competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:
CR087Mar10/DSM021May11

In the matter between:

Blinkwater Mills (Pty) Ltd Applicant

and

The Competition Commission of South Africa Respondent

in relation to the referral by

The Competition Commission of South Africa Applicant

And

Pioneer Foods (Pty) Ltd and Others Respondents

Panel : Norman Manoim (Presiding Member)
: Andiswa Ndoni (Tribunal Member)
: Medi Mokuena (Tribunal Member)

Heard on : 31 March 2016
Order Issued on : 10 June 2016
Reasons Issued on : 10 June 2016

Reasons for Decision

Approval

[1] This is an interlocutory application that questions the validity of the Competition Commission's ("the Commission") application of one of its prosecutorial policies, known as the Corporate Leniency Policy or CLP.[1]

[2] The applicant in this matter, Blinkwater Mills (Pty) Ltd ("Blinkwater") and sixteen other firms in the maize milling industry, are being prosecuted by the Commission for alleged participation in cartel conduct.[2] To distinguish it from the present interlocutory application we will refer to this latter case as the main matter.

[3] Blinkwater's application has been opposed by the Commission and Tiger Consumer Brands Limited ("Tiger"). Tiger is the seventeenth respondent in the main matter.[3] The Commission granted Tiger provisional leniency in respect of the main matter, acting purportedly in terms of the CLP. The CLP,

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[1] The application although interlocutory would, if the applicant was successful, finally dispose of the case against it.

[2] The respondents in the main matter are charged for contravening section 4(1)(b) of the Act more specifically for the operation of cartels in the milling sector.

[3] Opposing papers were also filed by another respondent in the main matter, Premier Limited but Premier did not file heads of argument in the hearing but attended in an observer capacity only as the relief initially sought against it was not pursued.

as we go on to discuss, provides for leniency to a member of the impugned cartel provided it is the 'first through the door' to claim leniency.

[4] Tiger, it is common cause, was not first through the door (in relation to the main matter) but the Commission nevertheless decided to grant it leniency. Blinkwater states that this decision was irrational and its relief follows from what it contends are the consequences of this proposition; i.e. that Tiger should not have been granted leniency, that if so, the initiation against it (Blinkwater) was unlawful, and if the initiation was unlawful, so was the subsequent referral.[4]

[5] Before we consider the merits of the relief that Blinkwater is seeking it is necessary first to have regard to the factual background of this matter. For the most part these facts are about the chronology of certain events and are common cause.

Background

[6] As mentioned earlier, central to the legal issues in this case is a prosecutorial policy of the Commission, formulated in 2004 and revised in 2008 known as the Corporate Leniency Policy or (CLP).[5]

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[4] In terms of the Act, a complaint referral which is the document that commences litigation in the Tribunal must always be preceded by a complaint which can be initiated by a complainant or the Commission itself. In this case the Commission initiated the complaint that forms the subject matter of the complaint referral in the main matter.

[5] For the purpose of this decision there is agreement that the relevant CLP is the one from 2004. In its founding affidavit, Blinkwater sought to rely on the 2008 leniency policy, but it now accepts that the relevant one is 2004.

[7] The CLP is a policy where the Commission in cartel cases agrees not to seek an administrative penalty from a firm implicated in a cartel in return for information from it that enables the Commission to prosecute other cartel members. In this sense it is described as leniency but it falls short of being immunity although it is often thought of in these terms – indeed the CLP even makes use of the terms interchangeably - because it does not render the firm immune from prosecution.

[8] Blinkwater highlights certain key provisions of the CLP. There are other provisions as well, on which the Commission and Tiger rely, but we consider those later when we deal with their argument.

[9] In terms of paragraph 3.1 of the policy the Commission explains that:

"The CLP outlines a process through which the Commission can grant a self-confessing cartel member, who is the first to approach the Commission, immunity or indemnity for its participation in cartel activity upon fulfilling specific requirements and conditions by such cartel member."

[10] It goes on to explain in paragraph 3.9 that:

"Granting immunity under the CLP is not based on the fact that the applicant is viewed less of a cartelist than the other cartel members, but on the fact that it is the first to approach the Commission and provided information that helps the Commission to uproot the harmful conduct that it would otherwise not have been able to detect."

[11] In paragraph 5.6 it makes the point on which much of the argument of Blinkwater in this matter turns:

"Only a firm that is first through the door to confess and provide information to the Commission in respect of cartel activity would qualify for immunity under the CLP. If other members of the cartel wish to come clean on their involvement in a cartel to which the applicant has already confessed, the Commission may explore other processes outside the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order. In the event that the matter is referred for adjudication in the Tribunal, the Commission may consider asking the Tribunal for favourable treatment of the applicants who were not the first to come."

[12] That then provided the backdrop to the application of the CLP. We now turn to how it applies in the present case.

[13] In December 2006, the Commission initiated a complaint against three bread producers Premier Foods (Pty) Ltd ("Premier"), Tiger and Pioneer Foods for their involvement in a bread baking cartel in the Western Cape ("the W. Cape cartel"). Subsequent to this initiation, on 14 February 2007, one of these firms, Premier, was granted immunity in terms of the CLP in respect of its participation in the W. Cape cartel.

