COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number: 37/CR/Jun01

In the matters between:

(1) The Competition Commission	Applicant
and	
Patensie Sitrus Beherend Beperk	Respondent
(referred in terms of section 50[1])	
and:	
(2) Jakobus Johannes Petrus Bezuidenhout	First Complainant
Jan Daniel du Preez	Second Complainant
and	
Patensie Sitrus Beherend Beperk	Respondent
(referred in terms of section 65(2)(b))	

REASONS AND ORDER

INTRODUCTION

This is a complaint referral brought by the the Competition Commission ('the applicant') in respect of a complaint lodged by an Eastern Cape citrus farmer, JJP Bezuidenhout ('Bezuidenhout'), against the local Gamtoos River Valley ('GRV') packing and distribution company, Patensie Sitrus Beherend Beperk

[1] Of Act 89 of 1998.

('Patensie' or 'the respondent').[2] The Commission alleges that the respondent, Patensie, is engaging in practices prohibited by Chapter 2 of the Competition Act 89 of 1998 as amended ("the Act"). More specifically, the Commission alleges that Patensie is in contravention of the provisions of sections 8(d)(i) and 4(1)(b)(i) of the Competition Act.

BACKGROUND

History of the Industry

1. The South African citrus industry accounts for approximately 2% of the total citrus production in the world market. Approximately 65% of the citrus produced in South Africa is exported, the balance either being sold in local markets or to a local processor to be made into juice.

2. In 1939 citrus co-operatives – many of which had been established in the 'twenties - belonged to the South African Citrus Exchange, a central co-operative which handled more than 81% of the fruit produced in South Africa. At about this time, the government established a statutory control board which brought the single channel marketing system into being. In terms of this system, all packers (co-operative and independent) had to channel the packed fruit to the co-operative Citrus Exchange, later replaced by Outspan International. Prior to the repeal, in 1996, of the Marketing Act of 1968, the citrus industry had deregulated the selling of fruit on the South African market.

The Parties

3. The first complainant is Jakobus Johannes Bezuidenhout ("Bezuidenhout"), the previous owner of the farm "Fairview" in Patensie and farmer of citrus fruit in the Gamtoos River Valley. Bezuidenhout informs us that he is no longer the owner of the farm, having ceased farming in his own name since August 2000 when his bankers took over the property and placed it in trust. He is presently still a shareholder in the respondent.

4. The second complainant, Jan Daniel du Preez ("du Preez"), owner of the farm "Hardleigh", Andrieskraal and also a farmer of citrus fruit in the Gamtoos River Valley, withdrew his complaint when his dispute with the respondent was settled in June 2000. He is no longer a shareholder in the respondent and no longer utilizes its packing and marketing facilities.

[2] This complaint referral actually consolidates two complaint referrals to the Tribunal, the one being a referral brought in terms of an order made by the South Eastern Cape Local Division of the High Court in terms of section 65(2)(b), the other being a referral by the Competition Commission in terms of section 50. This is explained more fully below.

5. Both complainants joined the Patensie co-operative in 1955. Following the restructuring of the packing company, the second complainant remained a member until 1999. As noted, the first complainant, Bezuidenhout, is still a member of Patensie.

6. The respondent is Patensie Sitrus Beherend Beperk ('Patensie' or 'the respondent'). Patensie has been in existence, in one form or another, since 1928. It provides packing and marketing facilities, as well as technical support to its members. The members of Patensie are all farmers. Patensie's Articles of Association ('articles') also permit it to pack the fruit of non-members.

7. The respondent maintains that, being one of approximately 200 packhouses in South Africa, it packs only 5% of the country's total citrus production.

Genesis of the Respondent Company

8. Patensie was originally registered as Patensie Citrus Co-operative Limited in terms of the Co-operative Societies Act 29 of 1939. Until July 1998 it conducted its packing and distribution operations as a co-operative under the Co-operative Societies' Act. On 3rd July 1998 the co-operative was converted into a limited liability company. All former members of the co-operative became shareholders in (or 'members' of) a restructured company, Patensie Sitrus Beperk ('PSB'). The company's Articles of Association purported to eliminate any distinction between producers and members. However a producer was a specific type of member because certain members were not producers, but only made use of the trading department which supplied farm equipment.

Patensie Sitrus Beherend Beperk

9. In March 1999, a second company, namely Patensie Sitrus Beherend Beperk, the respondent in the present matter, was incorporated. The directors of PSB became the directors of, and sole shareholders in, the respondent. In September 1999 a special resolution was passed bringing the respondent's articles into line with those of PSB. Members of PSB, including Bezuidenhout and du Preez, exchanged their shares in PSB for shares in the respondent. It appears that most of these transfers were affected in late 1999.

10. The respondent is a public company. It is the holding company of, and the majority shareholder in, PSB. It is envisaged that, once the restructuring process is complete, Patensie will be the sole shareholder in PSB. The respondent's shareholders are all citrus farmers. It provides packing and

marketing facilities through its subsidiary, PSB, which it refers to as its operational arm.

The Articles of Association

11. The respondent contends that, in contrast with other companies, it does not operate as 'an ordinary company or independently from its members'.[3] Its articles prescribe specific rights and obligations relating to *inter alia* membership, servicing of the company's long-term loans, transfer of shares and termination of membership, and utilisation of its packing and marketing services. To understand these rights and obligations, it is necessary to back track slightly to the provisions in existence under the old co-operative, which were essentially transplanted into the respondent's Articles of Association.

12. Under the co-operative, and later, PSB, members held pack rights ("pakregte") entitling them to have certain volumes of fruit per annum packed at the co-operative's pack shed. The individual pack rights were determined, irrespective of the actual volume of fruit delivered by each member, through a complex formula based on the individual members' financial contribution to redeeming the packing facilities capital liability in relation to the total available packing capacity of the pack house.[4] The pack rights were used to calculate the "pack right levy" ("pakregheffing") or capital contribution ("kapitaalbydrae") that members were liable, upon resignation, to pay to the co-operative.[5] This represented the pro rata obligation of members for the long-term debt of the company. This system was carried over from the co-operative to PSB, the predecessor of the respondent.

13. With the transformation from PSB to Patensie, a revised system of calculating the shareholders' capital levies was introduced after consultation with the members. Henceforth the levies were to be determined by the number of crates of fruit delivered across the respondent's weighbridge by each of the members of the respondent. It appears that the size of a member's shareholding in the respondent is approximately in proportion to the size of his output. Therefore, the size of a member's shareholding directly correlates with the capacity of the resources of the pack house used by that shareholder. Accordingly, the capital levy refers to a member's pro rata share of the capital obligation incurred by the company in investing in infrastructure and equipment. This levy (member's pro rata share of the debt) is based on the current

[3] Answering Affidavit, paragraph 11.10 page 81 of the record. This claim is central to the respondent's case and will be examined at length in this decision.
[4] The pack right determination in the former co-operative was enshrined in the Articles of PSB, see paragraph 29, page 35 of record.
[5] Paragraph 106[bis] of Constitution of Patensie Co-Operative Limited (PSB), p 181 of record.

shareholding of that member. Thus if a member has a 1% shareholding in the respondent, he is liable for 1% of the gross debt of the company.

14. The packing cost paid by each farmer using the respondent's facilities is also based on the quantity of fruit delivered, although this will vary with the quality of fruit delivered by a particular member.

15. Otherwise, the members' rights remained the same as under both the old co-operative and under PSB. The following are of particular interest in this matter: if a member wishes to resign from the respondent, he must transfer his shares to a person approved by the Board of Directors – in order to effect this transfer he must first make good his share of the outstanding capital liability. Shares can only be sold to other citrus farmers. Indeed we were advised that the Board would ordinarily only permit shares to be sold to an existing shareholder in the respondent.

THE COMPLAINT REFERRAL

Jurisdiction

16. On 20th of April 2000 the Complainants lodged a complaint with the Competition Commission against Patensie. This complaint was allegedly accepted by the Commission on 22nd June 2000.[6] On 22nd June 2001 the Commission referred the complaint referral to the Tribunal.

