

Civil prosecution for cartel conduct, the Premier Foods challenge

 By [Leana Engelbrecht](#)

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The on-going class action proceedings against the members of the so-called "bread cartel" have been well-documented and publicised.

These proceedings have been noteworthy in respect of procedural precedent created in the course thereof, most notably, the decision by the Supreme Court of Appeal which confirmed the availability of class actions when claiming civil damages in South African law and set out the requirements to obtain certification of a class for purposes of claiming civil damages. The latest procedural precedent to flow from these proceedings relate to a challenge by Premier Foods Proprietary Limited ("Premier Foods") of the Competition Tribunal's ("Tribunal") powers under section 65(6) of the Competition Act ("Act").

Section 65(6) of the Act sets out the basis on which a person, who suffered loss or damage as a result of collusive conduct, may institute a civil claim for damages. Such a person must obtain a certificate from the chairperson of the Tribunal or the Judge President of the Competition Appeal Court, certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Act. For damages to be claimed for loss or damage caused by collusive conduct claimants must first obtain such a certificate.

Premier Foods was the leniency applicant in respect of the bread cartel matter and, due to the leniency awarded to it, was not prosecuted with the other members of the cartel and was not party to the referral by the Competition Commission ("Commission"). Premier Foods, as leniency applicant, did participate in the hearing before the Tribunal and assisted the Commission in prosecuting the matter. The Tribunal's ultimate finding was that "[d]uring December 2006, Pioneer, Premier and Tiger Brands contravened section 4(1)(b)(i) and (ii) of the Competition Act".

The claimants in the class action, in line with the provisions of the Act, consequently applied to the chairperson of the Tribunal for the relevant certificate based on this finding by the Tribunal. The issuing of the certificate was, however, opposed by Premier Foods. Subsequently, Premier Foods launched an application for declaratory relief relating to the Tribunal's jurisdiction under section 65 of the Act. Premier Foods' opposition was based on the fact that a certificate could not legitimately be issued against it as the complaint was not referred against it and it was not party to the proceedings before the Tribunal. Additionally, Premier Foods' argued that its right to be heard (*audi alteram partem*) would be infringed should a certificate be issued against it in respect of proceedings that were not referred against it.

The respondents argued that the fact that Premier Foods was not a respondent did not amount to an insurmountable obstacle, as the Tribunal has the power to make an order in respect of all participants that participated in collusive conduct and is not confined to making orders relating to parties that appeared before it. Moreover, the respondents argued that

based on Premier Foods' involvement in the proceedings before the Tribunal it could not be said that Premier Foods was not before the Tribunal and that its right to be heard was violated. Furthermore, the order made by the Tribunal was consistent with the admissions of collusion made by Premier Foods in obtaining leniency.

The High Court found that the Tribunal has jurisdiction to issue a section 65 certificate in respect of Premier Foods' involvement in the bread cartel, irrespective of whether it was cited as a party in the referral or not. In particular the High Court found that:

- The Tribunal does not have powers to enquire into, adjudicate or make findings or orders in respect of matters not referred to it by the Commission in terms of the Act;
- The Tribunal, in terms of the Act, has the power to make an appropriate order in relation to a prohibited practice, including, declaring conduct of a firm to be a prohibited practice in terms of the Act, for purposes of section 65. The wording is clear and such an order can be made in respect of any party (a firm) that committed a prohibited practice and is not limited to parties formally cited as such;
- This is further supported by the fact that the Act defines a "respondent" (being a party against whom a complaint has been referred). It was, accordingly, available to the Legislature to confine this power to parties that were formally cited to appear before the Tribunal, but it decided to empower the Tribunal to make orders against firms involved in such conduct. There is thus a differentiation between firms and respondents and only if the legislature limited the application of the section to respondents could it have been argued that no certificate could be issued against a firm found to have colluded, but which was not cited as a respondent;
- A successful leniency applicant will receive immunity from adjudication before the Tribunal for its involvement in the cartel activity and immunity from a fine being imposed against it. Any order made by the Tribunal in respect of Premier Foods was not in contravention of the leniency awarded to Premier Foods. An order granted against a successful leniency applicant does not amount to adjudication in contravention of the Commission's Corporate Leniency Policy;
- Even though Premier Foods was not cited as a party against whom the referral was made, Premier Foods' involvement in the collusive conduct is set out extensively in the referral and, accordingly, it cannot be said that the order made by the Tribunal falls outside the referral and is not competent; and
- Section 65(6) contemplates the issuing of a certificate in respect of a finding of a prohibited practice made by the Tribunal. Such a certificate is purely an affirmation or attestation of a finding already made. If there is no finding against a party then no certificate can be issued.

It has since become common practice to refer a complaint against all parties involved in the allegedly collusive conduct (including the successful leniency applicant) and, accordingly, this issue may not be problematic in the future. This decision will, however, not only impact on possible civil liability for leniency applicants but will mean that parties implicated in collusive conduct and in respect of which the Tribunal makes a finding, even if such party was not a party to the referral to the Tribunal, may face claims for civil. It is, however, likely that this position would be challenged based on the fact that such a party would not have appeared before the Tribunal and its right to be heard would have been infringed.

ABOUT LEANA ENGELBRECHT

- Leana Engelbrecht is a senior associate in the Competition Practice at Baker McKenzie.
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