacture; Karan would not produce and supply those products (I&J products and Karan branded products) to any third parties; and Karan could continue with the manufacture and supply of house branded products.

[82] I&J point out that there are further clauses in the Manufacturing Agreement which are relevant and point away from a *per se* contravention. This includes clause 3.12. That was the undisputed evidence in the cross examination of Mr Schoeman of I&J. Mr Schoeman testified that the 'house brands' listed in Annexure B were not meant to have been included. His evidence in this regard was as follows:

> "MR TRENGOVE: Was there any intention to restrain [Karan] in their supply of house branded products to outsiders?
> MR SCHOEMAN: No.
> MR TRENGOVE: So was the agreement intended to apply to house branded product at all?
> MR SCHOEMAN: No.
> MR TRENGOVE: And in fact it is only because of [Annexure] B that the agreement at least purports to apply to house branded product as well. There's nothing else in the Agreement that makes it applicable to house branded products, is that correct?
> MR SCHOEMAN: No."

[83] Firstly, the Tribunal's stance in not accepting the evidence of Mr Schoeman is incorrect. Having drafted the Manufacturing Agreement, he was well placed to testify on the proper interpretation of the Manufacturing Agreement and in particular that

Annexure B was not the correct annexure. It was a product list. There was no evidence to gainsay this.

[84] Secondly, Mr Simonsen, the Commission's witness, also confirmed that Annexure B was a product list and was incorrectly attached. When he was questioned about I&J's position that some of the products were included in error, he agreed with it and stated that "there are errors here." I& J drew attention to the error confirmed in the evidence of Mr Simonsen. He gave an example in Annexure B where he explained that the product "Maxi's" ought to have been listed as a Karan product, not an I&J one. That there were errors appears also from the inclusion in Annexure B of a chicken schnitzel even though clause 13.6 expressly records that the Manufacturing Agreement "did not relate to any chicken based products." A glaring example of why an interpretative approach is necessary and would otherwise result in an injustice is the fact that Annexure B, to the Manufacturing Agreement, was the incorrect annexure. It would be an absurdity to find a contravention on a clearly incorrect document. Anything short of an interpretive approach would result in a grave injustice in interpreting the Manufacturing Agreement.

[85] I&J correctly submits that the Manufacturing Agreement as a whole shows that there was never an agreement to divide the market into house brands and supply to the food services trade. I&J correctly submit that if an interpretive approach is not adopted in respect of the Manufacturing Agreement, the conduct of the parties and the purpose of the agreement will be lost in its entirety. If this happens, it will be impossible to interpret the Manufacturing Agreement objectively in a business-like manner, as we are enjoined to do.

[86] Competition jurisprudence is evolving constantly and so are market conditions changing. Consequently, a more nuanced approach is required. Based on our constitutionally mandated authority to approach the interpretation of statutory

provisions more widely, courts have the interpretative authority to avoid a literalist approach or an interpretation based purely on the face of an agreement. [38]

The 2002 unsigned amending agreement

[87] Mr Simonsen of Karan testified that after the amending agreement, Karan began to sell beef burgers to food service customers.

[88] But it is clear that even prior to the Unsigned Agreement I&J and Karan supplied processed beef products to retail customers such as Hyperama, Spar and Pick n' Pay. They also sold the processed beef products to food services customers such as restaurants, delicatessens, fast food outlets, and caterers. The series of emails referred to below corroborate this. It is therefore undisputed that Karan sold its beef burgers to retail chain stores and independent retailers. Mr Pretorius of Karan was clear that it was Karan's intention to increase its volumes at their burger plant. It needed a volume of 300 tonnes per month. I&J could not place sufficient orders to reach that tonnage. It is undisputed that Karan continued its relationship with Pick n' Pay throughout. The evidence also points to the fact that I&J demonstrated that it attended to the distribution of the Karan products and its own products simultaneously and in competition with one another's products at the same time. This points away from any possible egregious conduct impairing competition and dividing the market.

[89] I&J also argues that the very *raison d'etre* of the Manufacturing Agreement was undisputed in the evidence led. The series of emails exchanged between the parties which formed part of the record, confirm this, and clearly reflect that the parties were in healthy competition with each other.

