IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

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

**DATE** 2/8/2013 **SIGNATURE**

CASE NO: 38235/2012

DATE: 02 August 2013

IN THE MATTER BETWEEN

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| PREMIER FOODS (PROPRIETARY) LIMITED | APPLICANT |
| AND | |
| NORMAN MANOIM N.O. | FIRST RESPONDENT |
| THE COMPETITION TRIBUNAL | SECOND RESPONDENT |
| THE COMPETITION COMMISSION | THIRD RESPONDENT |
| THE TRUSTEES FOR THE TIME-BEING OF THE CHILDREN'S RESOURCE CENTRE TRUST | FOURTH RESPONDENT |
| THE TRUSTEES FOR THE TIME-BEING OF THE BLACK SASH TRUST | FIFTH RESPONDENT |
| CONGRESS OF SOUTH AFRICAN TRADE UNIONS | SIXTH RESPONDENT |
| NATIONAL CONSUMER FORUM | SEVENTH RESPONDENT |
| TASNEEM BASSIER | EIGHTH RESPONDENT |

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| BRIAN MPHAHLELE | NINTH RESPONDENT |
| TREVOR RONALD GEORGE BENJAMIN | TENTH RESPONDENT |
| NOMTHANDAZO MVANA | ELEVENTH RESPONDENT |
| FAREED ALBERTS | TWELFTH RESPONDENT |

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JUDGMENT

KOLLAPEN J

1) The applicant, Premier Foods (Pty) Ltd has launched proceedings out of this Court in terms of which it seeks the following relief:

   (a) Declaring that neither the first nor the second respondent can lawfully issue a notice in term of section 65(6)(b) of the Competition Act 89 of 1998, certifying that the applicant's conduct has been found to be a prohibited practice under the Act in Competition Tribunal of South Africa, case numbers 15/CR/Feb07 and 50/CR/May08; and

   (b) Costs of the application in the event of opposition.

2) The third to the twelfth respondents oppose the relief sought. While the third respondent initially filed an answering affidavit suggesting that it would abide the decision of the Court, it subsequently filed a supplementary affidavit in which it sought to clarify that position.

3) In the supplementary answering affidavit it states that it had always been the intention of the third respondent to participate in these proceedings and that despite its statement that it would abide the decision of the Court, it was always its intention to oppose the application. That intention, the third respondent states, was evident from it filing a notice of intention to oppose and an answering affidavit and in engaging with the applicant's attorneys to agree to a date for the

hearing of the matter. It also submitted that even if the Court were to find that it sought to change its stance from abiding to opposing, such a change in stance should be permitted as it was in the interests of justice to do so and the applicant in any event could not claim any prejudice on account of such a change in stance.

4) The applicant's stance was that in adopting the position that it would abide the decision of the Court, the third respondent had made a decision not to oppose and accordingly the consequence of that decision was that it abandoned its right to oppose the application and was precluded from seeking to revive such a right as it purported to do. The applicant sought to rely in this regard on the minority judgment in the matter of *COMPETITION COMMISSION v LOUNGEFOAM (PTY) LTD* 2012 (9) BCLR 907 (CC).

5) While the doctrine of peremption has been raised as representing an obstacle to the third respondent's desire to oppose the application, I am not convinced that the facts relevant to these proceedings suggest that there was a deliberate abandonment of the right to oppose. In *THE MINISTER OF DEFENCE and OTHERS v SOUTH AFRICAN NATIONAL DEFENCE UNION* (161/11) (2012) ZASCA 110 (30 August 2012), the Court cautioned as follows:

> *'As with all cases of the abandonment of rights, acquiescence will not lightly be inferred. What is required to be shown is unequivocal conduct on the part of the litigant that is inconsistent with any intention to appeal, such as to point 'indubitably and necessarily' to the conclusion that he or she intended to abandon the right'.*

6) The Court went further however in affirming that even where it was satisfied that there had been acquiescence, it was open to the Court to overlook the acquiescence where the broader interests of justice would otherwise not be served and relied in this regard on the *dicta* in *GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA v VON ABO* 2011 (5) SA 262 (SCA), where the Court dealing with a challenge that the appeal had been perempted responded that:

*'It would be intolerable if, in the current situation, this Court would be precluded from investigating the legal soundness of the first order, as a result of the incorrect advice followed by the applicants or an incorrect concession made by them.'*

7) In this regard I am not satisfied that on what is before me it could be said that the conduct of the third respondent demonstrated unequivocal conduct that it had abandoned its right to oppose and accordingly it cannot be said that its right to oppose had become peremptied. However even if I am wrong on that conclusion, my view is that the interests of justice would be best served by ensuring the full participation of the third respondent in these proceedings given its important role in the administration and enforcement of the Act.

8) That being the case, the Court allowed the filing of the supplementary affidavit which effectively enabled the third respondent to proceed with its opposition to the relief sought by the applicant.

The facts relevant to the dispute

9) The facts underpinning this application are not in dispute and may be summarized as follows:
   (a) During December 2006, the Competition Commission (the Commission) received information concerning the operation of a bread cartel in the Western Cape and initiated a complaint investigation against the applicant (Premier), Tiger Food Brands Ltd (Tiger), Pioneer Foods (Pty) Ltd (Pioneer) and Foodcorp (Pty) Ltd (Foodcorp).
   (b) Premier applied to the Commission for leniency and was granted leniency in terms of the Commission's Corporate Leniency Policy (CLP).

Some of the main features of the Commission's CLP relevant to this application are:

(i) Section 3.1 of the CLP describes the CLP as follows:

'The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.'

(ii) Section 3.3 describes immunity as follows:

'Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed on that successful applicant.'

(iii) Section 5.9 provides that:

'The immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act'.

(iv) Finally, Section 6.4 provides that:

'Nothing in the CLP shall limit the right of any person who has been injured by cartel activity in respect of which the Commission has granted immunity under the CLP to seek civil or criminal remedies.'

(c) On the 14th of February 2007, the Commission referred a complaint under case number 15/CR/07 to the Competition Tribunal (the Tribunal) against Tiger and Pioneer for alleged price fixing and dividing of markets in the Western Cape (Western Cape complaint).

(d) On the 6th of May 2008, the Commission referred a second complaint under case number 50/CR/May 08 to the Tribunal against Pioneer and Foodcorp for the same alleged conduct in the broader South African market (the national complaint).

(e) Tiger and Pioneer were cited as respondents in the Western Cape complaint while Foodcorp and Pioneer were cited as respondents in the national complaint. Premier was not cited as a respondent in the referrals of the two complaints as the Commission's practice at the time was not to cite a leniency applicant in Tribunal proceedings as leniency immunized a self-confessed cartel member from adjudication before the Tribunal.

(f) The two complaints were consolidated into a single hearing before the Tribunal. The hearings took place during June and September 2009 and Premier, represented by counsel, participated in the proceedings. The Commission filed the witness statements of several Premier managers who participated in the bread cartel and five of Premier's witnesses presented oral evidence of the unlawful cartel activities of Premier and the other cartel members.

(g) In its decision and order handed down on the 3rd February 2010, the Tribunal found *inter alia* that '*During December 2006, Pioneer, Premier and Tiger Brands contravened section 4(1)(b)(i) and (ii) of the Competition Act*' and proceeded to set out the basis of the conclusion arrived at.

Section 4 of the Act prohibits what is termed restrictive horizontal practices and Section 4 (b)(i) and (ii) describe such practices as involving the direct or indirect fixing of the purchase or selling price or any other trading condition and the dividing of markets by allocating customers, suppliers etcetera. The Tribunal was satisfied that on the evidence presented to it, Premier and the other members of the cartel had contravened the provisions of Section 4(b)(i) and (ii) of the Act.

