THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 105/2010

In the matter between:

WOODLANDS DAIRY (PTY) LTD **First Appellant**
MILKWOOD DAIRY (PTY) LTD **Second Appellant**

and

THE COMPETITION COMMISSION **Respondent**

Neutral citation: *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010)

Coram: Harms DP, Lewis, Heher, Ponnan JJA and Ebrahim AJA

Heard: 24 August 2010

Delivered: 13 September 2010

Summary: Competition Act 89 of 1998 — requirements for valid complaint initiation and referral – power to issue interrogation summons – validity of summons – consequence of invalid initiation

ORDER

On appeal from: Competition Appeal Court (Davis JP with Patel JA and Dambuza AJA sitting as court of appeal):

1. The appeal is upheld with costs.
2. The order of the Competition Appeal Court is set aside and replaced with an order in the following terms:
    a. The appeal against the order of the Competition Tribunal of 17 March 2009 is upheld with costs and the cross-appeal is dismissed with costs.
    b. Paragraphs 2 to 8 of that order are set aside and replaced with an order in the following terms:
        i. The complaints initiated by the Competition Commission against the applicants during 2006 are set aside.
        ii. The referral of those complaints on 7 December 2006 by the Competition Commission to the Competition Tribunal is set aside.
        iii. The Competition Commission is directed to return forthwith to the applicants all documents and copies thereof in its or its legal representatives' possession and control procured from the applicants together with transcripts of the interrogations of Dr Kleynhans, Mr Gush and Mr Fick, including the documents attached to affidavits included in the papers filed by the Competition Commission before the Competition Tribunal in the main proceedings.
        iv. The Competition Commission is to pay the costs of the proceedings.
3. All costs orders include the costs of two counsel.

JUDGMENT

HARMS DP (LEWIS, HEHER, PONNAN JJA AND EBRAHIM AJA concurring)

INTRODUCTION

[1] This is an appeal from the Competition Appeal Court ('CAC') consequent to the grant of special leave to appeal by this court. The appellants are Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd. They purchase raw milk from dairy farmers for resale, presumably after processing and packaging. They, and a number of other major players in the field, stand accused before the Competition Tribunal of 'cartel activities', more particularly, contraventions of certain provisions of s 4(1) of the Competition Act 89 of 1998.

[2] Shortly before the scheduled hearing before the tribunal of the complaint referral the appellants applied for an *in limine* determination of certain issues. The object of the exercise was to obtain a number of orders which, if granted, would have put an end to the proceedings, at least as far as they were concerned. The tribunal upheld some of the points raised but dismissed the others on the assumption that those upheld made their consideration unnecessary. It found that two summonses issued in terms of s 49A (one against Woodlands and the other against Milkwood) to submit to interrogations and produce documents were void. It did not declare the evidence that had been obtained pursuant to the summonses to be inadmissible and held that questions relating to admissibility had to be dealt with during the main hearing on the merits. Consequently the tribunal issued an order for the preservation of this evidence. This meant that the proceedings had to continue.

[3] The appellants appealed to the CAC and the commission lodged a cross-appeal against para 1 of the order which declared that the summonses were void. The CAC upheld the appeal and the cross-appeal, both in part. It agreed with the tribunal that the Woodlands summons was void but held in favour of the commission that the Milkwood summons was not. It found for the appellants that the tribunal did not have the power to issue a preservation order and accordingly set it aside. Instead the CAC ordered the commission to return all the evidence obtained by virtue of the Woodlands summons to Woodlands.

[4] The order to hand the inadmissible evidence to Woodlands gave rise to a dispute between the parties. They disagreed about its effect and the appellants asked the CAC to clarify its order. They simultaneously applied for special leave to appeal to this court. The commission, in turn, applied for leave to cross-appeal. The

CAC granted some of the clarification sought and dismissed the applications to appeal and cross-appeal.

[5] One of the grounds on which leave to appeal was refused was that the tribunal and the CAC are specialists tribunals while this court is not one. However, as will appear in due course, the issues in this case do not touch on any specialist areas but are issues similar to those that are dealt with by this court on a regular basis. But that on its own would obviously not be a ground for special leave.

