

SOUTH AFRICA / JUDGMENT

Trustees for the Time Being for the Children's Resource Centre Trust and Others v Pioneer Foods (Pty) Ltd and Others, Mukaddam and Others v Pioneer Foods (Pty) Ltd and Others (25302/10, 25353/10) [2011] ZAWCHC 102 (7 April 2011) [2011] ZAWCHC 102

COURT

Western Cape High Court, Cape Town

CASE / FILE NUMBER

25302/10, 25353/10

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

Case No: 25302/10

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE CHILDREN'S

RESOURCE CENTRE TRUST First Applicant

THE TRUSTEES FOR THE TIME BEING OF THE BLACK

SASH TRUST Second Applicant

CONGRESS OF SOUTH AFRICAN TRADE UNIONS Third Applicant

NATIONAL CONSUMER FORUM Fourth Applicant

TASNEEM BASSIER Fifth Applicant

BRIAN MPAHLELE Sixth Applicant

TREVOR RONALD GEORGE BENJAMIN Seventh Applicant

NOMTHANDAZO MVANA Eighth Applicant

FARREED ALBERTUS Ninth Applicant

and

PIONEER FOODS (PTY) LIMITED First Respondent

TIGER CONSUMER BRANDS LIMITED Second Respondent

PREMIER FOODS LIMITED Third Respondent

And

Case No: 25353/10

IMRAAHN ISMAIL MUKADDAM First Applicant

W.E.M. DISTRIBUTORS CC Second Applicant

ABDUL KARIEM EBRAHIM Third Applicant

PIONEER FOODS (PTY) LIMITED First Respondent

TIGER CONSUMER BRANDS LIMITED Second Respondent

PREMIER FOODS LIMITED Third Respondent

Counsel for Applicants : Advocate R.T. Williams, SC

Attorneys for Applicants

: Abrahams Kiewitz Attorneys

(ref: Mr. C.P. Abrahams)

Counsel for 1st Respondent : Advocate P. McNally, SC (Johannesburg)

Advocate J Cassette (Johannesburg)

Attorneys for 1st Respondent : Cliffe Dekker Hofmeyr Incorporated

- Sandton

(ref: Mr. Nick Altini/Mr. Chris Charter)

Correspondent Attorneys : Cliffe Dekker Hofmeyr Incorporated – Cape Town

For 1st Respondent (ref: Ms Petra Krusche/Ms S. Barron)

Counsel for 2nd Respondent : Advocate J.G. Dickerson, SC

Adv. M. O'Sullivan

Attorneys for 2nd Respondent : Edward Nathan Sonnenbergs

(ref: J Balkin/Ms Sue Hayes)

Counsel for 3rd Respondent : Advocate A. Katz, SC (Cape Town)

Advocate J. Wilson (Johannesburg)

Advocate M. du Plessis (Durban)

Attorneys for 3rd Respondent : Nortons Incorporated - Sandton

(ref: J. Oxenam)

Correspondent Attorneys : Webber Wentzel Attorneys

For 3rd Respondent (ref: Mr. C. Coquelle)

Dates of Hearing : 23 and 25 November 2010

Date of Order : 26 November 2010

Date of Reasons in terms of : 7 April 2011

Rule 49(1)(c)

IN THE HIGH COURT OF SOUTH AFRICA WESTERN CAPE HIGH COURT, CAPE TOWN

THE TRUSTEES FOR THE TIME BEING OF THE CHILDREN'S RESOURCE CENTRE TRUST First Applicant

THE TRUSTEES FOR THE TIME BEING OF THE BLACK SASH TRUST Second Applicant

CONGRESS OF SOUTH AFRICAN TRADE UNIONS Third Applicant NATIONAL CONSUMER FORUM Fourth Applicant TASNEEM BASSIER Fifth Applicant BRIAN MPAHLELE Sixth Applicant TREVOR RONALD GEORGE BENJAMIN Seventh Applicant NOMTHANDAZO MVANA Eighth Applicant FARREED ALBERTUS Ninth Applicant

PIONEER FOODS (PTY) LIMITED First Respondent TIGER CONSUMER BRANDS LIMITED Second Respondent

PREMIER FOODS LIMITED Third Respondent

In the matter between: IMRAAHN ISMAIL MUKADDAM First Applicant W.E.M. DISTRIBUTORS CC Second Applicant ABDUL KARIEM EBRAHIM Third Applicant and

