CASES / VONNISSE

THE COURT REFUSES TO GRANT A CERTIFICATION ORDER IN THE BREAD-CARTEL CLASS ACTION CASES: A CLOSER EXAMINATION OF THE WESTERN CAPE JUDGMENT

***The Trustees for the time being of the Children's Resource Centre Trust v Pioneer Foods (Pty)* and *Imraahn Ismail Mukaddam v Pioneer Foods (Pty) Ltd* (Cases No 25302/10 and 25353/10) (Referred to in the judgment as "the Consumer Application" and "the Distributor application" respectively)**

1 Introduction*

In the above cases, which came before the Western Cape High Court for hearing on both 23 and 25 November 2010, the judge, Francois Van Zyl, AJ (hereinafter "the AJ") dismissed the two applications for leave to institute the class actions on behalf of the applicants against the respondent bread-manufacturing companies (*ie*, Pioneer Foods (Pty) Ltd ("Pioneer"), Tiger Consumer Brands Limited ("Tiger") and Premier Foods Limited ("Premier")) who, together with Foodcorp (Pty) Ltd, enjoy between 50% and 60% of the domestic bread market in South Africa. The judge promised to give reasons for his decision subsequent to his ruling on 26 November 2010 and, indeed, on 07 April 2011, he provided detailed reasons for his decision in terms of Rule 49(1)(c) of the Rules of the High Court.

Material facts as accepted by the Court and which are relevant for the purposes of this case note are as follows: Both cases emanated from a complaint raised with the Competition Commission following an allegation of a bread cartel operated by the Respondent companies in the Western Cape in December 2006. After a preliminary investigation, the Commission initiated a complaint against the three respondents in the above applications. One of the respondent companies, Premier, applied for leniency and disclosed to the Commission that, together with Pioneer and Tiger, it was part of a bread cartel in the Western Cape which fixed the selling price of bread and other trading

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conditions. Following this disclosure, Premier was granted corporate leniency by the Commission and, on 14 February 2007, an agreement was concluded between Premier and the Commission in terms of which Premier agreed to assist the Commission in its investigations and subsequent prosecution of the other respondents before the competition Tribunal. On the same day that the corporate-leniency agreement was concluded with Premier, the Commission referred the complaint made against Tiger and Pioneer in the Western Cape to the Competition Tribunal. Following the referral, Tiger negotiated a consent agreement with the Commission, in terms of which it admitted that it entered into an agreement with Premier and Pioneer during December 2006 regarding bread prices and discounts to independent distributors in the Western Cape which amounted to a contravention of the provisions of the Competition Act (89 of 1998). On 27 November 2007, the Competition Tribunal made a consent order against Tiger in terms of section 49D of the Competition Act and levied against it an agreed administrative penalty of approximately R98 million. With regard to the third respondent company, Pioneer, complaints against it were subsequently heard by the Competition Tribunal and, on 03 February 2010, it was found that, together with Premier and Tiger, it was part of a bread cartel in December 2006 in the Western Cape in contravention of the provisions of the Competition Act. Taking into account other contraventions of the Competition Act committed by the company in other parts of the country, Pioneer was subsequently ordered to pay an administrative penalty of approximately R195 million.

In the final analysis, the facts established that bread-cartel operations took place during December 2006 in the Western Cape. It was further established that the three respondent companies were part of that bread cartel in contravention of the provisions of the Competition Act (*ie*, Premier applied for and was granted corporate leniency, Tiger negotiated a consent agreement which was made a consent order by the Competition Tribunal in terms of the Competition Act and Pioneer was found by the Tribunal to have been in contravention of the Competition Act and an administrative penalty was imposed upon it). It was in the context of the above circumstances that the applicants brought applications for class-action certification against the three respondents in the Western Cape High Court for the compensation of the consumers and distributors who were detrimentally affected by the conduct of the respondent companies in contravention of the Competition Act.

