IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 20188/17

Date: 11/5/17

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

11-5-2017 .....
DATE SIGNATURE

In the matter between:

FARMERS TRUST **APPLICANT**

AND

THE COMPETITION COMMISSION OF SOUTH AFRICA **RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Competition Commission of South Africa (the Commission) brought an *ex parte* application for relief against nine Respondents. This is an application for reconsideration brought against the order granted on 22 March 2017 by Thlapi J in the urgent Court by the Sixth Respondent ("**Farmers Trust**") in terms of Rule 6(12)(c). Farmers Trust seeks to have the *ex parte* order reconsidered, in terms of which the Competition Commission (the Commission) conducted a dawn raid of Farmers Trust's offices on 23 March 2017. The application was brought by the Commission in terms of sec 46(1) of the Competition Act no 89 of 1998, as amended (the "Act").

[2] Farmer's Trust brought the application for reconsideration also in the urgent Court and wants this Court to reconsider the whole application, including urgency. Farmer's Trust filed an affidavit supporting its application and the Commission filed a replying affidavit. Farmer's Trust then filed an answer to that affidavit. I will deal with these affidavits later on in the judgment.

[3] The Commission filed a notice that par 8 and 9 on p 49 and 50 of this further affidavit filed by Farmer's Trust be struck out as it amounts to evidence which the deponent is not qualified to give or amount to new matter.

[4] In the papers before Court the Commission claimed that a search warrant to enter, search and seize information, documents, data and records from the premises belonging to the respondents was required.

[5] It was alleged that the Commission is investigating alleged contraventions of sec 4(1)(b) of the Act as the Respondents are alleged to have entered into agreements and/or engaged in practices to fix the price and trading conditions for the supply of fresh fruits and vegetables. It is alleged that the conduct is on-going.

[6] The Commission stated that it received a complaint from the Department of Agriculture, Forestry and Fisheries that intermediaries are involved in anti-competitive behaviour in their activities at fresh produce markets in the country.

[7] In the application the Commission stated that cartel conduct is very secretive and once detected requires urgent intervention. It was also stated that the ease with which evidence can be destroyed makes these investigations very sensitive.

[8] The Commission sets out in some detail the facts on which it based its application and said that the conduct of the Respondents involves undercutting the prices charged by smaller intermediaries by charging way below the average market price for certain agreed periods of a

trading day. The Respondents, it is alleged, keep their prices unsustainably low during these periods and quickly increase prices significantly as soon as the small intermediaries run out of stock. It is further alleged that they make decisions regarding the actual timing of the price increases. It was alleged that the Respondents are aware that their arrangements are unlawful in that they suppress competition by driving their competitors out of the market and by agreement increase prices paid for freshly produced fruits and vegetables by consumers. This gave rise to a reasonable apprehension that the Respondents have an incentive to hide or destroy evidence regarding their behaviour if they were to be afforded notice of the intended search and seizure. This, so it is alleged, would defeat the purpose of the investigation. The Commission indicated that search and seizure procedures would be the only effective way of investigation and less invasive methods would not yield the desired outcome.

[9] After receiving the complaint the commission started investigating these allegations and these investigations led to the launching of this application. It sets out in detail how the search and seizure would be conducted and also name the persons who would be involved in the procedure.

[10] The aforesaid was considered by Thlapi J who then granted the order.

[11] In the affidavit filed by Farmers Trust for the reconsideration it complained about the way that the search and seizure was conducted and said that the application should be reconsidered and dismissed with costs for the following reasons:

a) It is not urgent and no reasons were set out why the Commission could not be afforded substantial redress at a hearing in due course as the complaint was lodged as far back as 2015;

b) The order is couched in the form of a final order and no opportunity was afforded to the Respondents to be heard;

c) There was no service and no case was made out on the papers as to why the papers should not have been served;

d) The notice of motion is at odds with the prescripts of Rule 6;

e) None of the persons or entities are properly cited nor is it clear that they were duly informed of their rights if they were desirous of contesting the application; and

f) The averments in the affidavit constitute inadmissible hearsay, submissions by the deponent and the conclusions were not supported by primary facts.

[12] Farmers Trust proceeded to complain at length about the way in which the search and seizure was executed and the reputational damage caused by a media release on 23 March 2017. It also denies that it was involved in any wrongdoing.

URGENCY

[13] Pertaining to the question of urgency it must be noted that although the complaint was lodged in 2015 it is obvious on a proper reading of the papers that the Commission investigated the complaint before it decided on an appropriate cause of action. It is clear from the papers that the investigation resulted in a decision that the sec 46 route was the appropriate one and that the investigation reached a point in which the Commission had to act. In my view the urgency is self-evident and it follows that once this point in the investigation is reached the Commission has to act expeditiously to obtain evidence. Consequently I am of the view that the matter was indeed urgent.