[90] Although Mr Simonsen of Karan testified that after the Amending Agreement was drafted, Karan began to sell beef burgers to food service customers, this was not correct, because it is clear that even prior to the unsigned agreement, I&J and Karan both supplied processed beef products to retail customers such as Hyperama, Spar and

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[38] Per se Rules in US and EU Antitrust. Competition Law

Pick n Pay. They also sold the processed beef products to food services customers such as restaurants, delicatessens, fast food outlets, and caterers. The series of emails and the evidence corroborate this.

[91] In assessing whether the conduct of Karan and I&J actually contravened the prohibition, the email exchanges are relevant because they reflect intense competition between Karan and I&J to the extent that Karan could not meet supply demands. For example, in an email from Ms Mandy Murphy of I&J dated 8 October 2009, it was stated that:

> "regarding your request to pack and supply a beefburger directly to and under the PNP brand you have put I&J in a very difficult situation. . . I would like to remind you that when both I& J and Karan supplied PNP with the PnP no-name brand as well as the PNP choice brand there was direct negative interaction between the products. *When PNP no name brand was on promotion, the volumes of I&J beefers declined and the same occurred between PnP choice and the I&J homestyle* range."

[92] Ms Murphy also stated in the same email demonstrating intense level of competition between Karan and I&J in its own branded beefburger.

> " As mentioned you have put I&J in a difficult situation with PnP as such assuming the product concept range is as above, and that you can address and provide solutions for the above issues *then we not in a position to stop you"*

[93] This, and other emails, confirm that the competition between Karan and I&J was such that I&J lost out on sales. And Mr Simonsen of Karan repeatedly confirmed the mutual understanding that I&J could not stop Karan from supplying Pick n' Pay, in other words that I&J could not stop Karan in its trading. These emails clearly demonstrate that the conduct of I&J and Karan was inconsistent with collusion and cartel behaviour.

[94] Further analysis of the email exchanges demonstrates that the actual conduct between the parties was not a *per se* contravention. The evidence points to Karan and

I&J promoting their own brands in competition with each other. In an email from Mr Graham Simonsen (Karan) to Ms Jann Lurie (I&J) (16 November 2010 at 12h13) he says:

> "Karan beef shipments to I&J are down by 249 tonnes (-12.1%) January to October year-on-year. This has had a negative effect on our own overhead recovery at the burger plant, which we are hoping to make up by taking on the Pick n Pay range. As you guys are well aware, this is a factor of the economic environment as well as competitive pricing in the market."

[95] These emails indicate that there was no restriction on Karan on supplying Pick n Pay. Again, it is only by considering the true meaning of the impugned agreement that a court can properly construe its true meaning in order to be in a position to weigh it against s 4(1)(b)(ii).

[96] In assessing whether the conduct of Karan and I&J actually contravened the prohibition, the email exchanges referred to reflect intense competition between the Karan and I&J to the extent that Karan could not meet supply demands. There is an express reference in the email to the effect that I&J could not stop Karan in its trading. The emails confirm that the competition between Karan and I&J was such that I&J lost out on sales. This is inconsistent with collusion and cartel conduct. An analysis of the email exchanges demonstrates that the actual conduct between the parties was not a *per se* contravention.

[97] There are further examples of the intense level of competition between Karan and I&J in its own branded beefburger. The evidence clearly depicted the relationship between I&J and Karan. Mr Simonsen repeatedly confirmed the understanding that I&J could not stop Karan from supplying Pick n' Pay:

> "MR TRENGROVE: In other words, in part they concede that they can't stop you supplying Pick n Pay branded burgers to Pick n Pay.
> MR SIMONSEN: We went back as I've said, Pick n Pay approached after I&J. . . (intervention)

MR TRENGOVE: Will you just answer the question? She concedes...
MR SIMONSEN: Yes.
MR TRENGOVE: ...that you're entitled to do that?
MR SIMONSEN: Absolutely.
MR TRENGOVE: Under the manufacturing agreement?
MR SIMONSEN: I would assume so yes."

and

"Again the detail is not important but the principle is clear that they accept that you are entitled to supply Pick n Pay branded burgers in Pick n Pay.
MR SIMONSEN: Absolutely."

and

"MR TRENGOVE: No but the important point Mr Simonsen is that both sides accept...
MR SIMONSEN: Absolutely.
MR TRENGOVE: ...that you are entitled to supply Pick n Pay burgers to Pick n Pay.
MR SIMONSEN: Yes."