The AJ's primary reasons for dismissing the applications included, firstly, the fact that while it is important in cases such as this to clearly identify a class for the purposes of the "class action" on the "opt-out" basis, the applicants failed to identify the "class" for the purposes of the application. The AJ therefore concluded that "[T]o describe the class as, for instance, all bread consumers whose rights in terms of s 27(1)(f) and s 28(1)(b) [of the Constitution] have been infringed by the respondents' alleged unlawful acts, will not enable members of the public to decide whether they are included in the definition or not" (par 74).

Secondly, the AJ emphatically stated that the applicants failed to allege a legally recognized cause of action. In this regard, the AJ stated that to the extent that the applicants intended "to bring what can be referred to as a consumers' claim … such an action is … not available in our law and I do not

regard the provisions of section 65 of the [Competition] Act to have created such a cause of action" (par 87).

Thirdly, although the AJ seems to have accepted that both sections 27(1)(b) and 28(1)(c) of the Constitution (which were accepted as socio-economic rights) were horizontally applicable, he was only prepared to concede that those rights were applicable to private actors in a negative sense (*ie*, a duty not to infringe them) and left open the most important question of whether such rights could be positively applied (*ie*, a duty actively to promote those rights) to private actors (par 72).

It is in the context of this reasoning by Francois Van Zyl (AJ) that this case note attempts to determine whether the AJ's reasons were legally defensible on the basis of the current jurisprudence, taking into account the facts as established. The case note considers whether it was indeed justifiable to conclude that (1) "there is not an identifiable class of persons"; (2) "a cause of action is not convincingly disclosed"; and (3) "the socio-economic rights contended for by the applicants do not have horizontal application or do not place a positive duty on private entities such as respondents".

In arguing that, on the facts, there was an identifiable class of persons, we intend to show that, contrary to the AJ's findings:

(a) It is possible to identify those who had a potential claim for relief against the respondents;

(b) it is possible to define the parameters of the action so as to identify all the persons who would be bound by the result; and

(c) It is possible to enable those entitled to such relief to decide whether they should "opt out" or not.

In arguing that it is unfounded that a cause of action was not convincingly disclosed, we intend to argue that, in line with the South African Law Commission's paper on "The Recognition of Class Actions and Public Interest Actions in South Africa" (Project 88 – August 1998 43–44 par 5.6.8-5.6.9), it is clear that in determining whether a cause of action has been disclosed, the court hearing the certification application should refrain from undertaking a preliminary merits test, but must satisfy itself that the applicant has established a *prima facie* cause of action. It is in this regard that we would like to demonstrate that the applicants established a *prima facie* cause of action.

Finally, we intend to investigate whether the current legal position in accordance with the South African constitutional jurisprudence does not place a duty (whether positive or negative) on private entities such as the respondents, particularly in relation to the socio-economic rights contended for by the applicants.

2 Identifiable class of persons

One of the central issues in this note is the analysis of whether the AJ's finding that the applicants did not satisfactorily prove the existence of an identifiable class is jurisprudentially and factually sustainable. The relevance of this issue is made apparent by the AJ's finding (par 84) "that the applicants have also not made out a case for a sufficiently identifiable class of persons on the broad approach to the class they wish to represent".

The context of fulfilling this requirement deserves some special attention as, in the absence of a promulgated legislation and guidelines on class actions, the application of this requirement is not clearly defined in our law. The current practice in our law is that Judges of the High Court are therefore required to exercise discretion in each case and to develop guidelines applicable for each case.

In his reasons for turning down the application, the AJ noted (par 23–24) that prior to 1994 our law did not recognize class actions (see *First Rand Bank Limited v Chaucer Publications (Pty) Limited* 2008 (2) SA 592 (C) 598F–I). This position was departed from by the enactment of section 7(4) of the Interim Constitution of 1993 (Constitution of the Republic of South Africa, Act 200 of 1993). This provision for class action was later re-enacted in section 38 of the final Constitution (Constitution of the Republic of South Africa, 1996), introducing a type of group or class action which allowed for a competent court to protect the rights of groups of persons whose rights in the Bill of Rights, which forms part of the Constitution, had been violated.