THE APPLICATION TO STRIKE OUT

[14] Rule 6(12)(c) which makes provision for a reconsideration application reads as follows: *"A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order"*. Rule 6(12)(c) does not contain the words "*supported by such affidavits as the case may require*" as in Rule 6(11). This has been held to mean that the party seeking the reconsideration need not file an affidavit together with the notice specified in Rule 6(12)(c).[1]

[15] Where however the party seeking to reconsider the application does file an affidavit then the other party has an opportunity to file a replying

[1] **Siegwart v Fey** (unreported, case no 12252/99 dated 25 November 1998).

affidavit. This is made clear in **Industrial Development v Sooliman** where the Court held as follows:

> *"If a respondent who invokes Rule 6(12)(c) chooses not to put up an answering affidavit, then the applicant likewise has no need nor an opportunity to put up a reply.*
>
> *If a respondent who invokes rule 6(12)(c) chooses to file an answer, then the applicant may file a reply, which is, obviously, subject to the general rules and practice about not introducing new matter illegitimately."*[2]

[16] The Court made it clear that, if a replying affidavit was filed it would be subject to the ordinary rules regarding introducing new matter in reply[3]. Counsel for the Commission argued that this principle should apply with even greater force to a further affidavit filed by a party, in my view this argument is correct and self-evident.

[17] In **Finishing Touch 163 (Pty) Ltd v BHP Billion Energy Coal South Africa** the Supreme Court of Appeal sets out what the approach should be when an applicant introduces new material in its replying affidavit. The following was said:

> *"The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared, and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant."*[4]

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[2] **Industrial Development Corporation V Sooliman** 2013(5) SA 603 GSJJ t par 12, see also par 9
[3] *Supra*, par 12
[4] 2013(2) SA 204 (SCA) at par 26

[18] The court has a discretion to allow new matter in reply in certain rare instances. This is however allowed after giving a respondent the opportunity to deal with such new matter in a second set of affidavits.[5]

[19] The aforesaid makes it clear that the ordinary principles are only departed from in exceptional cases, for example where the new matter was not available when the papers were initially filed and only when the other party is given an opportunity to deal with such new matter.

[20] In the answer to the replying affidavit Farmers Trust made out a new case by attempting to demonstrate that it was not involved in price fixing. The Commission did not have an opportunity to deal with these allegations, it is also irrelevant for purposes of this application as Farmers Trust will be given an opportunity to state its case at the hearing before the Tribunal. It needs also mentioning that this affidavit was filed purportedly in response to the Commission's replying affidavit, yet it does not address the challenges made therein. As a result the content of paragraphs 8 and 9 of the further affidavit filed by Farmers Trust should be struck out.

THE TEST FOR RECONSIDERATION APPLICATIONS IN THE CONTEXT OF SEC 46 OF THE ACT

[21] If one proceeds to the merits of the application for the reconsideration the general principles pertaining to such applications should be

[5] **Shephard v Tuckers Land and Development Corporation (Pty) Ltd** (1) 1978 (1) SA 173 (W) at 178A.

considered, taking into consideration the nature of the application seen in context of what the Act seeks to achieve.

[22] In **ISDN Solutions** the court set out the various factors which the Court will consider when considering a reconsideration application:

> *"The framers of Rule 6(12)(c) have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attained by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein."*[6]

[23] In **Industrial Development v Sooliman** it was held that :

> *[10] The critical phrase in the rule is 'reconsideration of the order'. The rationale is to address the potential or actual prejudice because of an absence of audi alterem partem when the ex parte order was granted. The rule is not a 'review' of the granting of the order. A 'reconsideration' is, as has been often said, of wide import. It is rooted in doing justice in a particular respect, ie to allow the full ventilation of the controversy. In my view it would be a pretence at justice to craft a mechanical approach which disallowed a full ventilation, which would be the outcome if a relevant reply, if any, were to be prevented. The object of the rule should be, ex post facto, to afford an opportunity for a hearing afresh — as if there had been no earlier non-observance of the audi alterem partem doctrine. To*

[6] **ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others** 1996 (4) SA 484 (W) at 487 B-D.

disallow a reply, on principle, serves no sound principle or policy that is consistent with the aim of full and proper ventilation of disputes, which is what a 'reconsideration' ought to be about."[7]

[24] In the light of the aforesaid the reasons why the aggrieved party was not afforded the opportunity to be informed about the application is of great importance. The potential for injustice and possible prejudice are also factors of importance. On reconsideration all relevant circumstances will inform the decision ultimately taken by the Court.