17. This is, however, not the only route by which this matter was referred to the Tribunal. On 3rd April 2000, the respondent in this matter applied to the South Eastern Cape High Court for an order compelling the two complainants to deliver the whole of their citrus crop for the year 2000 to Patensie's packhouse.[7] Judge Horn found in favour of Patensie. However, the learned Judge was persuaded that certain of the provisions of the respondent's articles required scrutiny in terms of the Competition Act. Accordingly, in terms of Section 65(2)(b) of the Competition Act, the High Court referred, for adjudication by the Competition Tribunal, the competition offences alleged by the complainants. In the interim, pending determination by the Competition Tribunal, the learned Judge ordered that the complainants were to deliver their 2000 crop to Patensie. Pursuant upon Horn J's judgment, the complainants filed their complaint with the Commission on 16th May 2000.

18. These parallel routes to the Tribunal help account for the somewhat complex history of litigation in this matter:

[6] There is some controversy surrounding these dates –this is referred to below.
[7] Annexure JSD 38, p 266 of record.

- The first step is described above. It was initiated in the South Eastern Cape High Court by the respondent in this matter. It resulted in Judge Horn issuing an interim order compelling the two complainants, Bezuidenhout and du Preez, to deliver the whole of their citrus crop for the year 2000 to Patensie's packhouse.[8] However, as already noted, in terms of Section 65(2)(b) of the Competition Act, the learned Judge also referred the matter to the Competition Tribunal. Pursuant upon this judgment, the complainants filed their complaint with the Commission on 16 May 2000.

- Simultaneously with the filing of their complaint on 16 May 2000, Bezuidenhout launched an application before the Competition Tribunal for interim relief in terms of the then Section 59 of the Act. As required by the Act this application for interim relief was preceded by the complainants, Bezuidenhout and Du Preez, submitting a joint complaint to the Competition Commission on 20th April 2000 in terms of the then section 44.[9] The Commission accepted the complaint filed by the complainants on 22 June 2000.[10] The Competition Tribunal granted interim relief to Bezuidenhout on 10 July 2000[11], restraining Patensie from enforcing the obligation on the complainants to deliver their crop to its packhouse.

- Bezuidenhout - his co-complainant, du Preez, having entered into a settlement with Patensie - then applied to the Eastern Cape division of the High Court on 12 July 2000 for an order declaring that he was not obliged to deliver his crop for the year 2000 to Patensie for as long as the Tribunal's order remained in force.[12] This was dismissed with costs, Judge Froneman holding that the Tribunal could not make an order conflicting with a pre-existing High Court order.[13]

- In August 2001 Patensie applied to the TPD for an order suspending the Tribunal's interim relief order and compelling Bezuidenhout to comply with Justice Horn's order to deliver his citrus crop to Patensie. The application was allowed with costs and the Tribunal's interim relief order set aside and replaced with an order dismissing the complainant's section 59 application.

19. Note that the respondent initially argued that the Commission had referred the complaint submitted on the 20th April 2000 after the lapse of the prescribed time limits for the referral of a complaint. For this reason the

[8] Annexure JSD 38, p 266 of record.
[9] Du Preez subsequently withdrew his complaint in June 2000 after reaching a settlement with the respondent.
[10] The date of acceptance of the complaint is a contentious issue and one raised by the respondent in relation to the in limine question of jurisdiction. However, for reasons that will become apparent, this question becomes academic.
[11] See Tribunal Case No.: 66/IR/May00
[12] Annexure JSD 47, page 309 of record
[13] Annexure JSD 48311, page 309 of record

respondent initially challenged the Commission's jurisdiction to refer the complaints. However, the respondent abandoned this challenge at the second pre-hearing conference. The respondent essentially accepted that the Tribunal also derived its jurisdiction in this matter from Judge Horn's order in terms of Section 65(2). Therefore the complaint lodged by Bezuidenhout and Du Preez on their own account in April 2000 was, strictly speaking, superfluous since, in terms of Horn J's section 65(2) referral, a complaint referral was already pending. At the second pre-hearing it was agreed that the existing complaint referral would be consolidated with Judge Horn's referral. Patensie's legal representative indicated that it might later request a special costs order in respect of the costs incurred by virtue of the legal representatives having to file duplicate papers in respect of parallel complaints.

The Order Sought

20. The Commission alleges the following:

    1. that the respondent's Articles of Association constitute an agreement between parties in a horizontal relationship which directly or indirectly fixes trading conditions prohibited in terms of **section 4(1)(b)(i)** of the Act; and

    2. further that the respondent, through the provisions of the Articles of Association, is requiring or inducing the complainants not to deal with a competitor, conduct prohibited in terms of **section 8(d)(i)** of the Act.

21. The Commission accordingly seeks an order in the following terms:-

    1. declaring the conduct of the respondent to be a prohibited practice in contravention of section 4(1)(b)(i) of the Act;

    2. declaring the conduct of the respondent to be a prohibited practice in contravention of section 8(d)(i) of the Act;

    3. that the Articles of Association , specifically articles 25.1, 112.6, 110 and 30.1 be declared null and void;

    4. imposing an administrative fine of up to 10% of the annual turnover of the respondent from 1 September 1999 to the date of judgement;

    5. imposing interest of 15.5% per annum on the said administrative fine to run from the date of judgement until date of payment of such fine;

    6. any further and/or alternative relief as the Tribunal may deem fit.

22. Note that there is considerable confusion in the Commission's papers regarding the precise clauses in the Articles of Association that it seeks to nullify. In particular, there is confusion, in part understandable, between the Articles of Association of PSB (the respondent's predecessor and now the respondent's subsidiary), the Articles of Association of the respondent itself, and the addition to the Articles of Association of the respondent. It is this latter document entitled *'Toevoeging tot Statuut van Patensie Sitrus Beherend Beperk om Voorsiening te Maak vir Speciale Kontraktuele Voorwaardes Tussen Lede en die Maatskappy'* that contains the provisions designed to deal with the allegedly peculiar character of the respondent, or, at any rate, with the allegedly peculiar character of the relationship between the member/producers, on the one hand, and the respondent, on the other.[14] It appears that the specific articles cited in the Commission's prayers are drawn from the Articles of Association of PSB, the respondent's predecessor and, now, subsidiary.

23. The answering affidavit of Jacobus du Toit, the secretary of the respondent, assists us through the fog. Du Toit states:

> *'I have already mentioned hereinbefore that the Respondent's Articles of Association are the standard ones found in Schedule 1, Table A of the Companies Act 61 of 1973, with certain additions thereto in a document termed 'Toevoeging tot Statuut van Patensie Sitrus Beherend Beperk om Voorsiening te Maak vir Speciale Kontraktuele Voorwaardes Tussen Lede en die Maatskappy' to cater for the sui generis nature of the Respondent and the purposes for which it was established. If the Respondent's Articles of Association are compared with the Constitution of the old Patensie Citrus Co-operative and the Articles of Association of its predecessor, Patensie Citrus Limited, it is evident that the basic principles remained exactly the same.'*[15]

24. It concedes in its heads of argument that:

> *'..it is understood that the Applicant seeks to have set aside by the Tribunal, in terms of the Act, those Articles of the Respondent's Articles of Association that compel members (who are all producer members) of the Respondent to deliver all their citrus fruit to the Respondent for packing and marketing whilst they are all members of the Respondent and obliging members who wish to resign, to sell and transfer their shares to purchasers approved by the Respondent's Board of Directors and, lastly, the entitlement of the Respondent's Board to impose a fine on a particular member who*

[14] This document is reproduced at pages 39-54(and again pages 163-178) of the record.
[15] Du Toit's Answering Affidavit, Para 11.33 page 87 of the record

has failed or refused to deliver his citrus crop to the Respondent during a particular year'.[16]

25. The respondent's heads of argument provide further clarity:

> *'The relevant articles are to be found more particularly in an Addition to the Articles of Association of the Respondent and are set out on pp39-54 and 163-178 of the papers. Of particular relevance are articles 109.2, 110.3, the introductory paragraph to article 112, and 112.6….The applicant contends that these provisions fall foul of the Act…'*[17]

26. The introduction to **Article 112** provides that the respondent has a 'first right and option' to receive – the actual word used is 'koop' meaning 'purchase' - the crop of its members. It reads:

> *'112. Eerste reg en opsie op sitrusoes ten gunste van Maatskappy*
>
> *Vanaf datum van verkryging van lidmaatskap, verleen elke lid afsonderlik, 'n eerste reg en opsie aan die Maatskappy om jaarliks 'n lid se gehele sitrusoes of sodanige gedeelte daarvan as wat die Maatskappy mag besluit, te koop teen 'n prysbepaling soos in Artikel 114 uiteengesit en onderneem die lid on sodanige oes of sodanige gedeelte ten opsigte waarvan die Maatskappy die opsie uitoefen, te lewer onderhewig aan die volgende voorwaardes'*

27. **Sub-articles 112.1-112.6** provides for the mechanism whereby the individual members, or in specified instances, the management of the respondent, determines the size and quality of the crop to be delivered (112.1); whereby the members may make application for exemption from the requirement to deliver all of their crop (112.2); whereby the company may refuse to exercise its option (112.3-112.4); for compliance with a harvesting and delivery schedule specified by the respondent (112.6.1-112.6.2); and for the levying of fines in the event of non-compliance (112.6.3).[18]

28. **Article 109.2** specifies that, in the event that a member no longer complies with his obligations to deliver his crop, he may be required by the respondent to sell his shares or, failing that, the respondent may make arrangements for the sale of the dissident member's shares.