[14] On the same day that the Commission granted Premier immunity it referred a complaint against Tiger and Pioneer for their role in the W. Cape cartel.

[15] The events so far do not concern Blinkwater and it does not challenge the immunity granted to Premier in respect of this cartel.

[16] Thereafter events take a turn and lead to the implication of Blinkwater.

[17] Later in February that same year, Tiger's attorneys wrote to the Commission proposing that its client would conduct an internal investigation into whether it had been implicated in other cartel activities. In essence Tiger was proposing to provide information on geographic and product markets that went much further than those contemplated in the W. Cape referral i.e. one that was regional in scope and confined to bread baking.

[18] A key point in the letter is the attorneys' proposal that subsequent to this internal investigation, Tiger and the Commission negotiate on an appropriate consent order.[6]

[19] It seems the very next day[7] Tiger's attorneys wrote to the Commission seeking leniency in terms of the CLP.

[20] Why in 24 hours Tiger changed its position from contemplating accepting an appropriate consent agreement to requesting leniency is not explained in the record.

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[6] See letter from ENS annexure TG3 to Tiger's answering affidavit to the case in *casu*, record page 188 paragraph 5.6.

[7] Although the first letter TG3 is dated 19 February Tiger in its answering affidavit suggests this date was incorrect and the letter was written on 21 February.

[21] However what is clear is that prior to giving any information as a result of its proposed internal investigation Tiger was seeking leniency for evidence provided that fell outside the scope of the W. Cape cartel referral.

[22] Tiger and its advisors then conducted an internal enquiry. While Tiger was conducting its internal inquiry, a process that took some time, Premier applied for further immunity (recall the first was in respect of the W. Cape Cartel). We don't have a date on which the immunity was sought but we do know from the record that the Commission granted Premier further conditional immunity on 14 March 2007. This was granted in respect of its participation in a national bread cartel and "the wheat and milling cartels."[8]

[23] On the same day as the grant of leniency to Premier the Commission initiated a complaint against Pioneer, Tiger, and three others in respect of cartel conduct in the national wheat and maize milling markets.[9] We will refer to this as the first milling initiation statement. It becomes the subject matter of the referral in the main matter. At this stage, *ex facie* the initiation document, Blinkwater was still not implicated..

[24] On Tiger's version it held various meetings with the Commission in the course of April that year. It says it reiterated its application for leniency.[10] The Commission wrote back to Tiger in July to say that its application for CLP was

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[8] Commission answering affidavit paragraph 31.2 record page 62. The Commission in its affidavit says this date was 16 March but the actual document (see Record, page 18) appears to be dated on 14 March. A subsequent initiation (record page 21) also refers to the earlier date as having taken place on 14 March. Nothing turns on this discrepancy.

[9] Tiger answer para 9.1.5 record page 101.

[10] Tiger supra, para 9.18

under consideration, but it wanted to interview the Tiger witnesses to clarify information made available to it.

[25] Tigers' attorneys responded by agreeing to do so, but subject to an important proviso; that the interviews would take place in terms of the CLP, and that if the CLP application was not successful or if they failed to reach agreement on the terms of a consent order, the information would not be used against Tiger in subsequent proceedings.

[26] The Commission confirmed this approach in a letter written back.[11]

[27] There was some back and forth interaction between the two parties subsequent to this over the next few months. During this period the Commission interviewed Tiger witnesses and requested further information from Tiger, which it provided.[12]

[28] On 9 November two important events took place central to this case. The Commission and Tiger entered into a consent agreement and a conditional immunity agreement. This conditional immunity agreement is the subject of attack from Blinkwater who seek to have it set aside.

[29] The consent agreement and the immunity agreement are intertwined; with the former referencing the latter. Although the review does not seek to disturb the consent order, Tiger argues that the consequences of the other relief sought

[11] See Annexure TG 8 to Tigers answering affidavit record page 229.

[12] Tiger supra paragraph 9.23.

will have this effect and advance this as another reason why it is not competent.

[30] In terms of the CLP agreement whose terms are brief Tiger is:

"*... granted conditional immunity from prosecution before the Tribunal for its involvement in cartel activities regarding the fixing of prices and trading conditions in the milling industry within South Africa that resulted in contraventions of section 4(1)(b)(i) and 4(1)(b)(ii) of the Competition Act...*"[13]

[31] In terms of the consent order Tiger makes several admissions that it contravened the Act regarding discussions between competitors in the bread, maize and milling markets. However, these admissions are limited to the bread market; both in the Western Cape and nationally, and involve both price fixing and the closure of bakeries.

[32] However the final clause of the consent agreement contains a cross reference to the CLP agreement; specifically that he Commission and Tiger agree that the consent agreement also settles the matter for which Tiger received the CLP, provided it complies with the conditions of the CLP.