and

"MR TRENGOVE: But again the whole premise of the argument is, 'we are fully entitled to do what we do'.
MR SIMONSEN: Absolutely."

and

"But again it's a debate about your supply of house branded beef burgers to Pick n Pay, on the premise that you are fully entitled to do so correct?
MR SIMONSEN: Uhm.
MR TRENGOVE: Your answer, your nod doesn't record will you just answer audibly.
MR SIMONSEN: Yes.
MR TRENGOVE: So doesn't that illustrate that Mr Pretorius was correct that you continued throughout to supply the house branded products to the chain stores?
MR SIMONSEN: We came back into house brands to build volumes. That wasn't throughout.
MR TRENGOVE: Well and you came back because both sides interpreted the manufacturing agreement to allow you to do so?

> MR SIMONSEN: Well I&J could've terminated the agreement if they thought their contribution ... (intervention)
> MR TRENGOVE: They could've but they didn't.
> MR SIMONSEN: No.
> MR TRENGOVE: Just answer the question.
> MR SIMONSEN: So that ... (intervention)
> MR TRENGOVE: Just answer the question.
> MR SIMONSEN: Yes.
> MR TRENGOVE: Both sides interpreted the manufacturing agreement to allow you to supply house branded products to the chain stores?
> MR SIMONSEN: I would say yes."

[98] A further aspect of the evidence shows that there was no division of the market. In response to a question from the Chairperson of the Tribunal, 'So, irrespective of what I&J had to say, you would've built up the volumes using the Pick 'n Pay house brand?', he said ' and consequently dividing up of the markets.'.

[99] Consequently, the evidence clearly points to Karan and I&J promoting their own brands in competition with each other. There was no restriction.

Evaluation of the legal argument on characterisation

[100] I now deal with the assertion by the Commission that the Tribunal should not have considered the principle of characterisation. I have already referred to the Commission's arguments on characterisation. It is clear that the Commission failed to consider the full finding in *Ansac* on which the Tribunal based its finding. The case law is clear on the application of the principles of characterisation even in s 4(1)(b) alleged contraventions. There is no confusion in the Tribunal's finding about the ambit of s 4(1)(b). In paragraphs 45 and 46 the Tribunal's finding specifically relies on the ratio in *Ansac* and that the enquiry involves two legs. The Tribunal correctly applied the two leg approach as set out above. One leg requires the definition of the scope of s 4(1)(b) the answer to which must be determined through statutory interpretation. The other leg of the enquiry asks whether or not the conduct in issue falls within the terms of the prohibition. This is a fact based enquiry that must be answered by recourse to

the relevant evidence. Put another way, the question must be asked whether the conduct, properly characterised, is the kind of conduct that is to be prohibited under s 4(1)(b)(ii). The Tribunal goes on to explain the issue of characterisation by looking at the true nature of the Manufacturing Agreement to see if it falls within the scope of s 4(1)(b)(ii) as stated by the CAC.

[101] This is how characterisation was explained in *Ansac*:

> "[41] The Tribunal's ruling, particularly in the context of the reasons it gave, is open to the construction that (perhaps inadvertently) it has precluded evidence even if the object of advancing it is to demonstrate that Ansac's conduct does not fall within the prohibition in s 4(1)(b) at all. To that extent its ruling was in our view premature and therefore incorrect. This ruling the CAC endorsed. In this in our view it fell into the same error.
>
> [42] But even if the ruling is no more than ambiguous, and was not intended to have that effect, it is clearly desirable that there should be clarity on the issue, bearing in mind the uncertainty that clearly exists, and the enormous expense this uncertainty has already entailed.
>
> [43] We pointed out earlier that an agreement that involves, amongst other things, price-fixing, is prohibited by s 4(1)(b), and nothing can be advanced to justify it. But when has prohibited price-fixing occurred? This is not always simple to determine. In the United States the condemnation of price-fixing arises from judicial interpretation of s 1 of the Sherman Act.[39] In the European Union, in Australia, and in this country it is decreed by legislation.
>
> [44] In the United States the enquiry is approached by 'characterising' the conduct complained of to determine whether it constitutes that form of conduct that the courts have through case precedents labelled 'price-fixing' but have not comprehensively defined. In this country, where the prohibition is decreed by legislation rather than by judicial intervention, the prohibited form of conduct must be established by construing s 4(1)(b).
>
> [45] Once the ambit of sub-para (b)'s prohibition has been established the enquiry can move to whether or not the conduct in issue falls within the terms of the prohibition. That is a factual question that must be answered by recourse to relevant evidence.