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[16] Respondent's Heads of Argument Para 3.
[17] Respondent's Heads of Argument Paras. 4-5
[18] Clause 25 of the Articles of Association of PSB, the respondent's predecessor, contains a similar set of provisions. Clause 25.1 bluntly states that 'Elke produsent is verplig on met uitsondering van wat hy vir sy eie gebruik nodig het, al sy produkte aan die maatskappy te lewer.'

29. **Article 110** specifies the limitations imposed on the transfer of shares in the respondent. Shares may be transferred to an heir (110.1), the purchaser of the farm of a producer/member of the respondent (110.2); and, in terms of Article 110.3:

'enige ander persoon of regspersoon wat met die toestemming van die Raad van Direkteure kwalifiseer vir lidmaatskap kragtens die vereistes gestel deur die Raad van Direkteure van tyd to tyd.'

30. In its Heads of Argument the Commission has also made reference to **Article 114.3** of the respondent's Articles of Association. This clause specifies the respondent's remedies in the event that any members fail to meet his obligations to the respondent. Specifically, Article 114.3.1 entitles the respondent to apply for an urgent interdict to prevent a shareholder from delivering his fruit to anyone other than the respondent; Article 114.3.2 entitles the respondent to issue summons for specific performance and/or to impose and recover the fines provided in the Articles for non-compliance

31. It is thus common cause that the articles alleged by the Commission to be in contravention of the Competition Act are contained in the *'Toevoeging tot Statuut van Patensie Sitrus Beherend Beperk om Voorsiening te Maak vir Speciale Kontraktuele Voorwaardes Tussen Lede en die Maatskappy'.* It is equally common cause that it is Article 112 of the *'toevoeging'* – which contains the obligation imposed on the farmer/members to deliver their crop to the respondent's pack house – that is at the centre of this dispute. The other articles in contention are those that are alleged to give effect, in one way or another, to the obligation contained in Article 112.

EVALUATION

32. The Commission has asked us to find that Patensie engages in restrictive practices in violation of **Section 4(1)(b)** – a restrictive horizontal practice – and in violation of **Section 8(d)(i)** – an abuse of a dominant position. We will consider each of these claims in turn.

Section 4(1)(b)(i) – a restrictive horizontal practice

33. Section 4(1)(b)(i) provides:

4. Restrictive horizontal practices prohibited

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –
(a)……...

(b) it involves any of the following horizontal restrictive practices

(i) directly or indirectly fixing a purchase or selling price or any other trading condition

34. Note that transgressions of this section of the Act are prohibited *per se.* That is, no showing of anti-competitive harm is required. Nor may the transgressor invoke a pro-competitive or efficiency defence. All that is required to sustain a claim under this section is proof that parties in a horizontal relationship have agreed to fix a price or any other trading condition. Sections 4(1)(b)(ii) and (iii) extend this form of prohibition to agreements to divide markets and to collusive tendering.[19] The Commission alleges that the producer/members of Patensie, who are, *qua* producers, horizontally related, have, through the Articles of Association, conspired to fix 'a purchase or selling price or any other trading condition'. The Commission argues that the requirement through the Articles of Association that each producer/member delivers his crop to Patensie is a trading condition and asks for it to be prohibited under Section 4(1)(b)(i).

35. The practices listed under Section 4(1)(b) are arguably the most egregious offences under competition law and, hence, are prohibited outright - harm to competition is presumed and no pro-competitive defence is permitted. This is why the legislature has confined the application of this section to agreements whose content is clearly specified in the Act. Accordingly, if one understands that the purpose in citing specific agreements in Section 4(1)(b) is to limit the possible range of offences hit by this far-reaching section of the Act then one cannot read 'any other trading condition' as a catch-all incorporating an undefined range of practices. In our view the range of 'trading conditions' hit by this sub-section is limited by the contextual cobbling together of price fixing and the fixing of 'any other trading condition'**,** which, in our view, points to aspects of a particular trade/transaction that are intimately related to price, i.e. quantity and quality. Hence for a 'trading condition' to be hit by this section of the Act it should be part of the price-quantity-quality nexus of the concerned transactions/trade. This naturally includes an agreement that seeks to limit output but it would also likely include the fixing of a discount structure or repayment condition. However, a practice of the sort alleged in this case is not vulnerable to attack under Section 4(1)(b). Hence even if we assumed that the applicant was able to establish the existence of a horizontal agreement, the alleged content of the agreement is nowhere captured under Section 4(1)(b).

36. Accordingly the charge under Section 4(1)(b) falls to be dismissed.

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[19] The *per se* character of Section 4(1)(b) is elaborated in American Natural Soda Ash Corp and Botswana Ash 49/CR/Apr00

Section 8(d)(i) – an abuse of a dominant position

37. Section 8(d)(i) provides that:

I

8. Abuse of Dominance Prohibited

It is prohibited for a dominant firm to

(a)

(b)

(c)

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effects of its act –

(i) requiring or inducing a supplier or customer to not deal with a competitor;

38. Section 7(a) provides that a firm is dominant if its share of the market is at least 45%.

39. In order to sustain a claim under Section 8 dominance has to be established. In order to do this the relevant market must first be established.

The Relevant Market

40. The respondent asserts that the relevant market is the *international market for citrus products*.[20] It argues that the producers or farmers present citrus fruit for sale on the international market. In order to do this they must ensure that the fruit is appropriately packed or processed for the purposes of transport and ultimate sale and that an agent with the requisite knowledge of the international market is appointed to conclude sales on the farmers' behalf.

41. The first of these tasks, the actual production of the fruit, takes place on family-owned farms.

[20] The respondent actually avers that the international market is the 'primary' market on which approximately 65% of South Africa's citrus output is sold. The remainder is sold on the domestic market which they designate the 'secondary' market. For the purposes of this analysis the market contended for by the respondent may simply be conflated into the 'international market for citrus fruit' because, whether the primary market and secondary market are treated separately or conflated into a single 'market for citrus fruit', the essential features remain the same: fruit producers, on this version, are price takers and the producers linked to Patensie account for a small (that is, 'non-dominant') share of the total market and of each of the segments, both 'primary' and 'secondary'. We will henceforth refer to the market contended for by the respondents as the 'international market for the sale of citrus fruit' representing the most significant of the relevant market segments contended for by the respondent.

42. The second task – the packing of the fruit – requires extensive capital outlays beyond the reach of most individual farmers and is, it appears, subject to considerable economies of scale. Accordingly the farmers have historically tended to collectivise this stage in the preparation of their product for sale on the international market. That is to say, they have formed co-operatives, associations of farmers, which have raised capital, built plant and employed managerial and other personnel engaged in the packing and further processing of the fruit of the members of the co-operative.

43. The third stage in the process of bringing agricultural products to the international market – the actual marketing of the crop – also requires skills and facilities (for example, personnel and offices in key international locations) beyond the reach of individual farmers. The packing co-operative is therefore tasked with procuring the services of an agent responsible for marketing the output on the international market.

44. Certain important institutional changes have occurred over the eighty years that have passed since the founding of the Patensie Citrus Co-operative. For one thing, the legal form of the entity undertaking the packing of citrus fruit in the Gamtoos River Valley has changed from that of co-operative (of which the farmers were members) to that of a limited liability company of which the farmers are now shareholders. A second important change concerns the marketing of the crop. The international marketing of agricultural produce was, until recently, the exclusive preserve of a number of statutory 'control boards' established in terms of The Marketing Act No. 59 of 1968. This statute was repealed by the Marketing of Agricultural Products Act, No. 47 of 1996. The upshot is that the packing companies and others who desire to offer fruit on the international market will select, from a large array of contenders, an agent who will perform the marketing function.