[33] Nevertheless in terms of the consent order Tiger paid an administrative penalty of R98 million. At the hearing of the consent order the Commission informed the Tribunal that the penalty had been based on Tiger's national turnover for bread.

[13] Record page 243.

[34] Put differently, the turnover in respect of milling was not taken into account in the consent agreement presumably because this involvement was the subject of the CLP agreement, not the consent agreement.

[35] This consent agreement was subsequently confirmed by the Tribunal on the 28th November 2007.

[36] Here we need to go back in time in our chronology to see what other events had taken place by this time.

[37] On 2nd October 2009 the Commission initiated a further complaint in respect of the milling industry. In this initiation document, the second milling initiation statement, the Commission explained that its investigation had revealed that other firms were involved in the collusion. For the first time Blinkwater was amongst those mentioned.[14]

[38] On 24 March 2010 the Commission filed what it termed an "*amended initiation statement*".[15] In terms of this now third milling initiation statement, a further four firms not previously identified were added.

[39] To summarise the situation. The main case is now the subject of three separate initiation statements by the Commission.

[40] In the first initiation statement the Commission states the following:

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[14] Record page 21

[15] This document which is annexure C to the founding affidavit is not dated. The Commission does not date it either. We get this date from Tiger's answering affidavit. See paragraph 9.29 record page 114.

"The Commission has received an application in terms of the CLP... from Premier Food's relation to the conduct. The CLP application was supported by statements of several employees of Premier Foods who allege that they were part of the meetings held with competitors and also had telephonic discussions with competitors relating to pricing issues on an ongoing basis."

[41] But the initiation statement goes on to mention Tiger:

"*The anticompetitive conduct in the milling industry was further confirmed when Tiger Food Brands stated that it wanted to apply for leniency for anticompetitive conduct in the milling industry.*"

[42] The second initiation statement, which is the one that implicates Blinkwater, makes no further mention of either leniency application. The reason it explains other firms have now been added, is ascribed simply to the investigation.

[43] The third and final initiation statement adds four new respondents (but not of course Blinkwater which as noted had been added in the second) states the following:

"*The Commission has after receiving an application in terms of the ... CLP from Premier Foods Ltd, initiated a complaint against ...*"

[44] It goes on to state:

"Subsequent to the initiation, Tiger Brands Ltd applied for and was awarded leniency for their role in the aforesaid cartel. In terms of the leniency awarded

to Tiger Brands, it supplied the Commission with further evidence of collusive activities by the aforesaid companies and also implicated other firms, which did not form part of the first initiation." [The additional firms, are then named - one of which is Blinkwater]

[45] It then goes on to state:

"Further investigations carried out has (sic) established that apart from the firms mentioned above, the aforesaid conduct also involved ... [the names of another four firms not previously identified are mentioned].

[46] What this chronology indicates is that the first initiation came at a time when Premier had received leniency in respect of the milling cartel that forms the subject of the main complaint; but that at that stage only three firms were implicated, but not Blinkwater. The fact that Tiger is to apply for leniency is mentioned but it is clear from the wording of the statement that this information has not yet been received, and is still forthcoming.

[47] It is only long after Tiger has been granted leniency on 9 November 2007 that the additional names of alleged cartelists are added to the complaint initiation on 2 October 2009, in terms of the second initiation. As we go on to consider later this chronology is consistent with the Commission's explanation of its decision to offer Tiger leniency despite it being second through the door,.

[48] On 31 March 2010 the Commission referred the complaint against Blinkwater and others for cartel activities in the maize milling market. This is the referral in the main matter that Blinkwater seeks to set aside.

[49] No relief was sought against Tiger, and so it advised the Commission in about March or April 2010 that it would not oppose the referral.[16]

[50] Blinkwater filed an answer to this referral on 14 July 2010 in which it admitted involvement in price fixing. This fact is not in dispute.[17]

[51] At some stage after filing its answering affidavit in the main matter, and it is not clear exactly when, Blinkwater became aware of the fact that Tiger had been granted conditional immunity for the conduct for which Blinkwater had been charged. It then brought the present application on 9 May 2011.

[52] We have paraphrased below the orders it sought initially –

1. Setting aside the grant of immunity to Tiger Brands and Premier; or

2. Alternatively to the above, setting aside the grant of immunity to Tiger;

3. Setting aside the three complaint initiations referred to above; and

4. Setting aside the Commission's complaint referral.

[53] The manner in which Blinkwater raised its issues in the founding affidavit was by way of four points in limine.[18]

[54] The four points can be summarised as follows:

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[16] See Tiger answering affidavit paragraph 9.32 record page 116.

[17] See replying affidavit record page 359 para 11.

[18] We assume it adopted this approach in a founding as opposed to answering affidavit, because having already filed an answer in the main proceedings where these points might have been raised as points in limine this was the best way to raise them now, as it were, post facto.

First point in limine

The Commission did not have the power to grant immunity from prosecution.

[55] This was a point that such a grant was *ultra vires* the Act. However, this point was subsequently abandoned, presumably because of the decision from the SCA in the *Agriwire* case that decided precisely this point but which was not yet known at the time this objection was raised.[19] We therefore do not consider this point further.