PIONEER FOODS (PTY) LIMITED First Respondent

TIGER CONSUMER BRANDS LIMITED Second Respondent PREMIER FOODS LIMITED Third Respondent REASONS IN TERMS OF RULE 49(1)(c)

1. Two separately instituted applications came before me for hearing together in the "fast lane" of the motion court as matters of urgency. Argument started but did not finish on Tuesday, 23 November 2010 and continued on Thursday 25 November 2010.
2. As the applicants' alleged causes of action in both applications against the second respondent would have become prescribed on 27 November 2010, I was requested to and made rulings in both applications on Friday morning 26 November 2010 and undertook to give reasons for these rulings later.

3. In case number 23502/2010 (hereinafter referred to as "the consumer application") the following ruling was made:

The application is dismissed with no order as to costs.

4. In case number 25353/2010 (hereinafter referred to as "the distributor application") the following order was made:

"(a) The application is dismissed.

- (b) Applicants to pay the respondents costs jointly and severally, in each instance including the costs of two counsel."

5. The applicants in both applications thereupon filed requests for reasons in terms of rule 49(1)(c).
6. My reasons for these rulings follow hereunder.
7. In view of the fact that the applications were heard together and as many of the points argued arise in both applications, I decided to give my reasons for the rulings on both the applications in one document.

BACKGROUND

8. The three respondents, to whom I shall respectively refer as "Pioneer" (first respondent), "Tiger" (second respondent) and "Premier" (third respondent) are three of the four primary bakeries in South Africa. Together with Foodcorp (Pty) Limited ("Foodcorp") they enjoy between 50% and 60% of the domestic bread market in the country.
9. Their customers are divided into large retail groups, such as Shoprite/Checkers, Pick n Pay and Spar, the general trade, such as cafes, smaller retailers and spaza shops and independent bread distributors or agents. They do not sell bread directly to the public.
10. The independent bread distributors resell into the informal market.
11. The respondents and Foodcorp set their prices nationally ("the list price"). They however sell their bread to the retailers and to distributors at a discount or rebate off the list price. The discount to be granted off the list price is negotiated with the retailers and may differ from retailer to retailer. Similarly the discounts granted to the various distributors may vary depending on such factors as location, daily sales volumes and transport.
12. In December 2006 the Competition Commission (hereinafter referred to as "the Commission") instituted in terms of the Competition Act, 1998 (Act 89 of

- 1998) (hereinafter referred to as "the Act") received a complaint of an alleged bread cartel operating in the Western Cape. After a preliminary investigation, the Commission initiated a complaint against the three respondents in the current applications. This was referred to as "the Western Cape" complaint. 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 conditions.
13. Premier also revealed that a bread cartel operated in other parts of the country. As a result the Commission initiated a second complaint that was referred to as "the National complaint".
 14. Premier sought and was granted corporate leniency by the Commission in respect of both the Western Cape and the National complaint. On 14 February 2007 it concluded a leniency agreement with the Commission and agreed to assist the Commission in its investigations and subsequent prosecution of the other respondents before the Commission Tribunal.
 15. On the same day, 14 February 2007, the Commission referred the Western Cape complaint against Tiger and Pioneer to the Competition Tribunal.
 16. Tiger thereafter negotiated a consent agreement with the Commission with regard to both the complaints. In terms of the consent agreement, Tiger admitted that:
 - 16.1. 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 an agreement and/or a concerted practice to fix directly or indirectly a selling price in contravention of section 4(1)(b)(i) of the Act".
 - 16.2. Discussions with competitors took place nationally and in various regions regarding bread prices in the period 1994 to 2006 "which amounted to an agreement and/or a concerted practice to fix a selling price in contravention of section 4(1) (b) (i) of the Act".
 - 16.3. Discussions with competitors took place regarding the closure of bakeries in the period 1999 to 2001 "which amounted to an agreement and/or a concerted practice to divide markets in contravention of section 4(1)(b)(ii) of the Act".
 17. On 27 November 2007 the Competition Tribunal consequently made a consent order in terms of section 49D of the Act and levied an agreed administrative penalty on Tiger of approximately R98 million.18. The complaints against Pioneer was thereafter heard by the Competition Tribunal. On 3 February 2010 the Tribunal found, with regard to the Western Cape complaint, that during December 2006 Pioneer had contravened section 4(1)(b)(i) of the Act, in that it agreed with Premier and Tiger to increase the price of toaster bread and standard loafs by fixed amounts and to cap discounts given to bread distributors in Paarl and the Peninsula.
 19. In respect of the national complaint, Pioneer was found to have contravened section 4(1)(b) (i) and 4(1)(b)(ii) of the Act in that:

19.1. During 1999 it agreed with Tiger and Premier to divide markets in South Gauteng, Free State, North West and Mpumalanga amongst themselves; 19.2. During 2003 and 2004 they fixed the selling price of bread; 19.3. They would not allow customers to switch suppliers during the increase period in order to benefit from any differences in prices between the suppliers;

19.4. During July 2006 they agreed to fix trading conditions in that they agreed not to compete on price in the Vanderbijlpark area; and

19.5. During the last week of November 2006 they fixed the selling price of bread by agreeing to increase the price by 30c per loaf in Gauteng, with effect from 18 December 2006.

20. Pioneer was ordered to pay an administrative penalty in respect of both the complaints of approximately R195 million.
21. 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.
22. As a result of these events the applicants, in both the consumer and distributor applications, decided to bring class actions against the respondents for damages.

CLASS ACTIONS

23. Prior to 1994 our law did not recognise class actions (*First Rand Bank v Chaucer Publications (Pty) Limited* 2008 (2) SA 522 (C) at 598F-I). This position was departed from by the enactment of section 7(4) of the Interim Constitution of 1993.
24. Section 38 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (hereinafter referred to as "the Constitution") now provides:

"38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members."
25. In *Nqquza and Others v Permanent Secretary Department of Welfare, Eastern Cape* 2001 (2) SA 609 (ECD) Froneman J (as he then was) pointed out that there is no cogent reason for a restrictive interpretation of the provisions of section 38 because of the narrow content given to standing under the common law, particularly not in relation to so-called public law

litigation (at 619A-D).²⁶ With reference to *Maluleke v MEC, Health and Welfare, Northern Province* 1999 (4) SA 367 (T) he stated that the many practical difficulties that may arise in class actions "cannot justify the denial of such action when the Constitution makes specific provision for it" (at 623C).

27. Froneman J dealt with the practical objections to class actions, including the objection that the courts will be engulfed by interfering busy bodies rushing to court for spurious reasons - the so-called "floodgates" argument, and the objection that often the common interest of the applicants and those they seek to represent will be broad and vague - the so-called "classification" difficulty (at 623H-I).

28. He dealt with the "floodgates" objection as follows:

"But I also think that the possibility of unjustified litigation can be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road." [at 624D-E]

29. The "classification" problem, he stated, can be addressed in the same manner at a preliminary stage. He pointed out 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" (at 624F-G).³⁰ In *First Rand Bank Limited v Chaucer Publications (Pty) Limited* [supra] these suggestions by Froneman J were supported (at 599, para. [26]).

31. The *Nq Xuza* judgment was upheld on appeal to the Supreme Court of Appeal (Permanent Secretary, Department of Welfare, Eastern Cape v *Nq Xuza* 2001 (4) SA 1184 (SCA)). Dealing with the respondent's complaint that the class in that matter was not adequately defined, that Court stated that:

"From a point of view of practical definition it is beyond dispute that it is required for a class action that (1) the class is so numerous that joinder of all its members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the applicants representing the class are typical of the claims of the rest; and (4) the applicants through their legal representatives, the Legal Resources Centre, will fairly and adequately protect the interests of the class."

The Court concluded that the requisites for a class action were therefore present (at 1197H-1198A).

32. Cilliers, Loots and Nel in *Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th edition) submit that the requirement that the claims of the applicants representing the class must be typical of the claim of the rest, cannot be regarded as necessary for a class action brought in terms of section 38(c) of the Constitution, as that sub-section provides that the person claiming relief may act either "as a member of or in the interest of a group or class of persons" (at 201).