[25] In considering the application the purpose of the Act as set out in section 2 hereof is of importance. It reads as follows:

"*Purpose of the Act – The purpose of this Act is to promote and maintain competition in the Republic in order –*

(a) To promote the efficiency, adaptability and development of the economy;

(b) To provide consumers with competitive prices and product choices;

(c) To promote employment and advance the social and economic welfare of South Africans;

[7] *Supra*,at para 10.

(d) To expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) To ensure that small and medium-seized enterprises have an equitable opportunity to participate in the economy; and

(f) To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

[26] Section 46(1) under which the Commission approached the Court provides in relevant part as follows:

> *"46 Authority to enter and search under warrant*
>
> *(1) A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that-*
>
> *(a) a prohibited practice has taken place, is taking place or is likely to take place on or in those premises; or*
>
> *(b) anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.*

(2) A warrant to enter and search may be issued at any time and must specifically-

(a) identify the premises that may be entered and searched; and

(b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 48.

(3) A warrant to enter and search is valid until one of the following events occurs:

(a) The warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose for issuing it has lapsed; or

(d) the expiry of one month after the date it was issued." (Court's emphasis)

[27] The Commission, in order to succeed, needed to demonstrate that from the information on oath there were reasonable grounds to believe that: (a) a prohibited practice has taken place, is taking place or is likely to take place on or in those premises; **or** (b) anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

[28] In **Competition Commission v Yara (South Africa) (Pty) Ltd & Others**[8] the Supreme Court of Appeal has summarised the investigative process as comprising the following stages:

1.1 The purpose of the initiating complaint is to trigger an investigation, which might eventually lead to a referral.

1.2 The initiating complaint is merely the preliminary step of a process that does not affect the respondent's rights. The

[8] 2013 (6) SA 404 (SCA) at par 24.

purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case.

1.3 The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicious are justified.

1.4 The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.

[29] If one considers the aforesaid the Commission needed to prove that the information provided to Court demonstrated that there were reasonable grounds to believe that a prohibited practice was taking place and that there may be material in possession or under control of the Respondents which may be of assistance in the investigation.

[30] Counsel for the Commission argued that the Act seems to keep the bar low for the attaining of the warrant as this step is merely one of the starting points of the investigative process. This makes perfect sense in the context of an investigation into the possibility of prohibited practices which the Act seeks to prevent. Despite Farmers Trust's protestation against the fact that it was not given notice or be given an opportunity to be heard such a notice is not required.

[31] The Commission had, on a perusal of the facts, reasonable grounds to believe that the Respondents were engaging in prohibited practices, including, amongst others, price fixing or fixing of trading conditions in the market. This believe resulted in the necessity of an investigation to determine whether further action should be taken and the application for a warrant in terms of section 46.

[32] At the time the Commission sought its warrant this suspicion was set out supported by facts and the potential harm to the public was dealt with. This information and evidence must be viewed in the light of the scheme and purpose of the Act, which seeks to serve the public interest and to protect *inter alia* small and medium enterprises' participation in the economy, as well as the rights of consumers.

[33] The Courts, in a variety of circumstances and legislation, frowned upon applications that are intended to restrain or halt investigations. The principles that should apply are illustrated in the cases set out below. In the cases referred to parties sought to vindicate their rights under the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") and requested an interdict pending such reviews. These principles, in my view, find equal application in this matter and consequently I refer to some of them.

[34] The decision to institute an investigation or similarly the continuation of an investigation is not reviewable under PAJA. This has been the law since **Simelane and Others NNO v Seven-Eleven Corporation SA**

(Pty) Ltd and Another.[9] There the SCA had to decide whether a decision by the Competition Commission to refer a complaint to the Competition Tribunal was subject to review under PAJA. It held that it was not and stated as follows:

> *"Administrative decision or not - Point 1G*
>
> *[17] I cannot do better than refer to what is said in the Norvatis case. For the reasons there stated it is clear that in a case such as the one we are concerned with the function of the commission is investigative and not subject to review, save in cases of ill-faith, oppression, vexation or the like. Seven-Eleven should husband its powder for the contest before the tribunal."*

[35] In **Corpclo 2290 CC t/a U-Care and Another v Registrar of Banks** the Court held that the decision by the Registrar of Banks to investigate an institution was not an administrative action:

> *"Secondly, the Registrar's decisions to investigate the appellants' business and institute proceedings against the appellants for an interdict in terms of section 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of "administrative action" in section 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity. Whether or not administrative action, which would make PAJA applicable, has been taken, cannot be determined in the abstract. Regard must always be had to the facts of the case. A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external legal effect."* (Court's emphasis) [10]