[6] Although the appellants sought and were granted special leave to appeal, the commission neither sought nor received similar leave. This means that the order of the CAC setting aside the Woodlands summons with the consequent clarification order stands.

THE RELEVANT STATUTORY PROVISIONS

[7] Before attempting to explain the issues in any detail it is necessary to place the provisions of the Act in so far as they impact on this case in context. The purpose of the Act is, in general terms, to promote and maintain competition in the Republic (s 2). In consequence, the Act applies to all economic activity within, or having an effect on, the country (s 3). It prohibits in chapter 2 certain restrictive horizontal practices (s 4) and also some vertical ones (s 5), and the abuse of dominance (s 8).

[8] The administration of the Act is in the hands of the Competition Commission. Its chief executive officer, the Commissioner, is responsible for the general administration of the commission and for carrying out any functions assigned to it in terms of the Act (s 22). Some of the responsibilities of the commission are to ‘investigate and evaluate alleged contraventions of Chapter 2’, to refer matters to the tribunal, and to appear before it as claimant cum prosecutor (s 21(1)).

[9] Chapter 5 of the Act, entitled ‘investigation and adjudication procedures’, is divided into five parts. Important for present purposes are parts B and C: part B deals with powers of search and summons, and part C with complaint procedures. The other parts deal with confidentiality, tribunal hearings and appeals and reviews. This chapter in its present form was inserted by amendment during 2000, and is not clear as to the sequence of steps that have to be followed in relation to the initiation

of a complaint, the investigation, the use of the power to summon witnesses to testify and produce documents, and the referral of complaints to the tribunal. This, in turn, has given scope for delaying tactics through preliminary proceedings in different cases before the tribunal and the CAC.

[10] The Act, unnecessarily, reminds us that it must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in s 2 of the Constitution. Importantly, in the context of this case is that the Constitution is based on the rule of law, affirms the democratic values of dignity and freedom, and guarantees the right to privacy, a fair trial and just administrative action. Also important is the fact that the actions of the commission in relation to chapter 2 complaints, which are administrative, may lead to punitive measures. The so-called 'administrative penalties' (more appropriately referred to as 'fines' in s 59(2)) bear a close resemblance to criminal penalties. This means that its procedural powers must be interpreted in a manner that least impinges on these values and rights.

[11] I accordingly disagree with the view of the CAC that because it is difficult to establish the existence of prohibited practices a generous interpretation of the commission's procedural rights would be justified. This approach would imply that the more difficult it is to prove a crime, such as corruption, the fewer procedural rights an accused would have.

[12] The tribunal, after a hearing in relation to a prohibited practice, may make an appropriate order in terms of s 58(1). Such a matter may reach the tribunal as a result of a referral of a complaint to it by the commission (s 50(1)). In other words, a complaint referral by the commission is (subject to s 51) a jurisdictional fact for the exercise of the tribunal's powers in respect of prohibited practices.

[13] A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which, objectively speaking, could give rise to a reasonable suspicion of the existence of a

prohibited practice. Without such information there could not be a rational exercise of the power. This is consonant with the provisions of s 49B(2)(a) which permit anyone to provide the commission with information concerning a prohibited practice without submitting a formal complaint.

[14] The section also deals with the submission of formal complaints. A formal complaint is one submitted by a member of the public (a 'complainant') in the prescribed form and not one put in motion by the commissioner (s 49B(2)(b)).[1]

[15] In both instances, whether upon initiation of a complaint by the commissioner or on receipt of a complaint in the prescribed form, the commissioner 'must' direct an inspector to investigate the complaint as quickly as practicable (s 49B(3)).

[16] The use of the word 'must' gave rise to debate. The commission submitted that an investigation by the commission may precede the initiation of a complaint by the commissioner while the appellants contended that the investigation must follow the initiation. The word 'must' has often been equated with 'may' in the course of statutory interpretation. But that depends on context and, as Davis JP said in the court below, submissions about the meaning of the Act 'must be tested against the wording employed by the Act'.