Second point in limine

Neither Premier nor Tiger were entitled to leniency as the Commission already had sufficient evidence to prosecute.

[56] Subsequent to close of pleadings in the present interlocutory application, on 30 November 2015, Blinkwater's attorneys wrote a letter to the Commission and Tiger to suggest that this point raised disputes of fact which required oral evidence and discovery, and in their view should be properly ventilated at the *"...main hearing of the complaint referral... The matter could not be argued on the papers as they stand."*

[19] *Agri Wire (Pty) Ltd and another v Commissioner, Competition Commission and others* 2013 (5) SA 484 (SCA).

[57] The Commission and Tiger did not concede that a referral to oral evidence was necessary.

[58] In its heads of argument Blinkwater's counsel stated that since this point raised factual issues that could not be decided on the papers, Blinkwater would not pursue this point at the hearing of the interlocutory application. [20] At the hearing counsel repeated this but said Blinkwater reserved its rights to raise this matter at the hearing of the main matter.[21]

[59] Since this point has not been pursued we have not decided it. Whether it is competent to raise again later in the proceedings is not something necessary for us to determine now.

[60] Nevertheless the relief sought against Premier was eventually abandoned in the November correspondence referred earlier that preceded the hearing and subsequently confirmed when Blinkwater filed its heads of argument.[22]

[61] The third point in limine was pursued. We are unclear if the fourth was abandoned. We have for this reason proceeded to consider both.

Third point in limine

Since Premier had been granted immunity it was ultra vires the Commission's own policy to grant immunity to Tiger.[23]

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[20] See B heads of argument paragraph 1.9.1

[21] Transcript page 16.

[22] See Heads of argument footnote 2.

[23] See Blinkwater founding affidavit paragraph 32 record page 14.

[62] This was the main point of emphasis in argument before us and the only point raised in the heads of argument filed by Blinkwater.

[63] Let us examine how this point first evolved in Blinkwater's papers.

[64] In the founding affidavit of the interlocutory application Blinkwater states the following:

"*It is clear that the Commission's case against the applicant [Blinkwater] is exclusively based on the information disclosed to it by Tiger Brands pursuant to the latter's immunity application.*"[24]

[65] Blinkwater explained that it came to this conclusion based on a reading of the initiation documents. It points out that it was not mentioned initially in the first initiation document but that it is mentioned in the third initiation document.

[66] It then seeks to argue that the language of the third initiation document – which we set out above – suggests that the Commission's case against it comes exclusively from information provided by Tiger.

[67] The Commission in its answering affidavit denies this.[25] It states that it was its own investigation that implicated Blinkwater.[26]

[68] Blinkwater is first mentioned in the second milling initiation - not the third as Blinkwater claims.[27] This second initiation, as noted earlier, is silent on the

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[24] Ibid paragraph 33.

[25] See Commission answering affidavit paragraph 46.2 record page 78-9.

[26] Ibid paragraph 46.3 79.

source of the Commission's information. In the third initiation document the Commission is more explicit about sources.[28] The Commission says Tiger gave it further evidence against firms who were the subject of the first initiation (recall this excludes Blinkwater) but goes on to say of Tiger that: *"it also implicated other firms..."* Blinkwater is, *inter alia*, one of these "*other firms*" mentioned. We do not agree with Blinkwater that because the Commission made use of the phrase "*also implicated*" this means its case against it relies exclusively on the evidence of Tiger.

[69] However, the clearest statement of how the Commission approached the problem, emerges in paragraph 31.7 of its answering affidavit, where it explains that the cartel implicated here was complex, comprising agreements reached at national level that the national players conveyed through to a regional level which in turn led to regional agreements. However, neither Tiger nor Premier had representatives in each of the regions where the agreements were concluded and thus: *"...it was apparent to the Commission that it was necessary for it to have the benefit of the evidence of both Premier Foods and Tiger Brands at its disposal in order that it could successfully prosecute all the participants to the cartel."*[29]

Evaluation of the point in limine

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[27] See Annexure B to the founding affidavit.

[28] See Annexure C to the founding affidavit.

[29] See Commission answering affidavit paragraph 31.7 record pages 63-4.

[70] Blinkwater's attack on the Commission's decision to grant immunity to Tiger is that it was irrational.[30] The reason it was irrational it argued, was that the Commission had departed from its stated leniency policy, by granting leniency to a firm that was not first through the door.

[71] The courts have made it clear that: *"Rationality review is really concerned with the evaluation of the relationship between means and ends..."*[31]

[72] This is the approach we have taken to considering the validity of this point in *limine*.

[73] Although couched in the language of administrative law, Blinkwater also relies in testing for rationality on policy arguments for why the first through the door approach has been recommended in academic literature and adopted by a number of other jurisdictions. This it argues lies at the heart of the CLP which has had the benefit of being influenced by these approaches.