The institutionalization of class actions through the Constitution notwithstanding, the application of section 38 is restricted by the fact that Parliament had not yet promulgated an enabling legislation to provide for rules governing the procedure in class or group actions. The initial stage towards the formulation of this legislation only went as far as the South African Law Commission's paper on "The Recognition of Class Actions and Public Interest Actions in South Africa" (Project 88 – August 1998).

In dealing with the application for certification, the AJ (par 46), relying on Rachael Mulheron (*The Class Action in Common Law Legal Systems: A Comparative Perspective* (2004) 334–335), stated that the purpose of a class definition was;

(a) to identify those who had a potential claim for relief against the defendants;

(b) to define the parameters of the action so as to identify all the persons who would be bound by the result; and

(c) to enable those entitled to such relief to decide whether they should "opt out" or not.

This is in harmony with the AJ's judgment (par 42), where he referred to the Commission Report (see The Law Commission Report 50 par 5.6.27) that, to succeed in an application for certification as a class, the applicants had to show that:

(a) there was an identifiable class of persons;

(b) a cause of action was disclosed;

(c) there were issues of fact or law which were common to the class;

(d) a suitable representative was available;

(e) the interest of justice so required; and

(f) the class action was the appropriate method of proceeding with action.

In following the above steps, the decision in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* (2001 (2) SA 609 (ECD)) is directly in point. The plaintiffs applied for a class-certification order claiming that they

were entitled to a class action and public-interest proceedings under section 38 of the Constitution. The court granted an order requiring the provincial government to provide details of members of the class kept on a computer or physical file, and a publication order, requiring the plaintiffs to disseminate information about the proposed class action through the print and radio media in the province and, with the assistance of the provincial government, by notices at pension-payout points. The object of the publication order was to allow members of the class, if they so wished, an opportunity to exclude themselves from the proposed proceedings, and therefore, to opt-out of the proceedings.

In his judgment, the AJ agreed (par 29) with the finding of Froneman J (as he then was) in the *Ngxuza* case that "the determination of a common interest sufficient to justify class or group or representative representation will depend on the facts of each case. The common interest must relate to the alleged infringement of a fundamental right as required by s 38" (624F–G).

It was unfortunate that in following this approach, the AJ appeared to have conveniently disregarded the circumstances leading to the application for the certification, which clearly showed that the period or periods during which the alleged damages claim arose corresponded very well with the time at which the respondents put in motion their price-fixing agreements as reflected in the facts which the AJ appeared to have accepted as reflecting the true state of affairs. In this regard, the AJ seemed to have accepted as having been established, the fact that it was in December of 2006 when the three respondents implemented an alleged bread cartel operating in the Western Cape (par 12). It was as a result of the preliminary investigation by the Competition Commission that Premier, that one of the three respondents applied for leniency and disclosed to the Commission that together with Pioneer and Tiger, it was part of a bread cartel in the Western Cape which fixed the selling price of bread and other trading conditions (par 12). Following from the same cause of action and set of facts as outlined above, the matter was referred by the Commission to the Competition Tribunal, whereupon Tiger negotiated a consent agreement with the Commission in terms of which it admitted that it had entered into an agreement with Pioneer and Premier during December 2006 regarding bread prices and discounts to independent distributors in the Western Cape, which amounted to an agreement and/or concerted practice to fix directly or indirectly a selling price in contravention of the relevant provision of the Competition Act (par 16). With regard to Pioneer, the Competition Tribunal, subsequent to the investigation of the complaint lodged against the company, found, on 03 February 2010, that during December 2006 it (*ie*, Pioneer) had contravened the provisions of section 14(1)(b)(i) of the Competition Act in that it agreed with Premier and Tiger to increase the price of toaster bread and standard loaves by fixed amounts and to cap discounts given to bread distributors in Paarl and the Peninsula (par 18). Having accepted the facts above as having been established, the AJ's conclusion that the applicants failed to establish clearly the period during which the alleged damages claim arose is hard to fathom (par 83).