(h) The fourth to the twelfth respondents seek to proceed with a civil action to recover damages for the loss that the class of consumers they claim to represent suffered as a result of the unlawful activities of Premier and other members of the cartel in amongst other things fixing the bread price. In this regard they made application to the Chairperson of the Tribunal in terms of Section 65(6)(b) of the Act for the issue of a certificate to the effect that the Tribunal had found that the conduct of Premier had been found to be a prohibited practice in terms of the Act. The fourth to the twelfth respondents relied on the Decision and Order of the Tribunal of the 3rd of February 2010 to which reference has already been made in support of its request for the issue of a certificate.

(i) Premier opposed the issue of such a certificate and it appears that the stance of the first respondent was that the issue of the certificate was an administrative function performed by the Chairperson and not the Tribunal and could be determined by him and not the Tribunal.

(j) Premier then launched these proceedings for the determination of the ambit of either the Chairperson or the Tribunal's jurisdiction as regards Section 65 of the Act, seeking the declaratory relief already referred to.

The submissions of the parties and the issues in dispute

The position of the Applicants

10) The stance of Premier is that neither the first nor the second respondent has the jurisdiction to issue the certificate the fourth to the twelfth respondents seek in terms of Section 65(6)(b) as against Premier as Premier was not referred to the Tribunal by way of complaint referral and not cited as a respondent in the adjudication proceedings before the Tribunal.

11) It contends that once the Commission had made the election in not referring Premier to the Tribunal, then the Tribunal, being a creation of statute was precluded from making any order in respect of Premier as Premier was not before it as a party and the complaint that was the subject of the referrals did not in any event require that an order be made in respect of Premier and against Premier.

12) On this basis it accordingly contends that the first and second respondent cannot certify an order against Premier who was not included in the complaint referrals and was not a party in the proceedings before the Tribunal that culminated in its decision and order of the 3rd of February 2010. It also argues that for the first or second respondent to do so will violate the principle of *audi alterem partem*, as Premier was not a party before the Tribunal.

The position of the respondents

13) The position of the third to the twelfth respondents is that if regard is had to the Act as a whole and in particular the orders that the Competition Tribunal had the power to make then such orders were not confined to parties before it but could extend to non-parties and that the decision not to cite Premier as a respondent did not, regard being had to the Act, constitute an insurmountable obstacle to the making of the order it did against Premier on the 3rd of February 2010.

14) In addition it is contended that regard being had to the role of Premier in the investigation, the referral and finalization of the complaints, in particular its self-confessing stance, its application for leniency and its substantive participation in the proceedings before the Tribunal, then it could hardly be said that Premier was not before the Tribunal in substance if not in form and that the order made in respect of the conduct of Premier was wholly consistent and in line with Premier's own admission of its unlawful conduct. It must have as a leniency applicant contemplated that the Tribunal would declare the conduct of the cartel (of which Premier was a member) a prohibited practice.

15) Finally its stance is that the very informed and substantial participation of Premier as a leniency applicant and as a witness before the Tribunal cannot and does not support the conclusion contended for by Premier that its rights to *audi alteram partem* were violated.

Analysis and discussion

16) The Tribunal's jurisdiction and its powers are activated once the Commission refers a complaint to it in terms of Section 50 of the Act. Outside of such a referral the Tribunal has no powers *mero motu* to enquire into, adjudicate or make findings or orders. It would necessarily follow that the orders and findings that the Tribunal makes must be related to and arise out of the matters referred to it in terms of Section 50.

17) Once the referrals of the two complaints had been made on the 14th of February 2007 (the Western Cape complaint) and the 6th of May 2008 (the national complaint), the Tribunal became seized with the complaints and the manner of how it was required to deal with the complaints as well as its powers in doing so are set out broadly in Part D of the Act (Sections 52 to 60) which of course must be read together with Section 27 which deals with the functions of the Tribunal.

18) Section 27 beyond affirming that the functions of the Tribunal are to adjudicate on and determine whether prohibited conduct has occurred also provides in Section 27(c) that the Tribunal may 'make any ruling or order necessary or incidental to the performance of its functions in terms of this Act'.