[17] There can be little doubt that in the case of the submission of a formal complaint by a complainant such an investigation is necessary. It would otherwise not be possible for the commission to refer the complaint to the tribunal or to issue a notice of non-referral to the complainant (s 51).

[18] It is conceivable that the commissioner, by virtue of facts submitted informally or from facts obtained by the commission in the course of another investigation, may wish to initiate a complaint and to dispense with a subsequent investigation. It would accordingly appear reasonable to assume that in this case one could read 'must' as 'may'. The problem is that Parliament chose to deal with the two cases in an identical manner. The same word cannot bear different meanings in the same sentence depending on the circumstances. Even recourse to purposive construction superimposed on benevolent construction does not help. Furthermore, Parliament

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[1] *Clover Industries Ltd v Competition Commission; Ladismith Cheese (Pty) Ltd v Competition Commission* CAC cases 78/CAC/Jul08 and 81/CAC/Jul08 paras 9 and 12.

was quite particular in its use of ‘may’ and ‘must’ in this Act. In the preceding two subsections and the subsequent one the word ‘may’ is used. Why then the use of ‘must’ in this subsection if ‘may’ was intended? One finds the same pattern in other sections of the Act (compare s 50(3) and s 52(2)).

[19] The complaint must be initiated against ‘an alleged prohibited practice’. In this regard the CAC has held in *Sappi*[2] that ‘the Commission is not empowered to investigate conduct which it generally considers to constitute ‘anti-competitive behaviour’ and that a complaint can relate only to ‘an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant’. Otherwise, the CAC said in that case, the commission would act beyond its jurisdiction. No one submitted that this approach is in any respect incorrect.

[20] It is only during this investigation (‘an investigation in terms of this Act’) that the commissioner may summon persons for purposes of interrogation and production of documents (s 49A(1) read with s 49B(4)). I do not accept the submission on behalf of the commission that these far-reaching invasive powers may be used by the commissioner for purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion. It would otherwise mean that the exercise of this power would be unrestricted because there is no prior judicial scrutiny as is the case with a search warrant under s 46.

THE 2005 COMPLAINT INITIATION

[21] Mrs Louise Malherbe, a dairy farmer from Riversdal, wrote a letter to the commission during June 2004. She alleged that three milk distributors (Nestlé, Parmalat and Ladismith Cheese) were guilty of cartel activities by fixing the price of fresh milk. It is common cause that the letter was not a formal complaint by a ‘complainant’ as meant in s 49B(2)(b) but that it contained information submitted to the commission under s 49B(2)(a).

[22] Her information was followed up by two inspectors in the employ of the commission, Messrs Liebenberg and Theron. They obtained confirmation from other

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[2] *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor CC* 23/CAC/SEP02 para 35 and 39.

sources that corroborated Mrs Malherbe's allegations of price fixing or manipulation by Parmalat and Ladismith Cheese. They did not find any evidence of wrongdoing by Nestlé but they established that another distributor, Clover, may have been abusing its dominance in contravention of s 8.

[23] In line with the provisions of the Act they submitted a memorandum to the then commissioner, Mr Simelane, in which they set out the information at their disposal, and they recommended that a complaint be initiated against Parmalat and Ladismith Cheese regarding the fixing of the purchase price of milk in terms of s 4(1)(b). They also recommended that a complaint be initiated against Clover under s 8 of the Act. They did not, in particular, recommend any complaint initiation against Nestlé or any other member of the industry and also did not suggest that they had any information about contraventions of any other provisions of the Act.

[24] The commissioner did not follow their recommendations. If he had, the present proceedings would never have arisen. He instead initiated a single complaint 'concerning' these three entities on 9 February 2005. The initiating statement recorded that the purpose of the 'contact' reflected in the Liebenberg/Theron memorandum was 'to establish whether there is anticompetitive behaviour "at any level" in the [milk producing] industry'. The commissioner then stated that he had formed the belief 'that there exists anticompetitive behaviour in the milk industry'. He formed this belief, he said, in the light of the memorandum, a letter (we now know that it was Mrs Malherbe's), and public comments two years earlier by the Minister of Agriculture about the alleged high prices of food products.