Moreover, the AJ's conclusion that the applicants failed to define the class to which their damages claim related is also hard to swallow, particularly because the applicants were in possession of a section 65 [of the Competition Act] certificate issued by the Competition Tribunal against the companies, with the

exception of Premier Foods, and as conclusive proof of the wrongful conduct of the companies, arising out of a prohibited practice of the defendants. While it is conceded that the certificate plays no role at all in identifying potential civil claimants, it nevertheless certifies that the companies named in the certificate have been found guilty of specified offences in terms of the Competition Act, which offences would have invariably affected certain members of the society negatively.

Furthermore, the lack of the section 65 certificate against Premier should not be a hindrance to the determination of the class because, even though the AJ correctly stated (par 21) that "No proceedings were instituted before the Commission Tribunal against Premier as the Commission had granted Premier corporate leniency and entered into a leniency agreement with it," the requirement for entering into a leniency agreement was that a full disclosure had to be made. That disclosure pertained to the prohibited conduct that gave rise to the damages claim but the AJ conveniently overlooked that fact. Moreover, the Competition Commission's leniency programme did not extend to a damages claim. While it is acknowledged that in bringing a case before the Competition Tribunal, the Competition Commission acts in the public interest, there is invariably no doubt in every such case that harm against specific parties was alleged and proved.

The AJ's decision that the certificate issued under section 65 of the Competition Act was only a procedural requirement with no significant role in the definition of a class is overly simplistic. This decision is evidenced by the AJ's statement (par 78–79) to the effect that, based on the application papers, arriving at a definition of a class was impossible partly because "this problem is exacerbated by the various orders made by the Commission Tribunal" and partly because "it is not all clear during what periods and which parts of the country the alleged unlawful acts of the respondents allegedly affected the price of bread".

We therefore conclude that the statement of the conduct of the defendants – as reflected in the decisions of the Commission Tribunal and as summarized in the judgment (par 78–79) – provides sufficient description to the question with respect to the periods and parts of the country the alleged unlawful acts of the respondents allegedly affected the price of bread. Also, in looking into the period over which the fines were imposed, the AJ could have used the specific financial period to define the parameters of the class. For that matter, what remains clear from the facts is that, at least with regard to the Western Cape, all the three defendants were found to have been involved in a bread cartel, whether in accordance with the leniency agreement or as a result of the certificate issued by the Competition Tribunal.

In constructing such a description of the factual circumstances, the court could have easily arrived at a definition of a class, at least in the Western Cape, that defined the parameters of the action so as to identify all the persons who would be bound by the result, and to enable those entitled to such relief to decide whether they should "opt out" or not. By accepting the facts which established the identity of the wrongdoers and, at least the Western Cape as the part of the country in which the alleged unlawful acts of the respondents took place, it seems disingenuous of the court to then conclude that "it is not all clear during what periods and which parts of the country the alleged unlawful acts of the respondents allegedly affected the price of bread" (par 78).

It is therefore clear from the facts as described above that the AJ could have concluded, without fear of contradiction, that:

(a) it was possible to identify those who had a potential claim for relief against the respondents;

(b) it was possible to define the parameters of the action so as to identify all the persons who would be bound by the result; and

(c) it was possible to enable those entitled to such relief to decide whether they should "opt out" or not.

3 Determining whether a cause of action has been disclosed

In this regard, the South African Law Commission's paper on "The Recognition of Class Actions and Public Interest Actions in South Africa" (see above) made it is clear that in determining whether a cause of action had been disclosed, the court hearing the certification application should have refrained from undertaking a preliminary merits test, but had to satisfy itself that the applicant had established a *prima facie* cause of action. In this section of the case note, we attempt to determine if, indeed a *prima facie* cause of action had been established.