[74] Put at its highest what this argument suggests is that the stricture of only granting leniency to the first through the door has a rationale; one that would be undermined were it extended to the second firm. Although not expressed in these terms, what Blinkwater appears to be arguing is that if the policy has

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[30] Blinkwater heads of argument paragraph 1.9.2. *"The decision does not result from a lawful or rational exercise of powers accorded to the Commission in terms of the [Act]."*

[31] See *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at [32]. See also C. Hoexter *Administrative Law in South Africa* (second edition) page 340, footnote 86, which quotes Etienne Mureinik, writing in TW Bennet et al Administrative Law Reform (1993) who explains it in these terms : " *...(c) there is a rational connection between premises and conclusion: between the information(evidence and argument) before the decision-maker and the decision that it reached."*

a clear rationale, then undermining it would be to act irrationally as a matter of law.

[75] The argument advanced here is based on the incentives firms in a cartel face as predicted by a branch of mathematics often applied to economic problems known as game theory. The literature on game theory is famous for what is termed the 'prisoner's dilemma'. Two prisoners in jail at the same time charged with a minor crime both have knowledge of the same major crime which both have committed. Each prisoner is offered the opportunity of amnesty if he confesses to the major crime, but risks lengthy jail time if he remains silent and the other confesses. If both remain silent both will get imprisoned only for the minor crime. If both confess they will get some time in jail for the major crime, but not as long as if the one had confessed and the other had not. Game theory examines how they think through this problem based on how they believe the other prisoner will react but without the ability to communicate with one another, hence the term the prisoner's dilemma. Theory predicts, so the text books tell us, that the prisoners, because they are not able to co-operate, will each make the decision to confess, which is their second-best option. Note it is not the best which is that both remain silent.[32]

[76] Cartels however involve co-operation between competing firms. Thus through co-operation firms can reach the optimal decision which is not to confess by betraying the cartel's existence to the authority.

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[32] As one text book explains: *"Ideally they would both like not to confess and walk free but the temptation for both to confess and get a reward while the other gets locked up proves too tempting, so both end up confessing."* See Gunnar Niels et al, *Economics for Competition Lawyers* page 147.

[77] The theory behind the first through the door approach to amnesty is to incentivise betrayal via confession through a temporal element. As one writer has explained:

"Unlike in the basic prisoner's dilemma model it is no longer enough to confess; a firm must confess before other firms do in order to maximise the gains from confession... Confessing first is highly preferred over confessing second."[33] (Our emphasis).

[78] The Blinkwater argument is that by not adhering to the policy of granting leniency only to the first confessor, the Commission undermines its chosen policy. Cartelisation is no longer sufficiently disincentivised, because the race to be there first is no longer highly preferred.

[79] However in the real world prisoner dilemma situations seldom exist as they do in text books i.e. a world where each cartelist has perfect information about the others, and where for the purpose of prosecution, that evidence would suffice.

[80] In this case the Commission's version is there was not this perfect world. Premier was not able provide the Commission with complete information to allow it sufficient evidence to proceed against the sixteen other cartel members. As the Commission explains, it was not party to all the regional agreements. Expressed differently, Premier was not always at the scene of

[33] Christopher Leslie, Antitrust, Amnesty, and Cartel Stability 200 Journal of Corporation Law 453 at 466-7.

the so-called crime.[34] In this sense Tiger's evidence was not secondary to that of Premier's – merely a redundant recapitulation of what the Commission already had from the former – it was the primary evidence in respect of some of the cartel arrangements without which the prosecution would have been diminished in effect and scope.

[81] It seems unsurprising then, on these facts that the Commission would require more than one conspirator to betray the others, in order for it to be confident about mounting a successful prosecution.

[82] Therefore criticism of the Commission of acting irrationally on policy grounds does not hold. The Commission had an objective – to prosecute as many cartelists as possible in the main matter, and for that matter it needed to have further evidence that the first through the door could not supply, so it gave leniency to the second; the means and ends are rationally connected.

[83] Nor is the approach at variance with the thinking of other authorities in the world.

[84] The Organisation for Economic Co-operation and Development (OECD) which has a section devoted to completion policy noted in a secretarial document, following a roundtable devoted to leniency for subsequent applicants, the following:

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[34] Indeed it would have been possible to conceive of these regional agreements as separate self-standing conspiracies in which case Tiger might not have been second through the door. The only reason the Commission gives for conceiving them as part of greater single conspiracy is because the national agreements permeated down to the regional ones.

"There is a general consensus on the benefits of a mechanism for rewarding subsequent applicants both in terms of obtaining additional evidence and relieving the investigative burden of pursuing a case. While it was recognised that offering lenient treatment to subsequent applicants might weaken the incentives to be the first in, delegations on the whole found that the benefits of doing so outweigh the possible negative effects."[35]

[85] The OECD note goes on to state:

"As the threshold for obtaining immunity is generally relatively low in order to incentivize companies to come forward and denounce a cartel, subsequent applicants can often provide information and this co-operation is crucial for the prosecution of the cartel in its full extent and duration. In this context, delegations noted that since the immunity applicant is often not the ringleader it might not even know the full extent of the cartel conduct, hence highlighting the potential value of the subsequent applicants' cooperation."[36]

[86] Further leniency is a relatively new approach in competition law and it would be wrong to suggest that there is complete consensus on the best approach. As one some academic writers recently noted:

"Rewarding firms that help expose cartels with immunity or fine reductions is generally believed to enhance the effectiveness of antitrust enforcement, but

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[35] OECD Policy Roundtables: *Leniency for Subsequent* Applicants DAF/COMP(2012) 25.