45. Hence, although the legal form has changed somewhat, the nature of the production and distribution chain that commences down on an Eastern Cape farm and ends in a London fruit stall has remained relatively static – the farmer tends to his core business of growing the fruit; he presents his output for packing at a facility in which he has a direct economic interest; the packing facility procures the services of an agent mandated to market the product on distant markets.[21]

[21] This is, at any rate, an accurate characterisation of GRV farmers and the respondent. It clearly holds good for a great many other agricultural processing and marketing arrangements but it may not hold good for all such arrangements. That is, we are not suggesting that this caricature represents the only or even standard arrangement in the agricultural sector. Regrettably no evidence was presented in this regard.

46. On this basis the respondent contends that the relevant product and geographic market is that for the sale of citrus fruit on the international market. It is common cause that on this market the citrus fruit producers of South Africa, much less Patensie, constitute a share too small to influence price and, obviously, some considerable way below the threshold necessary to attain dominance.

47. The Commission, on the other hand, contends for a much narrower relevant market, namely the *market for the provision of packing and marketing services to the citrus farmers of the Gamtoos River Valley*. On this version the respondent is to be viewed as a simple provider of a good or service to the farming community, no different in principle to those who engage in the sale of fertilizer or tractors to the same community. The geographic market, far from being international, is reduced to the Gamtoos River Valley – the Commission argues, and purports to evidence, that the cost of transporting product to alternative packing facilities outside of the Gamtoos River Valley is commercially prohibitive. That is to say, the additional cost of utilizing alternative packing services from beyond the borders of the GRV is of such a magnitude as to enable the respondent to raise the price of its packaging service to GRV farmers by a small, yet significant non-transitory amount without fearing an equivalent loss of revenue.

48. It is common cause that some 70% of the citrus produced by the farmers in the GRV is packed, and the marketing arrangements are made, by the respondent. On the Commission's definition of the relevant market the respondent is then dominant. Much of the remainder of the output produced in the GRV (that is that portion of the output that is not packed by the respondent) is packed in facilities owned by large individual farmers and primarily utilized for the packing of their own crop. The small number of farmers who neither own their own packing facilities nor are members of the respondent, also have their produce packed at these individually owned facilities. These latter either sell their output to the farmer-packers or simply hire these facilities for packing purposes. The respondent's Articles of Association also permit it to pack the produce of non-members although this only rarely occurs. Again Patensie may purchase this product or it may simply hire out its packing facilities.

49. Differences in market definition, although always important, are usually manifest in subtle differences in assessment of the extent of product and geographic substitutability. However, in this instance, the difference between the contending views is vast. To summarise, the Commission's *product market* is that for the *packing* of citrus fruit while the respondent insists that the product market is for the *sale* of citrus fruit; the Commission's *geographic market* is the *Gamtoos River Valley*, while its opponents contend for an *international* market. These differences are

clearly indicative of fundamentally different approaches to defining the market. What is the basis for this veritable chasm between the contending views of the parties in this matter?

50. Before providing a direct answer to this question, it is instructive to note that the Commission initially contended for the ***market for the sale of citrus fruit in the GRV*** as the relevant market in this transaction. On this version the sale of citrus fruit was transacted between the individual farmer (the seller) and the respondent who purchased the fruit for packing and then on-sale to the international market. This was also the finding of the Tribunal panel in the interim relief hearing. However, in the present proceedings, the respondent has consistently held that no sale of fruit actually takes place (at least in respect of that portion sold on international markets) until the appointed marketing agent concludes the sale to the international buyers. Until that time the fruit is the property of the farmer who bears all the risk until the point of sale.

51. However, the Commission – and the panel in the interim relief matter – may be forgiven for having thought otherwise. When specifying the commercial relationship between the farmers and the respondent, the latter's Articles of Association refer, on several occasions, to 'koop' and 'koopprys'.[22]. The Heads of Argument submitted by counsel for the respondents in the Interim Relief hearing describe Patensie as 're-selling' produce on the international market. Moreover, the farmers clearly colloquially refer to the respondent as the purchaser of their crop. At any rate, what is absolutely clear is that once the farmer delivers his crop to Patensie he relinquishes all control of the product – his only further contact with the delivered crop is in the form of payments periodically made by the respondent. The farmers then could also be forgiven for believing that they had sold their crop to Patensie. However, respondent's counsel, in the present matter at any rate, insists that its client does not purchase the farmers' produce – indeed it is fair to say that this argument constitutes the cornerstone of the respondent's case.

52. Despite the likely conclusion of a plain reading of the respondent's articles, the Commission has, somewhat generously, conceded that a sale of fruit does not actually take place within the borders of the GRV. The Commission is confident that it is able both to make this concession and sustain its case because it argues that there is a 'notional equivalence' between, on the one hand, viewing the respondent, Patensie, as a purchaser of fruit from the farmers of the GRV or, on the other hand, viewing the farmers as the purchasers of packing and marketing services *from* Patensie. On either version the respondent is a dominant firm in the relevant product market in the GRV – it is either a dominant purchaser of

[22] See Clauses 112 and 114.2.5.1 of the respondent's Articles of Association

fruit in the GRV or a dominant seller of citrus packing and marketing services in the GRV.

53. It is however not difficult to see why Patensie insists on its point, a point now seemingly so obvious and yet one that was missed by its own Counsel at the interim relief stage. *It allows Patensie to argue that no transaction takes place in the GRV.* No sale of fruit takes place within the borders of the GRV and so, absent an exchange between farmer and the respondent, there can be no market for citrus fruit in the GRV. Moreover, because the packing stage is undertaken by a company collectively owned by the farmers, there can, on the respondent's version, be no question of the farmers purchasing a service from 'themselves'. Therefore, once again, absent an exchange between the farmers and the respondent, there cannot be a GRV market, or, indeed, any market at all, for the sale of citrus fruit packaging services in the GRV. On the respondent's version then there is no sale of fruit in the GRV; and there is no purchase of packing services.[23] All that remains then is the sale of fruit on the international market. It is common cause that, at this level, the farmers of the GRV are small fry in a perfectly competitive market – there can, on the respondent's version, be no question of dominance on the part of any player, including the respondent, at any stage along the chain of citrus production, packing and marketing.

54. This then explains the yawning gap between the views of the contending parties on the question of the relevant market. The respondent does not merely argue that the 'market for the packing and marketing of citrus products of the GRV' is not the relevant market. Its attack on the Commission's contention goes significantly deeper than this – it insists that there is no such market at all, or, at least, that the respondent and its members do not participate in this market. The respondent avers that it, Patensie, is simply the sum of its members who are citrus fruit producers of the GRV, and that accordingly it cannot enter into a market exchange with itself, much less inflict 'abuse' upon itself in the conduct of that exchange. On this version the provision of packing services by the respondent to its members is in the nature of a transaction internal to a firm. It is, to be sure, an activity that adds value to the product – the fruit – when it ultimately enters the market but it is no more a market transaction than would be the rendering of services by the IT department of a bank to, let us say, the Human Resources department of the self-same institution. On this version the charge levied by the respondent on 'its'

[23] At the very least the respondent is arguing that it, and the farmers who utilise its services, do not participate in the market for the packing and marketing of citrus fruit. For the most part, however, the respondent appears to be arguing that because 'its' farmer/members do not participate in a packing market and because those farmers who do not utilise its services make use of their own packing facilities, there is no market for packing and marketing citrus fruit in the Gamtoos River Valley.

farmers/owners for rendering a packing service reflects nothing more than the cost of providing the service, an internal bookkeeping charge, useful for costing and budgeting purposes but not indicative of the existence of a market.

55. In order then to test the validity of these contending views we have first to decide whether the relationship between the individual farmers and the respondent is, indeed, in the nature of a non-market, internal exchange. Expressed otherwise, do the respondent and the farmers who are its members constitute a *single economic entity* by virtue of the latters' shareholding in the former?

PSB and the Citrus Farmers of the GRV – a single economic entity?