Regardless of the AJ's admission that the Law Commission's statement of the legal position was accurate, he nevertheless came to the conclusion that a civil action based on anti-competitive behaviour was not available in our law and that he did not regard the provisions of section 65 of the Competition Act to have created such a cause of action (par 87). His conclusion was that regardless of what the statute said a cause of action could only be sustained in these kinds of proceedings if such a cause of action related to either a contractual or a delictual claim (par 87). In reaching this conclusion, the AJ reasoned that the applicants' proposed claim was clearly not contractual as no personal injury element was alleged. Neither was the claim delictual in nature, according to the AJ, as no economic loss could apparently be proved.

Counsel for the applicants argued (with reference to *LAWSA* Vol 8 Part 1 par 74) in the application for leave to appeal (before the same judge) that a breach of a statutory duty usually gave rise to a delictual action and in determining whether such an action arose, one had to have regard to the following factors:

(a) whether the statute was intended to provide a civil remedy;

(b) whether the plaintiff was a person for whose benefit and protection the duty was imposed; and

(c) whether the kind of harm and the manner of occurrence fell within the protective range of the duty.

As the AJ did not dispute these factors as being the appropriate ones to be considered in determining whether a statutory duty gave rise to a delictual action, we would like to assess if the relevant law and the facts of the case as established did not lend credence to these factors:

3 1 Is the statute intended to provide a civil remedy?

It has been stated that the AJ categorically stated that he did not regard the provisions of section 65 of the Competition Act to be creating a cause of action for which the applicants could claim a civil remedy.

The AJ's conclusion that he did not regard the provisions of section 65 of the Competition Act as creating a cause of action is arguable. Our argument is based not only on the language of the relevant sub-sections of section 65 of the Act, but also on the disputable conclusion of the AJ that the cause of action alleged by the applicant could not possibly be a delictual claim as there was "allegedly" no economic loss that could be proved. With regard to the provisions of section 65 of the Competition Act, even from the cursory reading of section 65(6)–(9), it is clear that the statute gives rise to a civil remedy. Section 65(6)–(9) of the Competition Act provides as follows:

> "A person who has suffered loss or damage as a result of a prohibited practice –
>
> (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or
>
> (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form:
>
> (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;
>
> (ii) stating the date of the Tribunal or Competition Appeal Court finding; and
>
> (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.
>
> (7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a civil court.
>
> (8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.
>
> (9) A person's right to bring a claim for damages arising out of a prohibited practice comes into existence –
>
> (a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or
>
> (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded."

The above sub-section does not deny the existence of a civil action by persons who may have suffered loss or damage as a result of a prohibited practice. On the contrary, the provisions of the sub-section merely impose conditions for the institution of such civil action. Firstly, the civil action may not be commenced if the person concerned has been awarded damages in a consent order confirmed in terms of section 49D(1) of the Act. Secondly, the aggrieved person must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form setting out matters stated in sub-section (6)(b)(i)–(iii). Subsections (7) to (9) further lend support to the existence of such a civil remedy. It is therefore inexplicable as to why the AJ reached a conclusion that this statutory provision is not intended to provide a civil remedy.

3 2 Whether the plaintiff is a person for whose benefit and protection the duty was imposed

This question has, to a large extent, been conclusively settled in the first section of this case note in which the settled factual circumstances were explicitly set out. However, for the sake of completion, even at the risk of repetition (which will be found to be necessary), the following is important in determining whether the applicants in the case are the persons for whose benefit and protection the duty was imposed. If, as determined above, the period of the operationalization of the bread cartel in the Western Cape was in December of 2006, then it is clear that the class of person, as determined above, who were victims of this prohibited conduct during that period, were clearly the persons for whose benefit and protection the duty was imposed as they were the persons entitled to commence an action referred to in sub-section (6)(b) of section 65.