[39] Quoted in note 2 above.

> [46] There is in principle no reason why the enquiry should not be conducted in reverse. The enquirer might choose first to identify the true character of the conduct that is the subject of the complaint, and only then turn to whether the conduct (so characterised) constitutes price-fixing as contemplated by s 4(1)(b). (This is how the enquiry is conducted in the United States, though there the two elements tend to be elided, because the scope of the prohibition is itself a matter of judicial rather than legislative determination.)
>
> [47] Whichever approach is adopted; the essential enquiry remains the same. It is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of this is a factual enquiry. In ordinary language this can be termed 'characterising' the conduct – the term used in the United States, which Ansac has adopted."

[102] It is clear that the Commission's submission that characterisation has no place in s 4 (1) (b) of the Act and seeks to bolster this approach by reliance on *Ansac* must fail in the light of the above mentioned paragraphs in *Ansac*. Contrary to what the Commission argues, the findings of the Tribunal do not deal with justification. The Tribunal's reasoning amounts to an analysis to see whether the Manufacturing Agreement and the conduct falls within the ambit of s 4(1)(b) (ii).

[103] In particular, the application of the characterisation principle in *Ansac*[40], *A'Africa*, [41]*Aranda*[42] and *Dawn Holdings*[43] could not be clearer.

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[40] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA) ; [2005] 3 All SA 1 (SCA) (13 May 2005)

[41] *A'Africa Pest Prevention CC and Another v Competition Commission of South Africa.* (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019)

[42] *Aranda Textiles (Pty) Ltd and Another v The Competition Commission of South Africa* (190/CAC/Dec20) [2021] ZACAC 1.

[43] *id 7*

[104] In my view the Commission is plainly wrong when it argues that the characterisation of conduct should not be conflated with judge made law to insert such a requirement into the structure of the section. Competition law jurisprudence as currently considered calls for a factual enquiry into the nature of the prohibited conduct as being essential and this does not translate into justification for the conduct.

[105] The Commission also argued that the *Ansac* decision is not authority for the proposition that an analysis of s 4(1)(b) of the Act is incomplete without '*characterizing*' the conduct as the Tribunal had found. The Commission submits that the word characterisation does not appear in the section and therefore it is wrong to embark on a characterisation exercise. But it would be far too simplistic to undertake a facial analysis of the Manufacturing Agreement and without more conclude that the words in the agreement per se amount to prohibited conduct. Theories of Competition law are characterised by uncertainty, ambiguity and complex economic theory and there is a considerable blur between what is lawful and unlawful conduct. Sometimes the conduct is overtly pernicious and sometimes not. In the absence of the process of characterisation the correct analysis of the conduct will result in legal uncertainty. Characterisation is not only logical but a fair process to assess whether the conduct falls within the per se prohibition.

[106] The Commission errs when it says characterisation is simply not part and parcel of the Act. On the contrary, *Ansac* is clear authority for the proposition that the conduct must be characterised to see if it falls with the ambit of s 4(1)(b) of the Act. *Dawn Holdings* also finds the same.[44] The Tribunal is correct when it found that looking at the face of the Manufacturing Agreement without more is incorrect.

[107] The Commission argues that the Tribunal ruling is emblematic of a deeper problematic approach by the Tribunal and that by characterising the conduct it had closed off any possibility of reaching a conclusion that an agreement, *per se*, violates s

[44] Id 7

4(1)(b) of the Act. This argument is flawed. The purpose of characterisation is merely to consider whether the conduct complained of falls within the purview of s 4(1) (b). That is precisely what this section is intended for. Although there will be occasions where the conduct is clearly so pernicious that it clearly falls within the ambit of the per se prohibition and will not have redeeming characteristics. In those circumstances there is no need for characterisation.