[36] OECD Policy Roundtables: *Leniency for Subsequent* Applicants DAF/COMP(2012) 25.

no consensus exists as to how to frame leniency policies in order to maximize the incentives for firms to co-operate with antitrust authorities".[37]

[87] Other writers emphasise that what matters is having a leniency policy and they are less categorical about whether it requires the race to be first.

"According to Hamaguchi and Kawagoe... the likelihood of a leniency application is higher the more companies there are in the cartel, but the stability of the cartel is not affected, by whether the fine reduction is available only to the first company coming forward or to subsequent ones as well. This suggests that creating this race to be first may not have much added benefit over and above having the leniency policy in the first place."[38]

[88] The argument that not rigidly adhering to first through the door policy is irrational on policy grounds, is not sustainable either on the facts of this case, or in the comparative literature and experience.

[89] The next arguments raised are primarily legal arguments.

[90] Blinkwater accepts the argument of the Commission and Tiger that both in terms of the Act and the CLP, it is entitled to depart from the policy in the sense that both state the policy is not binding on the Commission.[39]

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[37] Amedeo Arena. "Game Theory as a Yardstick for Antitrust Leniency Policy: the US, EU, and Italian Experiences in a Comparative Perspective" *Global Jurist* Vol. 11 Iss. 1 (2011) Available at: http://works.bepress.com/amedeo_arena/1/.

[38] See Niels et al, op cit. supra, page 305.

[39] Section 79(1) of the Act gives the Commission the power to issue guidelines (it is common cause that the CLP is issued in terms of section 79), while section 79(4) goes on to make it clear that a guideline is not binding on the Commission, the Tribunal or the CAC. The 2004 CLP cross refers this as well in clause 1.2 where it is

[91] What Blinkwater argues however, is that it would be irrational for the Commission to significantly depart from a previously stated policy – granting leniency to the second through the door it says constitutes such a significant departure.

[92] To illustrate the dangers of departing significantly from a stated policy – and hence its irrationality - it uses the following example. If the Commission is seen to be departing from the policy, a first come through the door applicant might be discouraged from applying because the Commission might decide to depart from policy, and refuse it leniency after the fact. This says Blinkwater would be contrary to the principles of reliance, rationality and accountability.

[93] This argument might be a good one if it applied to the facts of this case – it does not. Blinkwater is not a leniency applicant and has never professed to be one. Further, in the present case the alleged departure is about extending leniency to a second applicant, not denying leniency to a first comer; so again the argument fails.

[94] Finally Blinkwater appears to make a more general administrative law argument that departure from a previously stated policy is unlawful unless the authority i.e. in this case the Commission shows that the deviation has been

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stated "*This policy is purely aimed at providing guidance and is not binding on the Commission, the Competition Tribunal...or the Competition Appeal Court... In the exercise of their respective discretions or their interpretation of the Act.*" Clause 1.3 provides "*It must be noted that nothing in this Policy shall preclude the Commission from exercising its discretion or powers granted to it in terms of the Act on matters to which the adopted policy approach may be applicable.*"

made because of exceptional circumstances. It relies for this proposition on the case of *Sasol*.[40] Here the case concerned the validity of an administrative decision to refuse an applicant a license to operate a petrol station. Here the official purported to act in accordance with the policy and the applicant who challenged the decision accused her of acting too mechanically and rigidly. The passage relied on states the following:

"*The adoption of policy guidelines by state organs to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. As explained in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs, a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.*[41]

[95] But this case supports the opposite proposition to what Blinkwater contends for. The phrase used here about an exceptional departure is taken out of

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[40] *MEC for Agriculture, Conservation, Environmental and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA).

[41] *Supra fn 40 at* [19].

context – it refers to the applicant who wants to seek a departure from. However, as the Commission persuasively argued, the *Sasol* case is authority for exactly the opposite proposition; viz. that adhering mechanically to a previously stated policy would be irrational. A position that supports not undermines that of the Commission in the present case.

[96] Thus to the extent that the CLP can be read to deny leniency to a second through the door, this case would suggest that a departure is required by rationality and not evidence of a lack thereof.

[97] Both the Commission and Tiger argue that a fair reading of the whole of the CLP contemplates a second leniency and that there has been no departure from. We have not decided the case on this point but we have not rejected it either. However because the policy issue in this case is so important for the Commission we have opted to decide the case on a broader basis on the assumption that it was a departure.

[98] A final argument raised by Blinkwater in its replying affidavit is that the Commission could have got the necessary evidence from Tiger by other means, for instance as part of a consent agreement.