56. As already noted, it is a cornerstone of the respondent's case that PSB and its members constitute a 'single economic entity'.[24] This concept is only explicitly referred to in Section 4 of the Act, that section dealing with horizontal restrictive practices. Section 4(5) provides:

(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by,-

(b) a company, its wholly owned subsidiary as contemplated in Section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or
(c) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

57. Sub-section 4(5) ensures that agreements between firms that are related to each other in the fashion described will not be hit by the prohibition of the horizontal agreements described in sub-section 4(1). Implicit in the reasoning underlying Section 4(5) is the notion that firms cannot conspire with 'themselves'. In insisting that the respondent and its members do not have a separate existence, the respondent is effectively proposing that we import the reasoning underlying Sub-section 4(5) to a consideration under Section 8 – it employs this section in order to argue that a firm cannot abuse 'itself' and, hence, if related to the target of its alleged abuse in the manner described in Sub-section 4(5), its conduct will fall outside of the provisions of Section 8. We note, and we will imminently return to this, the only matter in which the 'single economic entity' concept has thus far been

[24] see paragraphs 87, 88 and 122 of the respondent's heads of argument. In para 88 respondent's counsel contends that '..the respondent clearly falls within the definition of Section 4(5)(b), in that the respondent's members all form "constituent firms within a single economic entity"'. And then in para 122 counsel argues: 'In real, practical terms, the Respondent does not have a separate existence, and for the purposes of deciding whether the Act is applicable or not, the Respondent must be viewed as if it does not have an existence separate from its members,'

considered by the Tribunal was in respect of a claim that a merger of two firms, allegedly part of a single economic entity, was not subject to the scrutiny of the Act – in other words, the Tribunal on that occasion permitted the 'importation' of the concept underlying Section 4(5) into a procedure under Section 12. In our view this concept is equally pertinent for enquiries under Sections 5 or 8 – just as a party cannot merge with itself or conspire with itself, so can it not abuse itself or conclude a vertical agreement with itself.

58. Let us then proceed under a set of assumptions most favourable to the respondent. That is, let us assume that a Section 8 charge cannot be sustained if the farmers – *qua* victim of the alleged abuse – and the respondent are related in the manner described in Section 4(5). And then let us examine whether indeed they are so related.

59. It is common cause that the relationship between the respondent and the farmers who are its members is not captured by Sub-section 4(5)(a) – that is, the relationship between PSB and the farmers who use its service is not that of a subsidiary to a parent. It is the applicability of Section 4(5)(b) – where the concept of a 'single economic entity' is introduced - that is in question. Paraphrasing the Act, the pertinent question then is 'are these firms – the respondent and the farmers – within a single economic entity similar in structure to the parent/subsidiary relationship described in Section 4(5)(a)?'

60. The respondent insists that they are members of a single economic entity. In support of this proposition we are referred to the history of the respondent. We are also referred to the 'not-for-profit' character of the respondent. Finally, we are referred to the ownership and control structures of the respondent. This set of facts, we are told, constitutes evidence of an identity of interest between the respondent *qua* packing company and its members *qua* producers. They are, in other words, members of the same economic entity, the same economic family, and while, as in all families, there are squabbles and black sheep, the family as an institution cannot abuse its members as a class without destroying the institution itself.

61. However these arguments do not support the respondent's claim to be part of the same economic entity as the farmers.

62. It may well be so that the farmers collectively set up a packing facility some 80 years ago because they were faced with no commercially viable alternative. The act of fruit packing was, or so it must have then appeared, inextricably part of the farming process but one too costly for individual farmers to undertake. However, much has changed since then. Above all economic and technological progress has ensured that packing

and marketing have, over this lengthy period, become clearly differentiated from the act of farming. This alone has ensured that the present generation of farmers is presented with actual and potential alternative packing and marketing services that were not available to their predecessors. Indeed it is clear that it is this perception of alternative service that partly drives the present dispute between the respondent and certain of its current and previous members. The decision on the part of the 'dissident' farmers to opt for these alternative sources of packing and marketing services may even represent a commercially unwise choice on their part insofar as the respondent may still offer the most cost efficient service. The source of this superior efficiency may well reside in the lengthy experience of the respondent and the capital sunk into its packing facilities. If this is indeed so, the respondent's inevitable continued dominance will not fall foul of competition law as long as it continues to secure that dominance by pro-competitive means. However, it is not apparent why an appeal to historical circumstance should allow a dominant firm to retain its custom by exclusionary rather than pro-competitive means.

63. We should add that the farmers are not required to prove the existence of more efficient alternatives - indeed it is possible that these alternatives, potentially in the form of the many efficient professional packaging firms, may have not displayed interest in the citrus industry precisely because of the exclusionary character of the relationship between the farmers and their existing provider of packaging services. Equally, it is possible that other providers of packing services have not attempted to enter this market because they perceive, in the respondent, the existence of an incumbent whose efficiency they cannot reproduce, much less better. It is not for us to evaluate these alternative explanations – this is the function of the market. It is simply for us to ensure that the market is permitted to operate.[25]

64. Nor does the respondent's appeal to its 'not-for-profit' character establish that it is part of the same economic entity as its members *qua* producers.

[25] The respondent insists that it and its members do not want a market – effectively that they elect to have their packaging and marketing services performed in-house. Competition law clearly cannot require a firm to 'externalise' the provision of an input – if a firm chooses to perform its packaging or marketing service internally that, for the most part, is its prerogative. However, the mere fact that a long-term relationship has been established with a supplier, possibly a supplier that was initially established with the financial and other support of its customers, does not mean that they are part of the same economic entity. It is indeed not clear that the respondent was ever part of the same economic entity as the farmers to whom it provided a service. We repeat that what appears to have changed is, first, the perception that there are practical alternatives; and then, partly through the introduction of the Competition Act, the perception that there are legal avenues available to press the claim to use these perceived alternatives.

65. Note that it is well established that not-for–profit firms are subject to competition law and there is nothing in our Act to suggest the contrary.[26] It is also well established that not-for-profit conduct may be highly anti-competitive, to wit, predatory. However, the claim here is somewhat distinct and considerably stronger – it claims that a not-for-profit relationship establishes that the firm allegedly foregoing profit is part of the same economic entity as its customers, those who make use of its services. Simply to state the proposition is to reject it.

66. Nor is it immediately apparent that the respondent's members are, *qua* producers, privileged by the claimed not-for-profit character of the packing firm. They are charged, at cost we are told, for their packing service. In addition they are levied a charge in order to cover the respondent's cost of capital. We are told that the respondent is distinguished from other firms because its charge does not include a margin for profit. However, we have been presented with no evidence in support of this assertion. The respondent's not-for-profit claim appears to amount to little more than a declaration that it does not pay its shareholders a dividend.[27] But this does not distinguish it from a great many profit-maximising companies who may have made a perfectly rational commercial decision to pay premium salaries and bonuses to their staff or to invest in capital equipment rather than distribute their surplus to their shareholders.[28] However, it is clear that an assertion to the effect that the firm shows no profit cannot be the basis for the claim that the respondent and the farmers who use its services are part of the same economic entity.

67. The respondent claims that its ownership and control structures establish that it is part of the same economic entity as the farmers who are its members. In particular we are told that only citrus farmers are members of the respondent; that the respondent's board of directors is composed entirely of farmers; and that there is regular, close contact between the board, the members and the management of the respondent.

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[26] Bellamy & Child *European Community Law of Competition* 5th Edition, para 2-003.

[27] Note that, on the respondent's own argument, the shareholders who are also the producers, should be indifferent as to whether their owner privileges are manifest in a distribution of the profits or in a decrease in the cost of the service. But in this instance they are, of course, not indifferent simply because each farmer owns a considerably greater share of his farm (which benefits from lower packaging prices) than of the packaging company.

[28] Indeed one may reasonably hypothesise that a firm with weak shareholders (that is, no dominant shareholder) and with no possible threat of acquisition through the market, will be dominated by its managers. Under these circumstances the shareholders are not likely to be at the front of the queue when the surplus is distributed – it will go to managerial salaries or to investment in expansion which increases the value of assets under the managements' control and hence their claim to ever greater salaries. Under these conditions the capital value of the asset will grow and this may satisfy the shareholder. However he is unlikely to receive dividends or, in this case, a reduction in the cost of the packing service.

68. There is a considerable jurisprudence surrounding the concept of a 'single economic entity'. In the landmark *Copperweld* case the US Supreme Court definitively decided that a parent and its wholly owned subsidiary were to be treated as a single firm for anti-trust purposes. This is not the question that we are asked to decide here. However, *Copperweld* remains significant for our purposes because, in arriving at its decision, the US court set a considerable standard for firms claiming to be part of a single economic entity:

> *"A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common not disparate; their general corporate actions are guided or determined not by two separate consciousnesses but by one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver…. If parent and a wholly owned subsidiary do agree to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for section 1 scrutiny."*[29]

69. The decision of the Seventh circuit in Fishman v Wirtz [30] is more directly in point. Here the court refused to extend the *Copperweld* principle to corporations owned in common by a large number of investors without proof that any individual or small group controlled both companies independent of the wishes of co-investors. The court found them to lack the complete unity of interest necessary to find them to be a single enterprise for the purpose of section 1 of the Sherman Act.