[108] In *Dawn Holdings* Rogers J said this:

> "This test is an objective one. The fact that the parties subjectively believed that a restraint was reasonably required does not suffice. Since the burden of proof in a s 4(1)(b) case rests on the referring party, it is for the Commission or private complainant to prove that these requirements are not met. In other words, where the *characterisation* of an agreement is in issue, the burden of proof is on the Commission or complainant to establish that the agreement, *properly characterised*, falls within the prohibition. Depending on the circumstances, there may be an evidentiary burden on the respondents to raise the issue of *characterisation* but it is unnecessary to go into this question because characterisation was squarely raised. "[45]

[109] It follows therefore that the principle of characterisation from the case of *Ansac, A'Africa, Aranda and Dawn Holdings* characterisation is an entrenched principle in South African competition jurisprudence. This is also consistent with international competition jurisprudence.

Is <u>implementation</u> of the Manufacturing Agreement a consideration?

[110] I&J have submitted that the Manufacturing Agreement was never actually implemented. Some authors suggest that it is unnecessary to show that the agreement was actually implemented or effective in order to establish a contravention. *MacNeil* makes it clear that implementation is an unnecessary requisite to establish a contravention. [46] It suffices to establish that some level of understanding was reached

[45] Id 7 at para 33

[46] *MacNeil Agencies Pty Ltd vs Competition Commission (*121/CAC/Jul12 [2013] ZACAC 3918 November 2013) at para 63

between the competitors that replaced independent action. I&J submit the evidence is clear that the parties understood and implemented the Manufacturing Agreement, if not from the outset, then in any event from about 2002, to mean that Karan was only precluded from selling I&J and Karan branded products. Following upon *MacNeil* actual implementation of the Manufacturing Agreement is not a consideration. It is clear, however, that the parties pursuant to their common understanding of the Manufacturing Agreement simply remained at liberty to sell house branded products to the retail trade and no-name to the food sector.

[111] I&J also referred the Court to a number of authorities on the conduct of parties in relation to the agreement. In *Stuttafords*[47] this Court explained that, where the conduct complained of

> 'is not expressly confirmed by the parties concerned, an inference may be drawn from the discussion itself where one of the parties commits to act in a particular way and the conduct of the other parties demonstrates an agreement to be bound. The proved facts from which the inference is to be drawn must objectively establish that at least one party assumes an obligation or gives an undertaking or assurance that it will act in accordance with what was discussed at the meeting. A mere expectation that a party will act in that way is insufficient. As contemplated in section 4(1)(b)(i) of the Act, <u>conduct that conforms with a binding arrangement must be shown to exist</u>.'

[112] In *Competition Commission of SA v NPC-Cimpor (Pty) Ltd and others,*[48] this Court held:

> 'That cartel activity represents the very worst strain of anti-competitive conduct is surely trite. Courts need to be vigilant in ensuring the prohibition of this conduct. This again is manifestly obvious. Indeed this Court … has developed a responsive jurisprudence for the curbing of cartel activity. But this does not mean that the rule of law does not apply to cartel cases and can be elided over in favour of a result. <u>That the</u>

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[47] Id 46.

[48] *Competition Commission of SA v NPC-Cimpor (Pty) Ltd and others* [2020] 2 CPLR 524 (CAC).

> <u>Commission must discharge the burden that the Act imposes upon it to produce relevant evidence that shows the nature of the conduct of the impugned party is such that it justifies a finding that the conduct so proved falls within the scope of section 4(1)(b) of the Act</u>.'

[113] I&J urged this Court to consider the fact that the Manufacturing Agreement was not implemented and this evidenced the parties' common understanding and intention that there was no prohibited restriction in the Manufacturing Agreement. It submitted that the intention and understanding of the parties' agreement, and the manner in which they "implemented it is vital" to the inquiry.

[114] Based on *MacNeil* it is clear, that proof of the actual implementation of an agreement is unnecessary to prove prohibited conduct. The relevance of the nature of the conduct and whether it conforms with a binding prohibited agreement goes to assess whether it falls within the ambit of s 4(1)(b).

[115] In considering how I&J and Karan conducted themselves in relation to the Manufacturing Agreement, conduct is relevant to the intention of the parties and whether that was within the ambit of the prohibition. The conduct of the parties goes no further than that. In this appeal therefore the conduct of the parties insofar as what they supplied and to whom is relevant to the <u>true meaning</u> of the Manufacturing and Amending Agreements. The actual implementation is not a decisive factor.

Time bar

[116] I&J submit that if the parties indeed amended the Manufacturing Agreement in 2002, then the important enquiry in this case is no longer what their original agreement might have meant, but how they understood and implemented their Amended Agreement from 2002 onwards. Accordingly the alleged practice would have ceased three years later in June 2005. Any possible contravention of s 4(1)(b)(ii) prior to that date would be time-barred under s 67(1) of the Competition Act which provides that a "complaint in respect of a prohibited practice may not be initiated more than three years after the practice has cease".