3 3 Whether the kind of harm and the manner of occurrence falls within the protective range of the duty

As explained above, the conduct alleged was that listed in section 4(1)(b)(i), namely, the fixing of a selling price or any other trading condition, as well as section 4(1)(b)(ii) of the competition Act, namely, dividing markets by allocating customers, suppliers, territories or goods or services. For the purposes of the above question, the protective range of the duty covered price-fixing (and fixing any other trading conditions) and dividing the markets. As the applicants (and those falling within the class) have had to pay more for bread than they would have had it not been for the respondents' price fixing and market-division conduct, the harm suffered and the manner of occurrence of the harm (as established by the facts), fell within the protective range of the duty. This is because the duty imposed by the Competition Act is aimed at protecting potential victims against inaccurate and wrongful prices which may be levied as a result of the wrongful conduct of price-fixing.

4 Availability of a positive duty upon private entities to uphold human rights (horizontal application of the bill of rights)

In the main judgment delivered by the AJ on 07 April 2011, he appears to have accepted the respondents' argument that both sections 27(1)(b) and 28(1)(c) (*ie*, the right to have access to sufficient food and water; and the right of every child to basic nutrition, shelter, basic health-care services and social services) did not place any positive duty on them as these sections, although admittedly of horizontal application, are only likely to be found to place a negative duty on the respondents. Even though the AJ conceded that he was not at all convinced that it could not be found, should the matter be allowed to go to trial, that the sections did not place a negative duty on the respondents in the sense contended for by the applicants (par 72), it was still clear that he was not prepared to accept the possibility of socio-economic rights within the Bill of Rights being capable of imposing a positive duty to private actors such as the respondents in this case. It would be fair to acknowledge that the AJ's about-

turn statement, in his judgment on the application for the leave to appeal, that the applicant consumers had a cause of action based on the alleged infringements of their Constitutional rights (par 17), is commendable.

That acknowledgement or concession by the AJ notwithstanding, it is appropriate that this case note should set the record straight on the available positive duty upon private actors to uphold rights within the Bill of Rights under the South African Constitution.

In this regard, it is important to note that the South African Constitution does not exempt the private entities such as the respondents from having to abide, even in a positive sense, with a particular right within the Bill of Rights merely because the state is regarded as the primary bearer of such a right or provision in the Bill of Rights. Although the AJ did not give sufficient reasons why he concluded, in the main judgment of 07 April 2011, that the rights contended for did not impose a positive duty upon the respondents, by his reference to the statement that "*the sections in question* do not place a positive duty on *private entities such as the respondents*" (authors' own emphasis added), the AJ clearly seems to have taken the view that the primary bearer of responsibility in relation to such rights was the state. This conclusion has not in any way been supported by South Africa's constitutional jurisprudence. Moreover, Constitutional Court Justice, Zak Yacoob, recently criticized the view that the primary responsibility for respecting and protecting fundamental rights lies with Parliament and government as being "highly objectionable and even anti-constitutional" (http://carmelrickard.posterous.com/testing-government-plans-for-constitutional-c (accessed 2011-09-16).

Justice Johan Froneman recently observed that "it seems quite clear that the Constitution asks for a deeper transformation of our society than merely the changing of elites." (Johan Froneman, Judge of the High Court, Eastern Cape Division (as he then was) "The Horizontal Application of Human Rights Norms" 2007 21 *Speculum Juris* 17; and see also Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146.)

The Honourable Justice concluded with an emphatic proposition of what the position should be with regard to the horizontal application of the Bill of Right by saying "Under the rule of law everyone is equal before the law: government, business corporations and ordinary individual alike. The application of law in all its forms is always 'horizontal'. And so it should be." (Froneman 2007 21 *Speculum Juris* 24).