70. As noted above the Tribunal has considered the 'single economic entity' concept in the *Bulmer* matter.[31] This concerned a merger between two firms both ultimately controlled by the same shareholders. The merging parties took the view that they did not have to notify their merger because the transaction had not brought about a change in control which they effectively conflated with the identity of the ultimate controlling shareholder. The Tribunal held that, despite identical ultimate controlling shareholders pre- and post-merger, a change in control had been affected by the transaction. It was therefore held that the firms in question were not part of the same economic entity despite the existence of an identical ultimate controlling shareholder:

> *"The scope to accept argument about a single economic entity as a jurisdictional prerequisite must at this stage of enquiry be limited to*

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[29] Copperweld Corp v Independent Tube Corp,467 US 752 (1984) at 771.
[30] Fishman v Estate of Wirtz 807 F. 2d 520 (7th Cir 1986) and Areeda, Anitrust Law 2000 supplement ¶ 1469.
[31] Bulmer SA (Pty) Ltd, Seagram Africa (Pty) Ltd and Distillers Corporation SA Limited, SFW Group (Pty) Ltd 94/FN/Nov00

the clear cut cases suggested by section 4(5) with the added rider that section 4(5)(b) be strictly interpreted here."[32]

71. Then further, on an examination of the facts of the particular case, the Tribunal concluded:

> *"On the facts before us we find there is no evidence to suggest the respondents form part of a single economic entity. Nor is there evidence that the shareholders direct the activities of either of the respondents let alone directing that they act in concert. On the contrary there is at least prima facie evidence that the two companies operated autonomously and were held out as competitors to their shareholders."*[33]

72. It is instructive to reflect on the language used by the adjudicative bodies cited here and then to mirror this against the relationship between the respondent and the farmers who utilise its packaging services: a 'complete unity of interest'; not …two separate consciousnesses but …one'; 'not unlike a multiple team of horses drawing a vehicle under the control of a single driver'.

73. It is difficult to conclude that the relationship between the respondent and its members meets these standards. Nor is this surprising. Each of the farmers controls his farm with no participation by the respondent in decisions concerning that economic entity. On the other hand each farmer owns a relatively insignificant share of the economic entity that is the respondent – the largest share is of the order of 6% and the lowest less than 1%. It is unimaginable that a 'complete unity of interest' can be sustained between entities whose control structures have so little in common. The individual farmer's control over, and interest in, his farm is absolute. However, when he acts as a member of the respondent he is a mere minority shareholder and a tiny one at that.

74. Reflect again on the *Fishman* standard – the Court refused to apply the single economic entity concept to corporations owned in common by a large number of investors without proof that any individual or small group controlled both companies independent of the wishes of co-investors. Even if it proved possible to unite a relatively large body of farmer/shareholders around a particular demand in relation to the respondent, it is wholly possible to override their views. The very complaint before us is indicative of the inability of dissident farmers to

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[32] Bulmer SA (Pty) Ltd, Seagram Africa (Pty) Ltd and Distillers Corporation SA Limited, SFW Group (Pty) Ltd 94/FN/Nov00 at page 19.
[33] Bulmer SA (Pty) Ltd, Seagram Africa (Pty) Ltd and Distillers Corporation SA Limited, SFW Group (Pty) Ltd 94/FN/Nov00 at page 22.

exercise control over 'their' packing company. We have, we hasten to add, no particular quarrel with the respondent's control structure. This is not our concern. We merely insist that, on its own, it belies the notion that the respondent and its members *qua* farmers constitute a single economic entity.

75. We find then that the respondent, Patensie, and the farmers who utilise its packing and marketing services are not part of a single economic entity, that, 'in real, practical terms' they do indeed have a separate existence. Hence, exchanges between these parties are in the nature of market exchanges and are not internal to a single firm or to firms that are part of a single economic entity. The products exchanged are services for the packing and marketing of citrus fruit – the respondent is the seller of these services and the farmers are the purchasers - and this constitutes the relevant product market.

The Geographic Market

76. Before turning to an evaluation of the alleged conduct, we must determine the geographical boundaries of the relevant market. The Commission, as already noted, contends for the Gamtoos River Valley as the relevant geographic market. It essentially argues that the additional cost involved in transporting GRV produced citrus beyond the borders of the Valley enables the respondent to exercise market power – to raise its price by a small, yet significant, non-transitory amount without having to contend with the prospect of a compensating loss of revenue.

77. While the respondent has not attempted to specify the precise boundaries of the geographic market for the provision of citrus packing and marketing services – it does not, of course, accept that this is the product market - it clearly does not believe that farmers in the GRV would be constrained by economic or commercial considerations from utilising alternative packers outside of the Valley.

78. The most elementary prima facie test of the geographic market is to examine the frequency of shipments in and out of the geographic region contended for. Do the farmers of the GRV utilise packing services beyond the borders of the Valley? Do farmers beyond the borders of the GRV utilise packing services available in the Valley? The answer to both questions is a resounding 'no' suggesting that the Commission's version of the geographic market should prevail. However, this is certainly partly explained precisely by the requirement that each member of the respondent delivers his output for the purposes of packing and marketing to the respondent exclusively. It is not clear whether those utilising the large packing facilities in the neighbouring regions – the facility in the

Sundays River Valley is a case in point – are subject to similar requirements.

79. Much of the Commission's evidence on the geographic market is contained in its expert's report that was submitted late in the proceedings. The respondent has asked for this report to be struck out. It argues that the expert report, which, as noted, was submitted late in the proceedings, contains, in addition to opinion and argument, new factual averments to which it, the respondent, has not had a proper opportunity to respond. It also points out that the factual averments in question are largely hearsay. The evidence complained of suggests that, for reasons of cost as well as the prospect of quality deterioration, farmers in the GRV would be hard pressed to utilise packing facilities outside of the Valley.

80. We are reluctant to grant the application to strike out. Section 55 of the Act explicitly takes an expansive view of the admissibility of evidence in proceedings before the Tribunal and this, in our view, dictates that an application to strike out will only be granted in rare circumstances.[34] We are however prepared to accord a relatively low weighting to evidence that is hearsay and, in particular, to evidence which the respondent has not had to opportunity to rebut. In this particular case, we are comforted by the fact that, albeit inconvenienced by the timing and character of certain of the submissions of the Commission, the respondent has, for the most part, taken the trouble to respond. Indeed certain of the allegations made in the belated expert's report are pre-emptively dealt with in earlier submissions by the respondent.

81. The Commission has reported remarks allegedly made to it in the process of preparing its expert's report that purport to demonstrate that farmers in the GRV are highly unlikely – because of cost and quality considerations – to transport their fruit to packing facilities outside of the Valley. The parties have submitted affidavits suggesting the contrary. This evidence is inconclusive. As noted earlier a relatively low weighting is attached to the Commission's hearsay evidence. As for the evidence submitted by the parties, their evidence is drawn from other areas of the country and a lack of sufficient specific context makes it very difficult to evaluate its pertinence in this particular matter.

82. The Commission asserts that the quality of the fruit will deteriorate significantly if transported over long distances. Again the respondent disputes this assertion.

[34] We do not in any event need to decide the striking out application since, as will be seen later, on the respondent's own evidence, transport costs still exceed the SSNIP test. Nor do we need to decide this striking out application in respect of the affidavits of Du Preez, Verwey and Bezuidenhout, since we have not relied on the material sought to be struck out in our decision.

83. However, in our view the determination of the geographic market hinges on transport costs.[35] Here each party to this dispute has presented evidence. The Commission calculates that the additional transport costs involved in delivering fruit to the Sundays River Valley packing facility, the closest alternative to the Patensie packing facilities in the GRV, would increase the cost of packing by approximately 27%. The respondent, on the other hand, finds that additional transport costs would add 12.67% to the cost of packing[36].

84. This latter evidence is, in our view, conclusive – even on the respondent's own figures packers in the GRV would be able to increase their price above the 5-10% threshold commonly employed in tests of this kind without fearing competition from packing facilities in adjacent areas.

85. We accordingly find that the relevant market is the market for the packing and marketing of citrus fruit in the Gamtoos River Valley.