[25] He added, senselessly, that he had 'in addition, further information' but then referred again to the information in the memorandum which he already had listed. This, he said, gave information about 'possible' price fixing in contravention of s 4(1)(b)(i) by Parmalat and Ladismith Cheese and 'indicated' the abuse of a dominant position by Clover, something covered by s 8.

[26] The commissioner then, in the light of the above, initiated without any qualification 'a full investigation into the milk industry'. The commissioner appears to have been oblivious to the fact that he was supposed to initiate a complaint against an alleged prohibited practice and that this should have led to a direction to an

inspector to investigate. He also ignored the fact that his initiation ran foul of the *Sappi* principles set out earlier. As said by the tribunal below, competition law is about anti-competitive effects that take place in markets and not in industries and that it seems highly unlikely that even the 'most egregious industry' in the country could be suspected of every crime in the Act. In addition, the commissioner did not have any material to support his belief that there was illegal anti-competitive behaviour in the industry as a whole.

[27] The subsequent events provide conclusive evidence that this initiation was seriously flawed. On 22 March 2005, the commissioner issued a commission summons against Dr Kleynhans, the then managing director of Woodlands, to be interrogated and produce documents in relation to an 'investigation into the milk industry'. The summons recorded that it had been issued in connection with a 'full' investigation based on the commissioner's reasonable belief in the existence of anti-competitive behaviour in the milk industry, which, apart from price fixing (s 4(1)(b)) and abusive behaviour (s 8), 'included' 'restrictive vertical practices' (s 5) – something that had not even been mentioned in the complaint initiation. This, by the way, belies the commission's argument that the initiation was limited to the three entities mentioned and in respect of the prohibited practices identified in the complaint initiation. It is not necessary to detail the content of the summons because both the tribunal and the CAC have found that it was so improper, overbroad and vague that it had to be set aside.

[28] In response to the summons the attorneys for Woodlands politely sought some particulars to enable Dr Kleynhans to comply fully with the demand. The commission's response is revealing. It said that a complaint had been initiated against Parmalat, Ladismith Kaas and Clover in order to establish whether there is anti-competitive behaviour at any level of the industry thereby allowing the commission the opportunity to evaluate the whole industry. This, too, refutes the commission's belated restrictive interpretation of the complaint initiation.

[29] The interrogation of Dr Kleynhans took place. His complaints about the nature of the investigation and the scope and meaning of the summons were brushed aside

in an unseemly and threatening manner. Requests for elucidation were either evaded or ignored.[3]

[30] Then followed a summons for the interrogation of Mr Fick of Milkwood concerning, once again, an 'investigation into the milk industry'. He was ordered to bring with him any 'other' documents or items in his possession or under his control 'that relate to this matter'. This summons differed from the Woodlands summons in that it did not give a list of documents. He was told that he would be asked about possible price fixing in the market and abusive behaviour and also about issues arising from the information submitted in response to a summons dated 22 March 2005. The summons or information was not more closely identified but one may now surmise that it was the Woodlands summons of that date.

[31] As mentioned, the tribunal held that this summons was also bad but the CAC held otherwise. The tribunal reasoned that a summons in terms of s 49A requires the stipulation of a prohibited practice accompanied by some particularity as to its nature, something that was missing. The CAC, however, held that the prohibited practices had been disclosed because Fick was entitled to see the information submitted pursuant to the 22 March summons. The first problem with this is that the validity of a summons must appear ex facie the document and does not depend on a possible request for further particulars. In addition, since the information obtained pursuant to that summons was, according to the CAC, tainted and could not have been used by the commission, it is difficult to see how that information could have given validity to the summons and be used to extract information from Fick. The CAC also did not mention the other problems with the summons such as the unbounded request for documents nor did it consider whether there was any indication on the papers that Fick was in fact entitled to see the information (see s 45 and 45A).

