

After legal defeats, competition body wants operating rules defined, writes Michael Bleby

Watchdog fights court-imposed muzzling

INTELLIGIBILITY, rather than narrow legalistic definitions, should be the guiding principle behind complaints brought to the Competition Tribunal for adjudication, the Competition Commission argues, as it seeks to regain the upper hand in probing alleged anti-competitive conduct.

In finding that one fertiliser company, Nutri-Flo, had not formally complained about the behaviour of two others, Yara and Omnia, when it originally complained about the actions of chemical giant Sasol, the Competition Appeal Court had mistakenly taken too narrow a definition, the commission says in its application seeking to challenge that ruling in the Supreme Court of Appeal.

The commission could make a similar argument to its stillborn case against South African Breweries (SAB). The original complainant, Port Elizabeth-based drinks wholesaler Nico Pitsiladi, made an issue of the fact that he did not get the same discount as that enjoyed by SAB's 13 so-called appointed distributors. While he complained about the lack of a discount, the case the commission brought against SAB included allegations of retail price maintenance, carving up geographical markets and abuse of dominance.

The commission makes the argument in the application brought last week, which it says is necessary to clarify its operating rules in the light of its defeat earlier this month. Then, SAB successfully

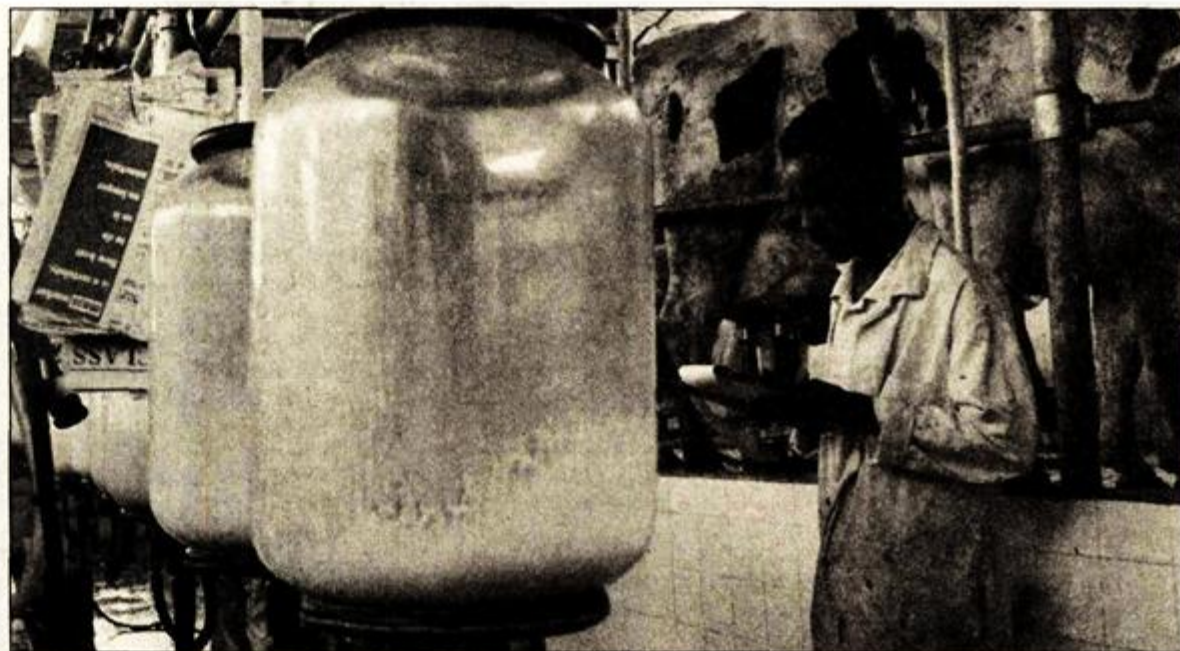
argued that the Competition Tribunal had no authority to hear the case brought against it because the commission had not followed procedure in preparing its complaint.

In its appeal court application, the commission argues that it is fair to bring up a wider range of allegations than those contained in the original complaint. A complainant may only see the aspect of a problem that applies to it and there may well be bigger and wider problems at play that only become apparent upon investigation.

"It is then for the commission, acting in the public interest, to investigate the precise nature and import of the conduct, and to ensure that any contravention is adequately described in the complaint referral," it says.

The appeal, and the disputes behind it, are part of a longer process of defining the powers that the commission can exercise. While zealous in its prosecution of alleged anti-competitive behaviour, the commission has shown — as the Supreme Court of Appeal ruled in September in the Woodlands case — a disregard for legal process. This saw it make "palpably untrue" statements to witnesses it interrogated during an unjustified investigation it had launched into the entire dairy industry in a "seriously flawed" manner, the court ruled.

With investigating powers modelled upon those of state prosecutors, the commission should be subject to similar safeguards to protect people from the possible abuse of



MILKING COMPLAINTS: The Competition Commission last week withdrew charges against four dairy companies after an adverse appeal court finding on its handling of an investigation into the industry.

power — balancing both intelligibility and legality — the Supreme Court of Appeal ruled.

"I do not accept the submission on behalf of the commission that these far-reaching invasive powers may be used by the commissioner for purposes of a fishing expedition," the court's deputy president, Louis Harms, wrote. "There is ... no reason to assume that an initiation (of an investigation) requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility...."

"A suspicion against some cannot be used as a springboard to investigate all and sundry."

In its application last week, the commission — which last week formally withdrew its case against dairy companies Clover, Ladismith, Parmalat and Nestlé — says the combined rulings of the Competition Appeal Court and the Supreme Court of Appeal constrain its ability to find and use new evidence of wrongdoing. "If this interpretation is correct, then the commission's powers under the act are restricted

and the competition regime itself may be ineffective," it says.

Also, if it is required to initiate a new complaint, and not just amend an original one, the original complainant — Nutri-Flo in the fertiliser case, or Mr Pitsiladi in the SAB case — would be unable to demand urgent relief, such as forcing a stop to illegal behaviour harming them, as they would not be part of the complaint. "A statute should not be interpreted restrictively so as to deny rights," the commission says.

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