Section 58 which deals with the Orders of the Competition Tribunal provides in 58(1)(a)(v) that the Tribunal may:

*'make an appropriate order in relation to a prohibited practice including -*

*(v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65'.*

19) The language of the section referred to above is clear and unambiguous to the extent that the order contemplated relates to a prohibited practice and further that it may be made in respect of the conduct of a firm, which in turn is defined as 'including a person, partnership or trust'. On that basis it can hardly be suggested that Section 58(1)(a)(v) confines the Tribunal to making the kind of orders contemplated only in respect of a party formally cited as such. Clearly if such was the intention of the Legislature, it would have used language to that effect. To seek to give the section a limited or restricted scope as the applicant seeks to do is not supported by the plain and clear language of the Act.

20) In this regard it is worth noting that the Act, while it does not define 'party', defines respondent as '*a firm against whom a complaint of prohibited practice has been initiated in terms of this Act*'. Section 58(1)(a)(v) must have been drafted mindful of this distinction and to the extent that there is reference to a firm and not a respondent in the section, it can only mean that the power to declare the conduct of a firm to be a prohibited practice is not confined to a party or a respondent in proceedings before the Tribunal and of course provided there was a proper factual basis to do so and that it was as a result of a hearing that was fair and in which the firm had the right to participate in as contemplated in Section 53 of the Act. Again if that was the intention of the Legislature, it would have used the term 'respondent' in Section 58(1)(a)(v) . That it did not is clearly indicative of the Legislative intent.

21) Premier argued that the extended meaning sought to be given to the term 'firm' in Section 58(1)(a)(v) is not sustainable in particular if one had regard to the provisions of Section 59 of the Act which also uses the term 'firm' and empowers the Tribunal to impose administrative penalties against firms. Arguing that the Tribunal could only impose administrative penalties against a firm who was a

party before the Tribunal, the term 'firm' must of necessity be given a limited meaning.

22) In this regard the term 'firm' is clearly used in two different contexts in Section 58 and Section 59. While it may be contended that a narrow meaning is necessitated by the circumstances contemplated in Section 59 (the imposition of administrative penalties which in any event would not be permissible in terms of the CLP) the same is not necessarily the same in respect of the matters dealt with in Section 58(1)(a)(v) and accordingly 'firm' could have different meanings if regard is had to the context of the two sections in question. This application does not concern the interpretation of Section 59 and to the extent that it may be relevant, it is in any event distinguishable as I have outlined above.

23) Accordingly the reference to 'firm' in Section 58(1)(a)(v) would not be confined to a party before the Tribunal.

24) Premier sought to rely on the *dicta* in *AGRI WIRE (PTY) LTD and ANOTHER v COMMISSIONER OF THE COMPETITION COMMISSION and OTHERS* 2012 (4) All SA 365 (SCA) where the Court in dealing with the position of an entity who has been afforded leniency in terms of the CLP stated that:

> *'that this signals quite clearly that a party who has been afforded conditional immunity, is not before the Tribunal for the purposes of the latter making a determination against it , including the imposition of an administrative penalty.'*

On this basis it was argued that it was not competent for the Tribunal to make an order in respect of Premier as it was not before the Tribunal for that purpose.

25) In Agri Wire (*supra*) the Court however went further and dealt with the position of an applicant for leniency before the Tribunal and in paragraph 8 of the judgment refers to Clause 3.3 of the CLP which reads:

> *'Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore the Commission would not propose to have any fines imposed to the successful applicant'.*

26) The Court then referred to the footnote in the CLP which explains adjudication as follows:

> *'Adjudication means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view to getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein'.*

It is accordingly clear that the order of the Tribunal in respect of Premier was not an exercise in adjudication as defined in the CLP and which the CLP prohibits in respect of a leniency applicant. Premier was not being prosecuted and no fines were being sought against it. To that extent the order made was not in contravention of the CLP and while Premier was in the main not before the Tribunal for the purpose of the latter making a determination against it, there is with respect nothing in the CLP or in the Act that prevents the Tribunal from making such an order as opposed to adjudicating on the conduct of Premier. On the contrary the express provisions of Section 58(1)(a)(v) empower the Tribunal to make such an order in such circumstances.