Dominance

86. The respondent is clearly dominant in the market for the provision of packing and marketing citrus fruit in the Gamtoos River Valley. It is common cause that at least 70% of the citrus fruit grown in the GRV is packed by the respondent who also arranges for the marketing of the fruit packed by it.

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[35] The determination of a relevant geographic market, like most competition law determinations, is highly fact specific. However, note Anti-trust Law Developments – Volume 1 (3rd ed., 1992) pp.295-296 'Actual sales patterns are often used to determine whether two areas are within the same market. Localised sales indicate separate markets. Where firms in differing locations have extensive overlaps in sales areas, all of the producing and sales areas may be included in the market.' And further: 'Transportation cost, especially in relation to the price of the product, is an important consideration in defining geographic markets. Low transportation costs between areas (or low differences in transportation costs from common producing areas) indicate that separate areas are within the same market. High transportation costs between areas, or high differences in transportation costs from common producing areas, have been cited in finding separate markets.' See footnotes 109-114 on the same pages in which an extensive survey of case law in this area is provided. For a European Commission decision that bears out this approach see Crown Cork and Seal/Carnaud/Metalbox (Case No IV/M.603)

[36] Transcript 27/02/02 page 40. On Du Toit's own submission in his affidavit replying to the Commission's further witness affidavits and expert report on page 727 of the record, additional transport costs would be R1,90 per carton, as opposed to Mr Parr's calculation of R4,08 per carton. Calculated on total packing fees of R15 per carton, which Du Toit himself accepts, this translates to an additional cost of 12.67%. In fact, earlier in this replying affidavit, on page 696 of the record, Du Toit, referring to a subsequent annexure on page 734, points out that average packing costs for oranges at the respondent is approximately R13.95 per carton, and those for soft citrus, R12.73 per carton. Based on these figures, the additional transport costs would increase the cost of packing by approximately 14% to 15%.

Abuse of a Dominant Position

87. Having determined that the respondent is dominant in the relevant market we are required to determine whether the conduct complained of constitutes an abuse of its dominance.

88. Section 8(d)(i), cited above, provides that a dominant firm may not require or induce a supplier or customer to not deal with a competitor. If a dominant firm engages in conduct thus described it is presumed to have engaged in an 'exclusionary act' defined by the statute as 'an act that impedes or prevents a firm entering into, or expanding within, a market'.[37] However this presumption is rebuttable provided that 'the firm concerned can show technological, efficiency or pro-competitive gains which outweigh the anti-competitive effects of its act.'

89. The respondent's conduct that is complained of is in clear violation of Section 8(d)(i). The respondent's Articles of Association – specifically Article 112 - clearly provide that the members of the respondent, who are farmers, are obliged to deliver their entire output to the respondent for the purposes of packing and marketing should the respondent exercise its 'eerste reg en opsie'. Expressed in the language of Section 8(d)(i), the respondent requires its customers – who are also its members – to deal with it, or, conversely, 'to not deal with a competitor'.

90. The respondent argues that the obligation imposed on its members to deal exclusively with it stems not from their status as farmers or customers but from their status as members or shareholders of the respondent. It points out that it is wholly possible for those who are required to deliver their crop to the respondent to escape this obligation. Those wishing to escape this obligation can do so through the simple expedient of selling their shares in the respondent, in other words by terminating their membership of the respondent.

[37] Note that Section 8 establishes two categories of 'exclusionary act'. The various sub-sections of 8(d) list specific practices which are presumptively exclusionary. In other words, if a dominant firm engages in the acts specified it will be presumed to have engaged in an 'exclusionary act', that is, be presumed to prevent or impede a firm from entering into or expanding in a market and hence the language '…any of the following exclusionary acts'. However, the exclusionary act will still be able to pass muster with the Act if the perpetrator is able to show pro-competitive gains that derive from the exclusionary act and that outweigh the anti-competitive consequences of the exclusionary act. Section 8(c), on the other hand, proscribes any act that is exclusionary – however to establish that the act complained of is indeed exclusionary, because unlike Section 8(d) a list of exclusionary acts is not provided, it will be necessary to establish what the restrictive practice is, that it indeed 'impedes or prevents a firm entering into, or expanding within, a market' and that its anti-competitive effect outweighs any pro-competitive gains deriving from the act.

91. The respondent readily acknowledges that restrictions are imposed on the sale of shares. These are, for the most part, plainly stated in the Articles of Association. A seller of shares has to have the identity of the purchaser approved by the respondent's Board of Directors[38] – we were, in fact, informed that the Board would be unlikely to approve a sale to any one other than an existing shareholder. A member selling his shares will only be allowed to affect transfer if he makes good his share of the outstanding capital liability or if the purchaser of the shares agrees to assume that liability. The respondent insists that restrictions imposed on the alienation of shares are standard practice. Moreover, argues the respondent, it is neither good law nor good economics nor good business ethics, to allow someone who has made a commitment to fellow investors, to renege on his commitment leaving his colleagues to shoulder the burden for a decision that, but for the renegade's initial commitment, may never have been taken.

92. It is, however, the nexus between the farmer's function *qua* farmer (the preparation of his crop for sale) and his duties *qua* shareholder (a duty towards his fellow investors) that the Commission seeks to impugn in terms of Section 8(d)(i).

93. The respondent offers an extensive defence of this arrangement. It argues that when taking out a loan to support a capital expansion programme it accepts a daunting commitment. In order to honour this commitment it has to ensure a sufficiently large and sufficiently regular income stream. It turns to its shareholders and effectively requires that they guarantee this income stream. However, its shareholders are, for the most part, men of straw, incapable of putting up the necessary financial guarantees. Accordingly they are required to guarantee their crop, their only unencumbered asset. This guarantee performs a dual purpose: it is the basis upon which a charge is levied that enables the respondent to meet its capital liability; and it provides the throughput necessary to ensure that the packing plant operates at full capacity and, so, at the lowest point on its cost curve. It is, in other words, a requirement that both ensures the respondent's ability to meet its capital requirement and its ability to operate its plant efficiently. We deal with the efficiency considerations later in this decision. For the moment we confine our remarks to the capital guarantee.

94. We do not take issue with the restrictions imposed on the alienation of shares in the respondent. Nor do we oppose the view that insists that, having guaranteed the respondent's capital liability, it is the duty of the guarantor, and one by no means inconsistent with competition law, to honour that commitment. These are contractual matters between the individual shareholders and the respondent and, as such, are not the

[38] Article 110

concern of the Competition Act. However, we do not accept the form in which this particular guarantee is effectively cast – this does constitute a violation of the Competition Act. It is, in effect, what US anti-trust jurisprudence would refer to as a 'naked restraint of trade'. It is certainly in flagrant violation of Section 8(d)(i)'s injunction against a dominant firm 'requiring or inducing a supplier or customer to not deal with a competitor' and, a such constitutes a prohibited 'exclusionary act', and act that, in the words of the statute, 'impedes or prevents a firm entering into, or expanding within, a market'.

95. The respondent protests that there is no evidence that any firm has indeed been prevented from entering into or expanding within the market. It insists that there is no evidence that an alternative packing firm wishes to enter the market or that any of the existing farms with packing facilities wish to expand in the packing market or that the expansion of any farmer is impeded in consequence of its relationship with the respondent. The respondent points out, with some justification, that the assertions made by some of the Commission's witnesses purporting to demonstrate the improvement in their circumstances since finding alternative packing and marketing facilities are vague and unsubstantiated. However, as already noted, in terms of Section 8(d) the complainant does not have to establish that the act complained of has an exclusionary effect, that is, that it prevents a firm from expanding in the market – if it is established that one of the acts specified in the various sub-clauses of Section 8(d) has been perpetrated and that the perpetrator is dominant, them the exclusionary nature of the act is presumed. We find that the Commission has discharged this onus.

96. This is, however, not the end of the matter. Section 8(d) specifically provides a defence to a firm found to have committed one of the exclusionary acts specified in sub-sections 8(d)(i)-(v). It grants the firm the opportunity to 'show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive consequences of its act.'

97. The respondent submits evidence purporting to indicate that it is indeed an efficient firm employing state-of-the-art technology – we note that if this is indeed so, and we have been given no reason to doubt the evidence, the respondent should have little trouble in retaining the loyalty of those who presently use its services. Indeed it should have no difficulty in attracting new customers including, if its views on the geographic market are to be believed, customers from beyond the borders of the GRV.