[32] The CAC also failed to deal with the proceedings pursuant to the summons. Fick was informed, as the interrogation began, that the investigation was in relation to prohibited practices including possible collusion and/or price fixing, abusive

[3] The order of the CAC included the setting aside of a summons concerning one Gush. This part of the order is not subject of the appeal and need not be considered but has to be reflected in the ultimate order to the extent that the order of the CAC is not in issue.

behaviour as well as vertical practices in the milk industry and that the party subject to the complaint was Parmalat. This statement was palpably untrue. Three companies were named in the initiation and Parmalat was but one of them. Parmalat was not suspected of abusive behaviour – that was Clover. What was not said was that Woodlands was being investigated. And it was also not said that the whole purpose of the interrogation was to extract information from Fick about the relationship between Woodlands and Milkwood. As Fick said (something the commission did not even deem worthy of reply) the whole enquiry targeted the relationship between Milkwood and Woodlands, and not one question was asked during the entire interrogation about Parmalat.

[33] I now revert to the 2005 initiation. The tribunal did not deal with its invalidity because of its finding that the summonses were bad for other reasons. The CAC did not deal with the issue in its main judgment but belatedly during the course of its judgment dealing with the merits of the application for leave to appeal. It focussed on the question whether it is possible to initiate a complaint against cartels within an industry without naming any one of the parties thereto and expressed the view that any finding that a party has to be mentioned would amount to Austinian formalism of the kind of jurisprudence employed during apartheid.

[34] The problem with this generalisation and tar brushing is that it ignored the structure of the Act, the impact of the Constitution on its interpretation, the CAC's own jurisprudence, not only in *Sappi* but also *Glaxo Wellcome*,[4] and the relevant facts. The CAC did not take into account that the initiation must at least have a jurisdictional ground by being based on a reasonable suspicion. The initiation and subsequent investigation must relate to the information available or the complaint filed by a complainant.

[35] There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility. There are reasons for this. The first is that any interrogation or discovery summons depends on the terms of the initiation statement. The scope of a summons may not be wider than the initiation. Furthermore, the Act presupposes

[4] *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02.

that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the tribunal. It could hardly be argued that the commission could have referred an investigation into anti-competitive behaviour in the milk industry at all levels to the tribunal.

[36] Members of the supposed cartel were in fact mentioned in the initiating statement. It was therefore not a case where no cartel member had been identified. The problem is that there were no facts that could have given rise to any suspicion that others were involved. A suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.

THE 2006 COMPLAINT INITIATIONS

[37] The commissioner did not refer the 2005 complaint to the tribunal. This explains why the invalidity of this complaint did not form the basis of a prayer in the notice of motion. The commissioner instead referred six complaints that were initiated during 2006. The first was dated 13 March and accused Woodlands and others of fixing the purchase price of raw milk. Two other complaints involving Woodlands were initiated on 12 May and, finally, on 6 December one was initiated against Woodlands and Milkwood. The remaining complaint did not affect either of the appellants. All the complaints involving one or both of the appellants related to practices prohibited by s 4(1).

[38] The appellants sought an order setting these complaints and consequent referral on 7 December aside. Their argument was premised on a finding that all the commission's evidence against them was derived from the invalid 2005 initiation and subsequent tainted interrogations and production of documents. Since the commission's investigation preceded these complaints it placed, according to the argument, the cart before the horse which means that the commission acted beyond its powers.

[39] It is necessary to emphasise that the CAC, in its clarification judgment, made it clear that its intention was to ensure that all documentation procured pursuant to

the investigation and other steps taken by the commission pursuant to the tainted Woodlands summons had to be placed beyond the use of the commission because Woodland's privacy had been unfairly breached. It crafted the clarification order on that basis.

[40] The commission, as mentioned, did not appeal this order and did not seek to argue that the approach of the CAC towards tainted evidence was flawed. It follows that the same approach has to be adopted towards the Milkwood evidence in view of the finding earlier that it, too, was likewise tainted.