[36] In **Competition Commission of SA v Telkom SA Ltd and Another**,[11] it was held that the decision to refer a complaint to the Competition

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[9] 2003 (3) SA 64 (SCA)
[10] [2013] 1 All SA 127 (SCA) at par 26
[11] [2010] 2 II SA 433 (SCA)

Tribunal, being essentially investigative in nature, was not a reviewable administrative action, it was stated as follows:

> *"[10] Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA, namely, the requirement that the decision be one of an administrative nature and the separate requirement that it must have the capacity to affect legal rights. I consider that Telkom has failed to establish both requirements. As to the second of these although the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subject to a hearing before the Tribunal, and be required to submit its business affairs and documentation to public scrutiny it cannot be said that its rights have been affected or that the action complained of had that capacity." [Internal footnotes omitted and emphasis added.]*[12]

[37] The Court went on to endorse **Simelane** in the following terms:

> *"In my view, the decision in Simelane that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative and not an administrative nature remains a correct reflection of the position under PAJA and the decision that PAJA does not apply in this review is correct."*[13]

[38] In **Bonitas Medical Fund v Council for Medical Schemes and Another**[14], the SCA held that the decision to institute an inspection was not appealable. It held that:

> *"[15] There is no material difference between the nature of an inspection in terms of section 44(4)(a) of the MSA and that of the investigation of a complaint by the Competition Commission in terms of the Competition Act 89 of 1998. Such investigation may culminate in a referral of the matter to the Competition Tribunal. In Competition Commission of SA v Telkom SA Ltd and another [2010] 2 All SA 433 (SCA) at paragraph 11, this Court held that a decision to refer a matter to the Competition Tribunal and the referral itself, are of an investigative and not an administrative nature and are not subject to review under the Promotion of Administrative Justice Act 3 of 2000. In my judgment, the same applies to section 44(4)(a) of the MSA."*

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[12] Supra, par 10
[13] Supra, par 11
[14] [2016] 4 All SA 684 (SCA).

[39] From the aforesaid it would seem to me certain principles evolved that should be kept in mind when investigative processes are considered:

a) Although a Respondent may be obliged to give evidence under oath, be subjected to a hearing and be required to submit its business affairs and documentation to public scrutiny it was found that its rights are not affected in any real sense. The decision to investigate and the process of investigation do not adversely effect the rights of a Respondent that has a direct and external legal affect;

c) The nature of an investigation requires that the Commission be given an opportunity to gain access to documents, without the suspected firm being given prior warning in order to prevent interference with the investigative process and possible destruction of evidence; and

d) A suspect firm will be able to exercise its rights including its right to be heard in the event of the Commission issuing a notice of referral.

[40] It is not a foregone conclusion that a notice of referral will be issued. The Commission may, upon conclusion of its investigation, issue a notice of non-referral. In the event of a referral, Farmers Trust will have a full opportunity to view all the documents upon which the

Commission will rely, access witness statements, hear witnesses, cross-examine witnesses, lead evidence and make submissions.

[41] The Act aims to serve the greater good and it is self-evident that in order to be able to do so the Commission must be able to investigate a complaint properly. It will be counterproductive if the Commission is required to inform a party about the possibility of a search and seizure as it will defeat the purpose of an investigation. Under these circumstances it is justifiable that a suspected firm is not given notice of the application in terms of section 46. If however it would turn out that the investigation was vexatious or brought in ill-faith a suspected firm may in due course be able to avail itself of any legal remedy available to it, to address any damages that it may have suffered.

[42] In the light of the aforesaid Farmer's Trusts can't succeed on the merits.

THE SECTION 50(5) DEFENCE

[43] Farmers Trust also raised the defense in the heads of argument in terms of sec 50(5) of the Act.

[44] Section 50(5) of the Act reads as follows:

> *"(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."

[45] Farmers Trust alleges that on the Commission's own version the complaint was lodged on 28 January 2015 and more than a year had lapsed before the application was launched.

[46] However a letter was attached to the Commission's reply in which the period was extended.

[47] As a result I am of the view that this defense can't succeed.

CONCLUSION

[48] In the light of all the circumstances I am of the view that the application for reconsideration should be is dismissed and the order made by Thlapi J should stand.

[49] I make the following order:

49.1 The matter is found to be urgent;

49.2 Paragraph 8 and 9 of the further affidavit filed by the Applicant is struck out;

49.3 The application for reconsideration is dismissed and the order granted by Tlhapi J is confirmed;

49.4 The Applicant in the Reconsideration application is ordered to pay the costs of the application, which costs will include costs of two Counsel.

R G TOLMAY
JUDGE OF THE HIGH COURT