While the traditional position that non-state actors such as corporate entities cannot be found liable for violating human rights is maintained as a matter of international law (see Charlesworth "Worlds Apart: Public/private Distinctions in International Law" in Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 243), the realization that non-state actors have become more influential internationally than was the case previously and that these actors have been implicated in a wide range of gross violations of human rights in various parts of the world has heightened the call for binding international standards for these actors (see, *eg*, Orentlicher and Gelatt "Public Law, Private Actors: The Impact of Human Rights on Business Investors in China" 1993 14 *Northwest Journal of International Law and Business* 1 66).

It is argued that this realization is not only acknowledged by the interpretation of traditional constitutions such as those of the United States of

America and Canada in certain limited circumstances, (while the American and the Canadian Constitutions do not contain an express provision regarding their application in the private sphere, courts in those jurisdictions recognize that private conduct may be subject to constitutional rights in certain limited circumstances – *ie*, if the conduct by the private actors is capable of being linked to or capable of being interpreted as effectively tantamount to that of the state actors; and in USA, the cases of *Blum v Paretsky* 457 U.S. 991, 102 S. Ct. 2777, 73 L.Ed.2d 534 and *Peterson v City of Greenville S.C.* 373 U.S. 244 (1963), among others, show that a private decision will amount to state action if exercised under the coercive power of the state or where the latter has provided such significant encouragement, either overtly or covertly, that the choice could in law be deemed to be that of the state). *Burton v Wilmington Parking Authority* (365 U.S. 715 and *Cooper v Aaron* 1958, 358 U.S. 14) are examples of a situation where acts performed by a non-state actor with the participation or involvement of the state "through any arrangement, management, funds or property" may also constitute state action. Even where there is no apparent state involvement, the case of *Marsh v Alabama* (326 U.S. 501) indicates that a conduct may also constitute state action if it relates to functions or powers normally exercised by the government. Again, in *Shelley v Kraemer* (334 US 1) it was held that a decision by the state to deny judicial or other intervention in enforcing racially restrictive covenants constitutes state action. In Canada, the Supreme Court held in *Dolphin Delivery* ([1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 595) that Charter rights did not bind private persons directly. Thus, both in USA and Canada, the manner in which constitutional rights reach private conduct is indirect because it is the state that is held primarily responsible, but that is not the case under the Constitution of South Africa. The latter Constitution represents a model of full horizontal application of constitutional rights.

The South African Constitution adopted in 1996 expressly recognizes that non-state actors are bound by constitutional rights. Section 8 provides:

> "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

It is interesting that this provision makes it abundantly clear that the application of the Bill of Rights is not only limited to binding the legislature, the executive, the judiciary and all organs of state, but it also extends to natural and juristic persons. Moreover, the Constitution does not limit the application of the Bill of Rights to private actors to merely a "negative duty". In deciding whether a provision of the Bill of Rights binds natural or juristic persons, section 8(2) enjoins consideration of the nature of the right and the nature of the duty imposed by the right.

What seems to be clear from section 8 is that a provision in the Bill of Right will not be excluded from binding juristic persons, such as the respondents, merely because the state is regarded as the primary bearer (or "positive duty" bearer) of such a right or provision in the Bill of Rights. However, the question as to whether a right or a provision in the Bill of Rights will be applied in private disputes only when the need has arisen for the court to test the constitutional validity of a statute or an executive act or to apply or, if necessary, develop the common law to give effect to that right seems far away from being resolved. This is particularly illustrated in the cases of *Du Plessis v De Klerk* (1996 (5) BCLR 658 (CC), 1996 3 SA 850 (CC) ("*Du Plessis"*). (The essence of this decision, which concerned the interpretation of a similarly worded s 7(1) of the Interim Constitution, was that the Bill of Rights was irrelevant to private litigation where no governmental conduct or legislation was relied upon by either party to the litigation), and *Khumalo v Holomisa* (2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC); in this case, O'Regan J held (par 32) that common law would not be the subject of direct application of the Constitution where a dispute involves private parties, arguing that to do so would render s 8(3) superfluous.) Cheadle and Davis also argue that human rights under the South African Constitution apply to non-state actors only indirectly through their application to law (Cheadle and Davis "Structure of the Bill of Rights" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 1 3). Currie and de Waal maintain that the 1996 Constitution has moved away from the position in *Du Plessis* but is now capable of both direct and indirect application to private conduct and disputes (Currie and De Waal *The Bill of Rights Handbook* (2005) 32 and 64.). They conclude that section 8 permits the direct application of constitutional rights to private disputes while the s 39(2) entrenches indirect application (Currie and De Waal *The Bill of Rights Handbook* 32 and 64). However, the authors hypothesize that direct application of the Bill of Rights to private disputes will offer no meaningful advantages over indirect application except in very limited instances where a common-law rule is being challenged for the courts to declare it invalid (Currie and De Waal *The Bill of Rights Handbook* 50).