33. It follows that a class action is available in terms of section 38 of the Constitution if it is alleged that a right in the Bill of Rights has been infringed or threatened. It only applies directly to infringements or threats to rights in the Bill of Rights.
34. This raises the question whether a class action is available outside the scope of section 38 of the Constitution, that is in non-Bill of Right cases and specifically where damages are sought for the alleged unlawful conduct of private entities.
35. The South African Law Commission in its paper on The Recognition of Class Actions and Public Interest Actions in South African Law (Project 88 - August 1998) ("the Law Commissions Report") concluded that legislation is needed to broaden the scope of class actions to non-Bill of Rights cases (chapter 3).³⁶ Although it was stressed in *Permanent Secretary Department of Welfare, Eastern Cape v Nxuza* [supra] that the only issue before that court was the issue of standing in terms of section 38(c) (at 1191E), the remarks referred to hereinabove, indicate that a general class action, not limited to Bill of Rights cases should be available in our law.
37. In *First Rand Bank Limited v Chauser Publications* [supra] Traverso DJP dealt with the availability of class actions in our law as follows:
- "As a point of first departure an applicant in a class action must allege that the right enshrined in the Bill of Rights is being threatened."
- (at 599D)
- (See also *Ngxuza and Others v Permanent Secretary Department of Welfare, Eastern Cape* [supra] at 61 ?D)
38. There are certainly strong indications that standing to bring class actions also in non-Bill of Rights cases should become part of our law. (*Wildlife Society of South Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 1095 (Tk) at 11041-1106; *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Nxuza and Others* [supra] and *Financial Services Board and Another v De Wet NO and Others* 2002 (3) SA 525 (C) at 624, para. [297]). Class actions where the claim is monetary in nature may however require, at least, appropriate rules of court. (Cilliers, Loots and Nel, op. cit. p. 201).
39. This question was however not argued before me. Applicants' counsel restricted her argument to section 38 of the Constitution. In the view that I take of both the applications, I regard it unnecessary to decide this issue. For purposes of this judgment in the consumer application, I will accept (without deciding) that the applicants do have standing to bring a class action for damages.

40. As Froneman J suggested in the Nqquza matter, the Law Commission's Report also recommended that a preliminary application should be brought, requesting leave to institute an action as a class action and to ask directions as to procedure before such an action is instituted (p. 40, para. 5.5.10).

41. According to the Law Commission's Report, the purpose of such a preliminary step is:

41.1. To act as a screen to potential abuse of the process; 41.2. To shield the defendant from an unreasonable burden of complex and costly litigation; 41.3. To act as a counter-balance to other reforms that might be seen as favourable to class members (for example, special costs rules);

41.4. It protects the interest of absent class members; and

41.5. The fact that most class action procedures in other jurisdictions have rules which control the raising of class actions.

(The Law Commission's Report, p. 39, par. 5.5.5)

42. The Law Commission further recommended that an application for certification as a class action may be granted when:

42.1. There is an identifiable class of persons;

42.2. A cause of action is disclosed; 42.3. There are issues of fact or law which are common to the class;

44.4. A suitable representative is available;

44.5. The interests of justice so require; and

44.6. The class action is the appropriate method of proceeding with the action.

(The Law Commission's Report, p. 50, par. 5.6.27)

43. With regard to the requirement that a cause of action must be disclosed, the Law Commission concluded that this does not mean that the court hearing the certification application must undertake a preliminary merits test. What is required is that the applicant needs to establish a prima facie cause of action (paras. 5.6.8 to 5.6.9, pp. 43-44).

44. Presumably as a result of the above, the present applicants brought the two applications for leave to institute the class actions.

45. I intend following the recommendations of the Law Commission as to the criteria to be satisfied before such an application may be granted, in my approach to both applications.

The definition of the class

46. The purpose of a class definition is:

46.1. to identify those who have a potential claim for relief against the respondents; 46.2. to define the parameters of the action so as to identify all the persons who will be bound by the result; and 46.3. to enable those entitled to such relief to decide whether they should "opt out" or not.

(Mulheron: The Class Action in Common Law Legal Systems (p. 334-335))

THE RELIEF SOUGHT

47. In the consumer application the following relief was originally sought by the applicants:

"1. That this matter is heard as one of urgency in terms of rule 6(12) of the rules of court ("the rules") and that the forms and service provided for in the rules be dispensed with;

2. Directing that a rule nisi be issued calling upon the respondents to appear and show cause, if any, to the above honourable court on 18 FEBRUARY 2011 at 10h00 or so soon thereafter as the matter may be heard, as to why a final order should not be granted in the following

terms:

2.1. declaring that all bread consumers in the Western Cape Province ("the consumers") who were prejudicially affected by bread prices in consequence of the respondents' breach of section 4(1)(b)(i) and (ii) of the Competition Act, No. 89 of 1998 ("the Act") constitute members of a class; 2.2. declaring that the class so constituted shall be an "opt out" class; 2.3. declaring that the members of the class will be bound by the judgment in the class action unless they give written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys that they wish to be excluded as members of the class; 2.4. declaring that the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, to the extent necessary, have the requisite standing to bring the class action against the respondents on behalf of the consumers for damages pursuant to the findings made by the Competition Commission ("the Commission") and/or the Competition Tribunal ("the Tribunal") that the respondents breached the aforementioned provisions of the Act; 2.5. declaring that the respondents' breach of the aforementioned provisions of the Act also amounted to an infringement of the rights guaranteed to consumers in the Bill of Rights, more particularly sections 27(1)(b) and 28(1)(c), read with sections 184(1) and (2) of the Constitution; 2.6. declaring that the applicants are entitled to sue the third respondent as a defendant in the class action despite the absence of a certificate in terms of section 67(6)(b) of the Act, alternatively that they are given leave to apply to this court on the same papers duly supplemented, if necessary, for leave to join the third respondent as a defendant to the action proceedings instituted out of this court once the certificate is provided by the Commission and/or Tribunal; 2.7. that respondents make discovery on oath of all documents relevant to the class action by no later than 31 January 2011; 2.8. that the application and action proceedings, once transferred from the South Gauteng High Court to this court, shall be consolidated with the application and action proceedings issued out of this court in connection with the class action;

2.9. that the respondents bear the costs of giving notice of the class action to the class in the manner provided in paragraph 4 below;

2.10. that the respondents pay the costs of this application jointly and severally, the one paying the others to be absolved;

3. That pending the return day:

3.1. the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, shall act as representatives of the class; 3.2. the applicants, assisted as aforesaid, may institute a damages action forthwith against the respondents on behalf of the class; 3.3. the respondents are ordered to make discovery on oath of all documents relevant to the class action by no later than 31 January 2011;

4. That the members of the class are given notice of this action in the following manner:

4.1. by publication of this order in one edition in each of the Cape Times, The Argus, Die Burger, Die Son and the Daily Voice in English, Afrikaans and isiXhosa; 4.2. by broadcasts of the contents of this order on 3 separate consecutive weekdays between 7am to 9am and 5pm to 7pm on each of the following radio stations: SAFM, 567 Cape Talk, Radio Good Hope, Heart 104.9 and Kfm in English, Afrikaans and isiXhosa; 4.3. that the respondents, during the period 17 to 31 January 2011 append sticky labels on the front of all of their respective bread packaging advising consumers of the class action, and further:

4.3.1. that it is an "opt out" class unless the consumer gives written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys, Ref: Mr C P Abrahams, Tel. 021 914 4842 that they wish to be excluded;

4.3.2. that unless they give notice of their intention to "opt out", the judgment in the class action shall be binding on all members of the class; and

4.3.3. that electronic copies of the application may be obtained by any interested party on request by accessing breadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.za ;

5. That the respondents are entitled to anticipate the return day hereof on five days' written notice to the applicants' attorneys of record;

6. That any party may re-enrol this matter on five days' written notice to the other parties for the purposes of obtaining directions from this court as to the further conduct of this matter;

7. Condoning service of this application upon the respondents prior to the hearing by facsimile and email transmission at the fax numbers and email addresses at the foot of the notice of motion;

8. that the order, once granted, may also be served at the aforesaid fax and email addresses.