27) Premier, relying on the *dicta* in *NETSTAR (PTY) LTD and OTHERS v COMPETITION COMMISSION and ANOTHER* 2011(3) SA 117 (CAC) sought to argue that once the referral of the complaint had taken place the Tribunal's 'only function was to determine whether in the light of the Act's provisions and the evidence placed before it or obtained by it pursuant to the exercise of its inquisitorial powers, that complaint is made out'.

As I understand its argument, Premier contends that the two complaints were confined to the respondents named therein and that Premier was not named as a party or a respondent and no determination was required with regard to the conduct of Premier by the Tribunal. Accordingly it argues that the finding made in respect of the conduct of Premier was both not necessary and not competent.

28) I have some difficulty with the conclusion that Premier seeks to draw from the *dicta* in Netstar. In Netstar the Court cautioned that the Tribunal was not at large to decide whether conduct was anti-competitive but had to do so in the light of a specific complaint referred to it and to ensure that its hearings were confined to the matters set out in the referral. Accepting this as a useful starting point it would be then be necessary to examine the referral in order to determine its parameters.

29) In both complaints the referral is effected using a particular form (Form CT 1) accompanied by a notice of motion and referral affidavit which together define the ambit of the Tribunal's jurisdiction. Thus it is difficult to conceive of a situation where the Tribunal makes an order in terms of Section 58(1)(a)(v) in respect of a prohibited practice that falls outside of a referral or makes a finding in respect of a firm that is not identified in the referral. Clearly the powers in Section 58(1)(a)(v) can hardly be said to be unlimited and there must at the very least be a causal link between the orders that the Tribunal makes in terms of Section 58(1)(a)(v) and the referral which ultimately remains the foundational basis for the Tribunal to exercise its powers.

The referral in Case No 15/CR/Feb07 (Western Cape complaint)

30) An examination of the referral and the Form CT 1 a well as the Notice of Motion and affidavit of Ms Nandisile Mokoena, senior investigator in the Enforcement and Exemptions Division in the Commission reveals that while the named respondents are Tiger and Pioneer, the referral affidavit provides considerable

detail of the role of Premier in the cartel and its conduct in price fixing, the fixing of discounts and the division of the market.

31) In her affidavit Ms Mokoena states that Premier was granted conditional immunity from prosecution 'as a result of its co-operation with the applicant (the Commission) during its investigation and confession of its role in the bread cartel activity involving the first and second respondents and Blue Ribbon itself in the Western Cape'. (Premier was trading as Blue Ribbon Bakery).

32) She also states in her affidavit that the 'gravamen of the applicant's complaint is that during the period November to December 2006, the respondents and Blue Ribbon... directly fixed the selling price of bread...fixed discounts and...agreed not to poach each other's independent distributors'.

The referral in Case No 50CR/May08

33) In the national complaint referral, the affidavit filed in support of the referral by Mr Avishkar Kalicharan, senior legal analyst in the Enforcement and Exemptions Division of the Commission also describes in considerable detail the operations of the bread cartel and the role of Premier in the acts that constituted unlawful price fixing and the division of the market. In his affidavit he also characterizes the complaint as conduct involving the respondents and Premier in the fixing of the bread price and the division of the market.

34) The terms and the scope of the referrals were clear and included the role and conduct (self-confessed) of Premier in how the Commission described the complaint. In the determination of the complaints before it the Tribunal by way of referral as well as through the evidence led before it (including senior staff of Premier), became privy to the role played by Premier and to the extent that its finding and order were located both in the referral and the evidence before it, it can hardly be argued that in making the finding that it did in respect of Premier, it

acted outside of its powers or outside of the terms of the referral. Recognizing that the Tribunal was tasked with making a determination in respect of cartel activity, it is inconceivable how the Tribunal could have been expected to make factual findings but in doing so was prohibited from including in those findings the conduct of a self-confessed cartel member who was represented before the Tribunal, led evidence before it and confessed to its role in the unlawful cartel activity, simply because such a cartel member was not formally cited as a party or a respondent in the proceedings before the Tribunal.

