

Tribunal clears air on complaints' time frame

THE Competition Commission referred a commission-initiated complaint investigation in 2006 against eight milk processors for alleged breaches of the Competition Act, 1998 to the Competition Tribunal.

In response to the commission's findings, two of the respondents, Clover and Ladismith Cheese, raised a point in law that the complaint was referred outside the time frames provided for in the act. This point was heard by the tribunal on in June.

The tribunal highlighted important principles regarding the initiation of complaints in terms of section 49B of the act and how the selected route affects the time period within which a complaint must be referred.

Firstly, the commissioner may of his own accord initiate an investigation in terms of section 49B(1) and in that instance the commission can refer the matter at any time as said in section 50(1) of the act. Secondly, any person may lodge a complaint with the commission as envisaged in section 49B(2)(b) in the prescribed form. In this instance, if the commission intends to extend the investigation period beyond a year it has to obtain the consent of the complainant to extend the investigation period, or it would have to



approach the tribunal for an extension in terms of section 50(4) of the act.

Section 49B(2) distinguishes between the submission to the commission of information concerning an alleged prohibited practice which may be submitted "in any manner or form" and a complaint which must be submitted "in the prescribed form".

Clover and Ladismith Cheese claimed that a letter from a milk producer, submitted to the commission prior to the complaint being initiated by the commission, was a complaint submitted in the "prescribed form" and as a result the commission had one year within which to submit the complaint to the tribunal unless an extension

was obtained from the milk producer.

The commission contended that the milk producer's letter was not a complaint under the act but constituted a mere submission of information that, among a number of other things, triggered the initiation of the complaint investigation by the commission.

In assessing the arguments, the tribunal highlighted various important principles regarding the distinction between a mere "submission of information" and a complaint lodged in the "prescribed form".

The tribunal began by assessing the letter of the milk producer and made some telling observations:

- Despite the letter having been addressed to the chairman of the Competition Board (albeit cited incorrectly), it was submitted to the deputy minister of the agriculture department;
- The milk producer's physical address was not provided; and
- The constant reference in the letter to "we" or "us" made it unclear whether the grievance was submitted in the milk producer's personal capacity or on behalf of a number of producers

The tribunal also observed that the milk producer made it very clear that it wishes to remain anonymous and held that "this

requirement of anonymity is clearly not consistent with someone intent upon prosecuting a complaint".

The tribunal then distinguished clearly between a grievance and a complaint lodged in the prescribed form and made the remark that "complaints are part of everyday life and like the milk producer, there are aggrieved citizens who regularly commit grievances in writing for submission to those deemed able to assist".

However, "articulation of a grievance becomes a complaint where there is some realistic basis for apprehending that the aggrieved person intends, absent a referral by the commission, to assume the role of the complainant herself. The best evidence of such signal would be the submission of a completed form CC1 (commission's complaint form) in the prescribed form".

As regards Clover and Ladismith Cheese's reliance on the Glaxo Wellcome case, in which the Competition Appeal Court held that "a complaint may be initiated in any manner or form or in the prescribed form", the tribunal commented that "the flexible stance is to permit a layperson to submit a complaint. However, there can be no tolerance of

informality in submitting a section 49B(2)(b) complaint if the form of the submission leaves the commission uncertain as to whether a complaint has been submitted or information has been submitted."

In the instant case, the commission also managed to illustrate to, and convince, the tribunal that the alleged milk cartel was encountered and illuminated by a variety of sources, some of which predated the milk producer's letter.

The tribunal was satisfied that the milk producer had no intention to be a complainant in terms of section 49B(2)(b) and accepted the commission's contention that the complaint was initiated by the commission in terms of section 49B(1). The tribunal concluded that "the milk producer's letter constituted nothing more than the submission of information in terms of section 49B(2)(a) of the act. Accordingly the time frames referred to in section 50(2) do not apply".

A prospective complainant should take care to submit a complaint to the commission in its proper form if it is his intention to be cited as a complainant.

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