The decision in the case of *Khumalo v Holomisa* (*supra*) has been interpreted by Currie and De Waal as presenting the state of affairs which requires the interpretation of section 8(3) independent from sections 8(1) or 39(2) of the Constitution, effectively making it clear that this section makes provision for avenues for enforcing obligations of non-state actors in relation to constitutional rights (*ie*, "positive duty") or obtaining redress for violations of constitutional rights committed by such non-state actors (*ie*, "negative duty"') (*Khumalo v Holomisa supra* par 52). This is the approach preferred by Mongalo (Mongalo "Corporate Governance and the Constitution: A Case for Broadening the Stakeholders" in Du Plessis and Pete (eds) *Constitutional Democracy in South Africa 1994–2004* (2004) 179–180).

It has been made clear that the South African Constitution expressly states that non-state actors can be bound by constitutional rights depending on the nature of the right and the nature of the duty imposed. The Constitution further expressly recognizes that the judiciary is bound by these rights. While it is clear that the claimant who wishes to enforce a constitutional right against a non-state actor would usually bring a common-law or statutory action, this does not detract from the fact that the Constitution explicitly recognizes horizontal

application of constitutional rights. The usual invocation of constitutional rights by claimants against non-state actors in common-law and statutory suits must not be interpreted to mean that the South African Constitution is of indirect application with regard to non-state actors. In other words, it is not a legal requirement that the breach of common-law or statutory provision as alleged by the claimant must amount to a conduct which qualifies as "state action". Neither is it necessary that such breach should be tantamount to an action exercised under the coercive power of the state nor should it be interpreted as being committed with the participation or involvement of the state. Also, the alleged breach needs not relate to functions or powers normally exercised by government.

5 Conclusion

It has been established in this case note that the facts of this case reveal an identifiable class of persons in the sense that, (a) it is possible to identify those who have a potential claim for relief against the respondents; (b) it is possible to define the parameters of the action so as to identify all the persons who will be bound by the result; and (c) it is possible to enable those entitled to such relief to decide whether they should "opt out" or not.

It has also been established that a *prima facie* cause of action has been established in the sense that (a) the Competition Act (in particular s 65(6)-(9)) is intended to provide a civil remedy; (b) the applicants are persons for whose benefit and protection the duty under the Competition Act was imposed; and (c) the kind of harm and the manner of occurrence upon the identified class of persons fall within the protective range of the duty.

Finally, regardless of the AJ's concession that his main judgment was never intended to create an impression that the Constitution did not impose a duty to observe human rights upon the respondents, the language of his judgment (par 72) clearly communicated an opposite message. To the extent that the message communicated in the AJ's main judgment emphatically spurned the availability of a positive duty on private actors in the horizontal application of the Bill of Rights, this case note has established that the Constitution does not limit the observance of only a "negative duty" by private actors in the horizontal application of the Bill of Rights and does not regard the state as the primary bearer of responsibilities imposed by the Bill of Rights.

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