[117] Insofar as it may be necessary to deal with the time bar in relation to the Amending Agreement, if it indeed was concluded, it is common cause that it was concluded in June 2002. An analysis of Mr Simonsen's evidence that Karan was fully engaged in the food services market by 2002, bearing in mind he was not in the employ of Karan when the Manufacturing Agreement was signed. This date could therefore not be disputed by the Commission. On the Commission's own version, therefore, any purported '*allocation*' to I&J of food services customers therefore ceased by 2002, and Karan was supplying house brands up to the time Mr Simonsen left the employ of Karan in 2012.

[118] If is accepted that that Amending Agreement came into existence in 2002 then I&J correctly submits on that version, the parties' conduct since 2002 has not been in contravention of s 4(1)(b)(ii). The alleged market division conduct on which the Commission relies accordingly became time barred by June 2005 in terms of s 67(1) of the Act, when the complaint was not initiated within three years after the practice had ceased.

[119] The complaint on which the referral was based originated in February 2013, when the Commission initiated a complaint against several feedlots. The Commission took more than four years after initiation of that complaint to conduct a dawn raid, during which it found the Manufacturing Agreement. It took another three months to initiate the present complaint being June 2017. By then, almost three years had lapsed since Karan had ceased production of burgers patties for I&J because of the termination letter which is in 2014. The Commission argues that the offending conduct persisted from 2000 until the termination of the Manufacturing Agreement in 2014. The facts do not support this interpretation.

[120] In the light of the undisputed evidence that as from 2002 there was no restriction so the 2014 date as date of cessation of the prohibited practice is clearly wrong. In this case the complaint was out of time as there was no Manufacturing and Amending

Agreement in place. In addition this was not a situation where there was a secretive agreement incapable of detection. The Commission despite being in possession of the Manufacturing and Amended Agreement did not act timeously.

[121] *Pickfords*[49] allows for the Commission to seek condonation where it initiates a referral outside the time period contemplated in s 67(1) of the Act. The Commission did not seek condonation. *Pickfords* provides that time bars are important mechanisms to prevent inordinate delays that may be detrimental to the interests of justice,[50] and that the societal interest in certainty and quality of adjudication and for disputes to be '*finalised timeously'*, requires that '*disputes be brought before a court as soon as reasonably possible'*.[51]

[122] Clearly based on the undisputed evidence, any '*market allocation*' which is alleged by the Commission was not given effect to within three years prior to the initiation of the Commission's complaint and the complaint must therefore be dismissed on this basis alone.

Conclusion

[123] On a proper analysis of the evidence and the law, Karan was only precluded from supplying I&J and Karan branded burgers. Karan continued to sell house branded products to the retail trade and no-name to the food sector. The Manufacturing Agreement is, therefore, not the type of limitation that is envisaged as a *per se* contravention. These are perfectly permissible commercial restraints as described in *SAB*. This restraint does not reach the threshold of a cartel agreement in contravention of s 4(1)(b)(ii). The evidence also did not show that Karan exited the market because of the Manufacturing Agreement, another feature pointing way from a s 4(1)(b) (ii) contravention.

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[49] Id note 3 at para 14.

[50] Id at para 44.

[51] Id at para 43.

[124] Cartel conduct is among the most egregious of disruptions to the competitive market, and something more than the present Manufacturing and Amending Agreement would be required before the line between legitimate commercial agreements and cartelism is crossed. The Manufacturing Agreement, construed in its true sense and together with the evidence, does not demonstrate that the relationship between I&J and Karan divided the market in contravention of the Competition Act.

[125] For these reasons, the appeal must dismissed with costs.

Order

1. Condonation is granted for the late filing of the appeal.
2. The appeal is dismissed.
3. The Commission is ordered to pay the first respondent's costs including the cost of two senior counsel.
4. The Commission is ordered to pay the costs of the postponement including the cost of two counsel.

M Victor
Judge of Appeal
Competition Appeal Court
of South Africa

I concur

pp N Manoim

N Manoim
Judge of Appeal
Competition Appeal Court
Of South Africa

I concur

pp L Modiba

L Modiba
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