[99] There are two problems with this argument; one as a matter of law, the other of fact. As a matter of law even if Blinkwater is correct that Tiger might have given the same co-operation if it had entered into a consent agreement, this does not make the decision an irrational one. As the Constitutional Court in the *Democratic Alliance v President of Republic and others* remarked on the evaluation of the relationship between the means and ends:

"The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred."[42]

[100] Thus the Commission as a matter of law was not required to consider whether a consent agreement was a better means for achieving its end in the circumstances. Nevertheless on the facts of this case it is by no means clear that the Commission even had this option open to it. As the chronology set out earlier illustrates, soon after filing its answer in the W. Cape cartel case and before the main case in the present one was contemplated, Tiger started approaching the Commission with a view to providing it information on other cartel activity. Whilst it is true that in its letter of 21 February it asked for the Commission to consider a consent agreement on favourable terms, within a day its position had changed to a request for leniency. At no time was Tiger aware that Premier had applied for and been granted leniency, so its incentives to concede to some lesser form of satisfaction such as a benign consent order, cannot be presumed. Then when Tiger at the end of the investigation was ready to present its fruits to the Commission (who up and till then had not participated in it) the attorneys again made the terms clear. If we confess and you want to use it we want leniency, if you do not, hand our information back.

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[42] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at [32].

[101] Most significantly of all, the leniency agreement and the consent order were signed on the same day. Therefore Blinkwater on this record – and it has put up no facts of its own – cannot gainsay the fact that the Commission might not have got the evidence it needed had it not offered leniency but only a consent agreement for the cartel *in casu*.

[102] Blinkwater's contentions here are wholly speculative and must be rejected.

[103] In conclusion we find that although the Commission departed from the CLP to offer leniency to Tiger who were not first through the door, this approach on the facts of this case was not irrational.

[104] It follows then that since this decision was not irrational then the follow on arguments about the unlawfulness of the initiation and the referral, which are contingent on the finding in respect of the leniency application being unlawful must fail as well, save for the independent argument in respect of the fourth in limine point which we go on to deal with below.

Fourth point in limine.

The complaint initiation lacked the necessary averments to make out a case for a prohibited practice. It argued that the Commission attempted to draw an inference by mere association i.e. attendance at meetings.

[105] It is unclear whether this point has been abandoned because unlike the first point in limine Blinkwater did not say it had. But it was not considered again in its heads of argument or in oral argument by it at the hearing. The

Commission however addressed argument on this point at the hearing and in its heads of argument, and for this reason we will consider it.

[106] Blinkwater's argument is that in the initiation document the Commission goes no further than to allege it attended meetings where collusive agreements were discussed. It contends that mere attendance does not suffice to constitute an infringement of the Act, hence the initiation fails to make out a case of a transgression against it and is hence, unlawful.

[107] In this regard Blinkwater had relied on two court decisions which were then operative on the topic. In the case of *Woodlands*[43] the suggestion was that a complaint initiation must contain sufficient information and particularity as would be required of a complaint referral. In the Competition Appeal Court ("CAC") decision in *Yara*, (which at the time this point in limine was taken, had not yet been determined on appeal) that court had determined that a complaint could not be amended by the Commission.[44] Blinkwater contended that what the Commission had done with the three initiations in this matter was to amend an existing complaint and not initiate a new complaint.

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[43] *Woodlands Dairy (Pty) Ltd and another v Competition Commission* 2010 (6) SA 108 (SCA).

[44] *Yara South Africa (Pty) Ltd v Competition Commission and Others* [2011] ZACAC 9; [2011] ZACAC 2.

[108] By the time this matter came to argument this proposition has been unsettled both on its approach to the procedural point and the substantive law.

[109] On the procedural point the Supreme Court of Appeal overturned the CAC decision in *Yara* and in so doing made far reaching findings on the nature of the initiation.[45] *Inter alia*, the Court noted that an initiation can be informal and even tacit, and that the purpose of the initiation is to trigger an investigation – as the court observed it is merely a preliminary step in the process that does not affect a respondent's rights; thus it is wrong to conflate the initiation statement with a referral, which does.

[110] The second point is that in two decisions on substantive law in respect of cartels, the CAC has indicated that the passive attendance at meetings where price conspiracies are struck is not a defence - the law imposes a duty to speak on the silent party.[46]

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[45] *Competition Commission v Yara SA* (Pty) *Ltd and others* 2013 (6) SA 404 (SCA) [34].

[46] See *Reinforcing Mesh Solutions v Competition Commission and Others* 119/120/CAC/May 2013 at [21] and [31]; See also *Macneil Agencies (Pty) Ltd v Competition Commission* 121/CAC/Jul 2012 at [64] and [71].

[111] Thus the case law makes it quite clear that the fourth objection is without substance both as a point of substantive and procedural law. This point too is dismissed.