9. That this application and court order thereafter be served upon the respondents by the sheriff at their respective registered offices or principal place of business;
10. Alternative relief."
48. Prior to the hearing of the consumer application, the applicants amended their notice of motion and filed an affidavit by Charles Pieter Abrahams (hereinafter referred to as "Abrahams") in support thereof. The important amendments were the following:
- 48.1. Paragraph 2.7 of the original notice of motion was amended to read as follows:
- "2.7 That the respondents make discovery on oath of all documents relevant to the class action by no later than one month after the grant of the final order;"
- 48.2. Paragraph 2.8 was amended to read as follows:
- "2.8. That any action proceedings, once transferred from the South Gauteng High Court to this court, shall be consolidated with any action proceedings issued out of this court in connection with the class action;"
- 48.3. Paragraph 2.3 of the original notice of motion was deleted in its entirety.
- 48.4. Paragraph 4 was amended to read as follows:
- "4. That the members of the class are given notice of this action in the following manner by the respondents, within one week of the rule nisi being confirmed:
- 4.1. By publication of this order in one edition in each of the Sunday Times, Rapport, Cape Times, The Argus, Die Burger, Die Son and The Daily Voice in English, Afrikaans and IsiXhosa;
- 4.2. By broadcasts of the contents of this order on three separate consecutive week days between 7.00 a.m. to 9.00 a.m. and 5.00 p.m. to 7.00 p.m. on each of the following radio stations: SAFM, 567 Cape Talk, Radio Good Hope, Heart 104,9 and KFM in English, Afrikaans and IsiXhosa;
- 4.3. By appending sticky labels on the front of all of their respective packaging advising consumers of the class action for a period of 14 consecutive days, and further:
- 4.3.1 that it is an "opt out" class unless the consumer gives written notice to the applicants' attorneys of record, Abrahams, Kiewitz Attorneys, Ref: Mr C P Abrahams, Tel. 021-9144842 that they wish to be excluded;
- 4.3.2 that unless they give notice of their intention to "opt out", the judgment in the class action shall be binding on all members of the class; and
- 4.3.3 that electronic copies of the application may be obtained by any interested party on request by accessing breadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.zabreadinfo@ak.law.za ;"

49. The amendment to paragraph 2.7 was necessary to bring the prayer for early discovery, which formed part of the rule nisi which was to be enrolled for hearing on 18 February 2011, in line with that date.
50. As the applicants would no longer be bringing a similar application in the South Gauteng High Court, as was foreseen in the original founding affidavit, paragraph 2.8 was amended to delete reference to such an application in that paragraph.
51. Paragraph 3.3 fell away as a result of the amendment to paragraph 2.7.
52. Paragraph 4 was made part of the rule nisi and the areas in which publication were to take place were broadened. This change was explained by Abrahams to have been necessitated by the fact that the applicants would no longer bring a similar application in the South Gauteng High Court. Consequently it would be necessary to publish in additional newspapers.
53. Despite their declared intention not to bring a similar application in the South Gauteng High Court, paragraph 2.1 of the notice of motion was not amended. It remained limited to "all bread consumers in the Western Cape". When this issue was raised with counsel for the applicants, she moved for an amendment of paragraph 2.1 of the amended notice of motion to insert the words "or elsewhere" between the words "the consumer" and the word "who" in the second line of paragraph 2.1.
54. Tiger opposed the granting of this amendment, but it was not opposed by Pioneer and Premier.
55. In the exercise of my discretion, I decided to allow the amendment as it was clearly an oversight. The affidavit by Abrahams in support of the amendment made it clear that the application would no longer be limited to consumers in the Western Cape and case law supports the contention that a second application in another jurisdiction would not be required (see Permanent Secretary Department of Welfare Eastern Cape and Another v NqXuza and Others 2001 (4) SA 1184 (SCA) paras. [22]-[24] at pp. 1201-1202).
56. The original notice of motion in the distributor application was similarly amended. In its amended form it reads as follows:
 - "1. That this matter is heard as one of urgency in terms of rule 6(12) of the rules of court ("the rules") and that the forms and service provided for in the rules be dispensed with;
 2. Directing that a rule nisi be issued calling upon the respondents to appear and show cause, if any, to the above honourable court on 18 FEBRUARY 2011 at 10H00 or so soon thereafter as the matter may be heard, as to why a final order should not be granted in the following terms:

2.1. declaring that all bread distributors in the Western Cape Province ("the distributors") who were prejudicially affected by bread prices in consequence of the respondents' breach of section 4(1)(b)(i) and (ii) of the Competition Act, No. 89 of 1998 ["the Act"] constitute members of a class;

2.2. declaring that the class so constituted shall be an "opt in" class;

2.3. declaring that the distributors will be bound by the judgment in the class action unless they give written notice to the applicants' attorneys of record, Abrahams Kiewitz Attorneys that they wish to be included as members of the class;

2.4. declaring that the applicants duly assisted by their attorneys of record, Abrahams Kiewitz Attorneys, to the extent necessary, have the requisite standing to bring the class action against the respondents on behalf of the distributors for damages pursuant to the findings made by the Competition Commission ("the Commission") and/or the Competition Tribunal ("the Tribunal") that the respondents breached the aforementioned provisions of the Act;

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