35) In addition the facts in Netstar and the finding of the Tribunal which was reversed on appeal are clearly distinguishable. There the Tribunal went outside of the referral in considering facts and circumstances, even engaging in speculation and the Court accordingly concluded that the factual findings of the Tribunal could not stand. The caution therefore from Netstar that the only function of the Tribunal is to determine if the complaint is made out must accordingly be understood in the context and the factual matrix of the particular case.

36) I have difficulty in associating myself with this line of reasoning that Premier has urged me to embrace. It militates against the very purpose and architecture of the Act, it undermines the objectives of the CLP, it encourages opportunism when an applicant for leniency after making confession of its role in a prohibited practice and being immunized as a result thereof is able to successfully argue that notwithstanding its confessed role, the Tribunal is not competent from affirming in the form of an order such a role purely because it was not formally a party.

37) If the Tribunal is correctly confined to determining whether a complaint has been made out, then that is precisely what it did given the width and the scope of the complaints referred to it. In my view while it was limited in its adjudicative function to the respondents before it, there was no such limitation in determining whether the complaint was made out and while in that regard such a finding and

order that it made related to Premier, it was in the context of Premier being before it, participating in the proceedings and confessing to its cartel activity.

38) Mr Unterhalter in response to a question by the Court conceded that while the Tribunal was competent to make a factual finding in respect of the conduct of Premier, it was however precluded from elevating such a finding to an order as it then did. He argued that the failure to cite Premier as a respondent continued to stand as an insurmountable obstacle to the Tribunal making the order that it ultimately did in respect of Premier.

39) I have some difficulty in following the distinction, particularly in the context of the matter before the Tribunal and the finding and order made in respect of Premier, which Premier seeks to advance. Surely if the Tribunal was entitled to make a finding against Premier, as was conceded, it could only have done so on the basis of the complaint that was referred to it and having been satisfied that there was a proper factual basis for doing so and that the rules of natural justice were honoured in doing so. It has not been suggested that the finding made in this regard was open to any criticism or attack. On the contrary it could not have been when it was so wholly consistent with what Premier had placed before the Tribunal.

40) If the finding is not open to attack, can it be arguable that the order can be assailed simply on account of Premier not being cited as a respondent? The order in respect of Premier mirrors in every respect the findings made against Premier and I cannot imagine any circumstances that would compel this Court to accept the correctness of the findings made but not the order that follows it, in particular when that order purely mirrors the findings. To do so would be importing an unacceptable level of formalism into the work of the Tribunal and may well have the consequence of undermining the ability of the Commission and the Tribunal in giving effect to the Act.

41) In this regard it warrants mention that the order of the Tribunal in relation to Premier was an affirmation of the stance and role that Premier had confessed to and which it must have expected when it elected to avail itself of the provision, including the protective provisions, which benefited it from, of the Corporate Leniency Policy.

The issue of a certificate in terms of Section 65(6)(b)

42) What Section 65(6)(b) contemplates is the issuing of a certificate in respect of a finding of a prohibited practice made by the Tribunal. The certificate is purely an affirmation or an attestation of a finding already made. Such a finding is of the kind contemplated by Section 58(1)(a)(v). Accordingly when a request is made for the issue of a certificate it would be in respect of a finding already made and in existence. No new finding is required in order to issue a certificate.

43) Put simply if there is no finding on record, there can be no certificate issued and conversely it must follow that if there is a finding the issue of the certificate should ordinarily follow in accordance with the finding. In this regard the proposition that the Chairperson of the Tribunal is obliged to issue a certificate where a finding has been made is difficult to countenance as it is indeed difficult to conceive of circumstances under which the Chairperson of the Tribunal could justifiably refuse to issue a certificate in the face of a finding that remains valid and in place at the time the certificate is requested.