The request for oral evidence

[112] Blinkwater's approach to this case has been a product of its times. As noted in July 2010, when it filed its answering affidavit in the main case, it had admitted the contravention. But less than a year later when it brought this application in May 2011, it clearly felt that the tide of court decisions had turned in its favour. The Commission had suffered several setbacks in cases concerning its powers to initiate and refer cases. Blinkwater explains in its founding affidavit that it was these decisions that influenced its decision to bring this challenge.[47]

[113] But once pleadings in this interlocutory matter had closed, some more time had elapsed, and in the interim, the tide of court decisions had turned back in favour of the Commission. In *Agriwire,* the SCA upheld the validity of the

[47] See founding affidavit, paragraph 18, record page 10. Blinkwater here mentions *Woodlands* and the CAC decision in *Yara, supra.*

Commission's power to use the CLP.[48] In *Yara,* the SCA took a wider view of the powers to initiate.[49] In the CAC, as noted, the court was taking a broader view of liability in cartel cases. In the Constitutional Court in *Allpay,* the court indicated that the fact that administrative action might be found unlawful did not mean that the courts should automatically set it aside.[50] Small wonder then that Blinkwater had second thoughts about having this matter decided on the present papers.

[114] In December 2015 its attorneys wrote a letter to the other respondents proposing that the second point in *limine* could not be argued on the record and should be referred to oral evidence. This invitation was rejected. [51]

[115] Then on 30 March 2016, a day before the commencement of the present hearing, Blinkwater's attorneys wrote again to the other parties, this time proposing that third point in *limine* also raised a dispute of fact and this too should be referred to oral evidence,

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[48] *Supra* fn 19.

[49] See SCA decision in *Yara supra.*

[50] *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (1) SA 604 (CC) [40].

[51] Blinkwater has suggested it was accepted but we are satisfied from submissions made by Tiger and the Commission during oral argument that there was no basis for it to have come to this conclusion.

[116] This invitation too was rejected by both the Commission and Tiger.

[117] Since its opponents had refused to concede the referral to oral evidence Blinkwater elected to argue the point as a preliminary issue when we heard this matter on 31 March 2016. Both Tiger and the Commission opposed the application. We gave an interim ruling on the day of the hearing that this application could be determined later and we requested all the parties to argue on the merits of the application as well, which they duly did.

[118] We have decided to refuse to refer the matter to oral evidence.

[119] There are several reasons for us having come to this conclusion.

[120] In the first place, as Tiger has argued, there is no genuine dispute of fact. Blinkwater has not put up any facts on these issues to dispute those of the Commission and Tiger. The dispute referred to amounts to no more than Blinkwater saying *"...why should we accept your contentions on these issues we need to go to oral evidence".* But since it puts up no facts to dispute the version of the two respondents, it must accept them.

[121] Second, as the Commission and Tiger both argued, referrals to oral evidence in applications are rare events which courts do not lightly grant. Blinkwater

came before the Tribunal with a review without the necessary facts to make its case. There is no basis to indulge its request for oral evidence so it can find out if it has such a case. Finally, the basis of the request is unusual, bizarre and plainly not thought through. It was unclear during argument if Counsel for Blinkwater wanted the matter of oral evidence to be heard as part of the main matter or a separate enquiry preceding the main matter.

[122] But besides all these difficulties what would be the point of such an enquiry? For the Tribunal to determine, wearing the hat of a prosecutor, if the Commission had sufficient evidence to prosecute Blinkwater, without granting leniency to Tiger? Whilst courts sometimes are called upon to judge if a prosecutor has sufficient evidence in a case, deciding whether it should have been confident enough with the evidence of witness A to proceed without that of witness B, is unheard of and certainly we were given no authority for such an approach. A prosecuting agency like the Commission has to make such choices *ex ante* before it embarks on a referral. For a judicial body to second guess, *post facto*, whether a prosecutor's choice of the sufficiency of evidence it sought to rely on was correct or too cautious or resulted in redundancy would be improper, imprudent and fruitless.

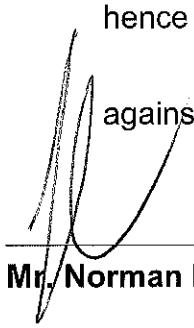
[123] The application for oral evidence is refused.

Other issues

[124] In view of our decision on the earlier points it is not necessary for us to address the merits of arguments raised by Tiger that the review has not been brought timeously or other problems with the relief sought had we found that the Commission acted unlawfully .

Order and Conclusion

[125] Having heard the parties to this application the Competition Tribunal orders that the application be dismissed. Tiger did not seek costs in this matter and hence we do not need to determine this issue. We do not award costs for and against the Commission.



Mr. Norman Manoim

10 June 2016
DATE

Ms Andiswa Ndoni and Ms Medi Mokuena concurring

Tribunal Researchers: Derrick Bowles assisted by Kameel Pancham

For the Applicant's:	Adv. KW Luderitz SC and Adv IB Currie as instructed by Roestoff and Kruse Attorneys
For the Commission:	Adv D Unterhalter SC and Adv. BD Lekokotla.
For the Seventeenth Respondents:	Adv. W Trengrove SC and Adv. R Pearce as instructed by ENS.