98. However, this is not sufficient to sustain a successful efficiency defence under Section 8(d)(i) – to counterweight the anti-competitive consequences of its exclusionary act the respondent must show that the

efficiencies derive from the exclusionary act itself; expressed otherwise, that the efficiencies would not occur but for the exclusionary act.

99. The respondent would have us accept that, firstly, it would not be able to raise the loans necessary for undertaking efficiency enhancing capital investment were it not for the restrictive practice, that is, if its members did not guarantee to deliver their crop to the respondent for packing. Secondly, and related to this, it insists that, without its members' crop it would not have sufficient throughput to achieve the scale economies necessary to attain maximum operating efficiency and thus, to realise the value of its capital investment.

100. However, we cannot accept that the exclusionary act – the requirement that its members deliver their crop to the respondent – is a pre-requisite for the raising of capital. Thousands of firms raise loans without tying their shareholders or any other of their customers into a requirement of the sort employed here. Many firms, to be sure, give comfort to their sources of finance by entering into long-term contracts with their key customers. Competition law would have no quarrel with an arrangement of this sort because contracts have escape clauses and they have termination dates and provisions for periodic re-negotiation of their material terms. However, in this instance the farmer must first be released from his commitments *qua* shareholder before being released from his commitments *qua* producer.

101. The respondent appears to urge us to view the agricultural sector as a special case. It is a cyclical industry subject to unforeseen price fluctuations and other vagaries beyond the control of the borrower or lender of capital. For this reason an agricultural packing house does not attract strong committed shareholders but relies on the men of straw who have set up a packing plant simply because they have no choice but to do so.

102. This argument may have carried weight in years gone by when the erstwhile co-operative was first established. However we have not been provided with any reason for accepting this argument now. All commodity markets are subject to price fluctuations and many to the vagaries of the weather and other uncontrollable natural forces. However, just as the provision of packing services has developed, so too has the provision of finance – and so financing models have developed which have ensured the provision of capital to sectors beset by uncertainties similar to those that afflict agriculture. We should also point out that there are many firms whose prosperity is as closely tied to the vagaries of agricultural output and prices as that of the respondent – none of these require that the farmers invest in them, much less that they tie their investment to an

exclusionary arrangement such as that required of the citrus farmers in this instance.

103. Nor have we been provided with any evidence of the assertion that this arrangement is a pre-condition for raising capital – for example, we have been provided with no evidence suggesting that this financing model is applied in respect of other citrus packing houses, much less other enterprises dependent on agricultural production. Nor, indeed, do we have reason to accept, in the absence of evidence to this effect, that one of the several strong players in packaging or in the provision of logistics services would spurn the prospect of investing in a growing industry, one that, as the respondent reminds us, is intimately linked with one of South Africa's most successful export industries.

104. Our reaction to the argument that the guaranteed crop is necessary to ensure that the plant's scale economies are exploited is similar. The respondent's imperatives in this regard are no different to those of any other producer of goods or services. However, other producers do not ensure throughput via exclusionary arrangements with their customer base. They secure it by offering the best service at the lowest price. They may seek to bolster this by entering into long-term contracts with their customers – their success in persuading customers to enter into these contracts will itself obviously be predicated on their ability to offer a reliable and relatively inexpensive service. This is the pro-competitive means of ensuring investment and full capacity utilisation. Indeed excluding competitors through mechanisms that tie-in one's customer base, generally, ensures that little attention is paid to the efficiencies that produce a better product at lower prices. If the respondent has managed to achieve efficiencies in the absence of these market-based incentives, then we, and, more important, the farming community, are entitled to expect even greater things from them in circumstances where their competitors and potential competitors are not denied access to their customer base.

105. We accordingly find no merit in the respondent's efficiency defence – the anti-competitive consequences of its exclusionary practices are not counterbalanced by efficiency, technological or other pro-competitive gains.

REMEDIES

106. We have dismissed the charge against the respondent under the Section 4(1)(b). However, we find the respondent in violation of Section 8(d)(i) of the Competition Act insofar as Article 112 of the Respondent's Articles of Association effectively require its customers not to deal with a competitor.

Other articles purport to give effect to the requirement effectively contained in Article 112.

107. The Commission has asked us to strike down, to declare null and void, the offending sections of the respondent's Articles of Association.[39] As noted above it is common cause that these, in the Commission's estimation, include the specific article that obliges the farmers to deliver their crop to the respondent – the introductory paragraph to Article 112 - as well as those articles that purport to enforce this obligation. This latter category, contends the Commission, covers the various sub-articles of Article 112 as well as Articles 109.2, 110 and 114.3.1, 114.3.2 and 114.3.3.

108. As already indicated, we do not accept all the elements of this argument. Article 112 which grants the respondent a 'first right and option' over the crop of the farmer/members explicitly obliges the latter to deliver their crop to Patensie. Sub-articles 112.1 to 112.6 specify the precise mechanisms whereby the farmers comply with the respondent's exercise of the option over their crops including the respondent's right to levy a fine. These articles clearly purport to enforce the obligation contained in the introductory paragraph to Article 112 and accordingly fall to be nullified. So too does Article 109.2 which specifies that, in the event that a member no longer complies with his obligations to deliver his crop he may be required by the respondent to sell his shares or, failing that, the respondent may make arrangements for the sale of the dissident member's shares. Article 114.3.1 provides that the respondent may seek an urgent interdict in the event that a member sells or delivers his crop to anyone other than the respondent and 114.3.2 provides that the respondent may issue summons for specific performance and/or for payment of the fines levied for non-performance. These clauses also clearly seek to enforce the obligation in Article 112.

109. However Article 110 which specifies that the respondent's Board of Directors may determine the identity of the purchaser of its shares is an obligation imposed on a farmer qua shareholder. This is severable from the obligation imposed by Article 112 which is an obligation on the farmer qua producer.

110. The farmers may protest that their continued and onerous commitment to meet their share of the capital liability effectively binds them to the respondent. We however point out that, should they find a better price on packing services and a better marketing arrangement elsewhere, then, by virtue of the nullification of their obligations qua producers, they are at liberty to exercise an alternative packing option and so more easily meet their various obligations, including those to the respondents, through the superior margins earned on their crop.

[39] Please note paragraph 22 of this decision.

111. The respondent will insist that, while we have not interfered with the obligation of the shareholder to make good his share of the capital commitment, we have eliminated the mechanism by which this obligation was secured. This cannot, however, be our concern – certainly it cannot outweigh our requirement to ensure compliance with the Competition Act. The respondent will have to devise an alternate mechanism for ensuring that it is able to meet its capital repayments – it could, needless to say, do so through the simple expedient of incorporating its capital charge into the cost of its service, thus normalizing its relationship with its shareholders and its customers.

112. The Commission has asked us to impose a fine equivalent to 10% of the respondent's annual turnover. However, in our view, a fine is not appropriate in these particular circumstances. While we have characterized the anti-competitive transgression as 'naked', the interface between shareholder obligations and producer obligations and between the requirements of the Act and the provisions of the Articles of Association, is certainly complex – the respondent may well have believed that its longstanding practices would pass muster with the Competition Act. While these factors certainly do not protect the practice complained of from the scrutiny of the Competition Act, it does impact on a decision regarding a punitive remedy such as a fine. Certainly, if the respondent persisted with this approach or if it attempted to reintroduce a similar anti-competitive restriction in another guise, then it would make itself vulnerable to a fine. Others, in the agricultural sector or elsewhere, who utilize similar anti-competitive mechanisms and who, in the wake of this decision, persist with those practices, may well render themselves liable to a fine. However, we do not consider it appropriate to impose a fine on the respondent in this matter.

ORDER

Accordingly we declare:

1. In terms of Section 58(1)(a)(v) of the Competition Act, that the respondent's conduct in requiring its customer/shareholders not to deal with a competitor contravenes Section 8(d)(i) of the Act

2. In terms of Section 58(1)(a)(v) of the Act, that the following articles of the respondent's Articles of Association are practices prohibited in terms of Section 8(d)(i) of the Act:

   Article 112 in its entirety
   Article 109.2
   Article 114.3.1

Article 114.3.2

3. In terms of Section 58(1)(a)(vi), that the following articles of the respondent's Articles of Association are void:

   Article 112 in its entirety
   Article 109.2
   Article 114.3.1
   Article 114.3.2

4. There is no order as to costs.

_____ 8 April 2002

D. Lewis **Date**

Concurring: F. Fourie and P. Maponya