44) Any interested person has the right in terms of Section 66 to apply to set aside or amend a finding or order erroneously sought or granted in the absence of a party. If Premier contends that it was not a party and therefore by implication was absent as a party it could theoretically have brought an application in terms of Section 66. It has not done so and even if it did it would in my view have faced an insurmountable obstacle in making out a case that the finding of the Tribunal in respect of its conduct was either erroneously sought or erroneously granted.

45) For the reasons already offered the finding was both justified in law and on the facts available to the Tribunal, in the main the confession and the evidence by Premier of its role in the cartel and in the conduct that the Tribunal found to be a prohibited practice in terms of Section 4 of the Act.

Under these circumstances it must therefore follow that for as long as the finding of the Tribunal remains unchallenged, then the issue of the certificate as proof of such finding is not only permissible but also in my view peremptory.

46) Premier additionally sought to suggest that the finding of the Tribunal in relation to Premier was void on account of the fact that Premier was not cited as a party and placed reliance on the *dicta* in *TODT v IPSER* 1993 (3) SA 577 AD, arguing as I understand that no consequences could flow from an act that is void. While Todt (*supra*) provides support for the broad proposition that no consequences flows from a void decision, the case is also clear as to under what circumstances a decision of a Court could be regarded as being void. Those circumstances are:

a) Where there has been no proper service;

b) Where there is no proper mandate; or

c) Where the Court lacks jurisdiction.

47) None of those circumstances present themselves in this matter that will allow the formulation of a conclusion that the finding of the Tribunal in relation to Premier is void. The challenge on this aspect is also destined to fail.

The applicant's rights to *audi alterem partem*

48) Premier contends that the consequence of a finding made in the absence of it being cited as a party violated its rights in terms of the *audi* principle. Beyond restating that the applicant was a participant in the proceedings, represented by counsel and fully aware of the nature of the proceedings and the stance it had

adopted as a leniency applicant who had confessed to its unlawful role in cartel conduct before the Tribunal, it does not state in what manner it has been prejudiced or in what fashion its rights to *audi* were violated.

49) The third respondent points out, compellingly in my view, that the applicants claim that its *audi* rights were violated remains unsupported and unsubstantiated in that it (the applicant) cannot say it was unaware of the complaint referral, not informed of the details of the complaint, did not have adequate notice of the Tribunal's proceedings, did not participate in the proceedings and was unable to present its evidence to the Tribunal.

50) In as much as the principle of *audi* is inextricably linked to considerations of fairness, evenhandedness, objectivity and inclusiveness in the decision-making process, it is also both a matter of form and of substance. It may in appropriate circumstances where form may be said to be wanting, to examine issues of substance in order to determine whether there has been observance of the principle notwithstanding any deficiency in form. Not to do so would run the risk of adopting an overly technical and formal approach to a principle that at the heart of it is about procedural fairness.

51) In the context of the proceedings before the Tribunal, it could not be said that the principle in relation to Premier was not observed. It was represented at the hearing, allowed its staff to participate and to contribute to the proceedings as witnesses and was heard in every sense of the term.

52) I accordingly conclude that the challenge to the finding of the Tribunal on this aspect must also fail.

In all the circumstances and for the reasons given, it is evident that the applicant has failed to make out a case for the relief it seeks.

Order

53) In the circumstances I make the following order:

1. The application is dismissed;
2. The applicant is ordered to pay the costs of the third respondent which costs shall include the costs of two counsel;
3. The applicant is ordered to pay the costs of the fourth to the twelfth respondents.

N KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

38235/12

HEARD ON: 15 JUNE 2013
FOR THE APPLICANT: ADV D UNTERHALTER SC with ADV M du PLESSIS & ADV L KELLY
INSTRUCTED BY: NORTONS INCORPORATED
FOR THE THIRD RESPONDENT: ADV G MARCUS SC with ADV C STEINBERG
INSTRUCTED BY: CHEADLE THOMPSON & HAYSOM INCORPORATED
FOR THE FOURTH TO TWELFTH RESPONDENTS: ADV M le ROUX
INSTRUCTED BY: ABRAHAMS KIEWITZ ATTORNEYS