[41] Both the tribunal and the CAC found that the commission's whole case against the appellants was derived from the impugned interrogations. These findings were based, presumably, on an allegation in the founding affidavit that it was apparent from the commission's founding affidavit in the referral, witness statements and argument that the evidence obtained through the tainted investigation forms the basis of the referral in relation to the appellants and was inextricably part thereof.

[42] The allegation was denied in the answering affidavit in bald terms with reference to 'all of the reasons set out above'. There were no preceding reasons and this means that that the denial was meaningless. Counsel for the commission nevertheless sought to rely on inferences from other facts for the submission that there may have been further untainted facts which could have justified the referral and that it should be left to the tribunal to determine whether there was any admissible evidence. I agree that as a general rule it is preferable to leave such a determination to the tribunal during the referral hearings.

[43] The general rule does not, however, find application in the present proceedings. The problem for the commission derives from the terms of the 2006 complaint initiations. They all explicitly relate back to the investigation under the 2005 complaint and state that they were drawn as a consequence of that investigation. In other words, the 2006 complaints were the direct consequence of an invalid complaints procedure. Without the invalid complaint initiation and subsequent investigation these complaints against the appellants would not have seen the light of day. It follows that by applying the approach in *Pretoria Portland*

Cement[5] the consequent referral should have been set aside, unfortunate as the result might be in the circumstances.

CONCLUSION

[44] It follows from this that the appeal should be upheld and that the 2006 complaints and the subsequent referral to the tribunal should be set aside. The relief granted by the tribunal in relation to the summonses has in a sense become moot but will for the sake of clarity be retained. The same applies to the clarification order of the CAC. It is not necessary to deal with Woodland's separate attack in relation to the fifth complaint.

[45] The commission, in its heads of argument, raised the issue of waiver but did not address it during oral argument. The issue was dealt with in some detail by both the tribunal and the CAC and there is no reason to revisit the matter. The commission also complained about what it called the delaying tactics of the parties cited in the referral. Although one has to agree that such tactics are to be deprecated and that tribunals and courts should take a strong stand where feasible, it is not possible to dismiss a valid complaint of this nature merely because of delay.

[46] There did not appear to be any disagreement between the parties that the result should determine costs, also in relation to the proceedings before the tribunal, and that the costs of two counsel should be allowed. The appellants sought costs of a third counsel and costs on the scale as between attorney and client. There is no justification for such an order.

THE ORDER

[47] The following order is made:

1. The appeal is upheld with costs.
2. The order of the Competition Appeal Court is set aside and replaced with an order in the following terms:
    a. The appeal against the order of the Competition Tribunal of 17 March 2009 is upheld with costs and the cross-appeal is dismissed with costs.
    b. Paragraphs 2 to 8 of that order are set aside and replaced with an order in the following terms:

[5] *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) paras 71-73.

i. The complaints initiated by the Competition Commission against the applicants during 2006 are set aside.
ii. The referral of those complaints on 7 December 2006 by the Competition Commission to the Competition Tribunal is set aside.
iii. The Competition Commission is directed to return forthwith to the applicants all documents and copies thereof in its or its legal representatives' possession and control procured from the applicants together with transcripts of the interrogations of Dr Kleynhans, Mr Gush and Mr Fick, including the documents attached to affidavits included in the papers filed by the Competition Commission before the Competition Tribunal in the main proceedings.
iv. The Competition Commission is to pay the costs of the proceedings.

3. All costs orders include the costs of two counsel.

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L T C Harms
Deputy President

APPEARANCES

APPELLANT/S	J J Gauntlett SC (with him R G Buchanan SC and F B Pelser) Instructed by: Rushmere Noach Inc, Port Elizabeth Webbers Attorneys, Bloemfontein
RESPONDENT/S:	A R Bhana SC (with him A J Coetzee and T Dalrymple) Instructed by Knowles Husain Lindsay Inc, Sandton McIntyre & Van der Post, Bloemfontein