THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 49/12
Reportable

In the matter between:

IMRAAHN ISMAIL MUKADDAM	**1st Appellant**
W E M DISTRIBUTORS CC	**2nd Appellant**
ABDUL KARIEM EBRAHIM	**3rd Appellant**

and

PIONEER FOOD (PTY) LTD (Registration Number: 1988/004036/07)	**1st Respondent**
TIGER CONSUMER BRANDS LTD (Registration Number: 1972/006590/06)	**2nd Respondent**
PREMIER FOODS LTD (Registration Number: 1968/002379/06)	**3rd Respondent**

Neutral citation:	*Mukaddam v Pioneer Food* (49/12) [2012] ZASCA 183 (29 November 2012)
Coram:	NUGENT, PONNAN, MALAN, TSHIQI and WALLIS JJA
Heard:	**6 NOVEMBER 2012**
Delivered:	**29 NOVEMBER 2012**
Summary:	**Class action – whether 'opt in' action allowed – whether 'legally tenable' cause of action shown.**

ORDER

On appeal from Western Cape High Court, Cape Town (Van Zyl AJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

NUGENT JA (PONNAN, MALAN, TSHIQI and WALLIS JJA CONCURRING)

[1] Mr Mukkadam, the appellant, is a purveyor of bread. So is Mr Williams, who trades through the medium of W.E.M. Distributors CC, and Mr Ebrahim, who were applicants together with Mr Mukkadam in the court below, but who are not parties to this appeal. They all conduct business in the Western Cape. They purchase their bread from one or other of the respondents, who are major producers, add their margins, and distribute mainly to informal traders, through whom it reaches consumers.

[2] For some time in the Western Cape the respondents engaged in practices prohibited by the Competition Act 89 of 1998. Essentially, they engaged in co-ordinated fixing of prices, fixing of discounts that were given to distributors such as the appellants, and agreed not to deal with one another's distributors. The nature of their anti-competitive conduct, its effect, and the consequences

for each of them when subjected to investigation by the competition authorities, is dealt with fully by Wallis JA in the related appeal of *Trustees for the time being of the Childrens' Resource Centre Trust and others v Tiger Consumer Brands Ltd and others*,[1] and I need not repeat what was said in that judgment.

[3] The appellants allege that they and about 100 other distributors in the Western Cape suffered financial loss as a result of the prohibited conduct, particularly the fixing of discounts they would receive, and the appellants wish to pursue claims for damages in a class action. They applied to the Western Cape High Court to certify the institution of a class action on behalf of themselves and other affected distributors for recovery of their losses. The application was dismissed by Van Zyl AJ and they now appeal with the leave of this court.

[4] I have already joined with Wallis JA in the appeal in the *Trustees'* case in recognising class actions as a permitted procedural device for pursuing claims, where the case calls for it, so as to permit those who are wronged to have access to a court. I need not repeat what will need to be shown for such a class action to be certified. I need say only that included amongst them the applicants for certification will need to satisfy a court, where a novel cause of action is sought to be established, that the claim is at least legally tenable, albeit that the court is not called upon to make a final determination as to the merits of the claim, and that a class action is the most appropriate means for the claims to be pursued. Failing that, the certification of a class action holds the potential only to be oppressive to the proposed defendants.

[1] *Trustees for the time being of the Childrens' Resource Centre Trust and others v Tiger Consumer Brands Ltd and others* Appeal Case No. 050/2012 (ZASCA182).

[5] The claims that the appellants wish to advance are claims for recovery of damages. Although not fully expressed in the founding affidavit the damages they claim are explained as follows in the appellant's heads of argument:

'All bread distributors would have directly suffered a reduction in gross profit margin as a result of the respondents' unlawful conduct and to this extent suffered a common fate in the reduction of gross profit. It is further submitted that damages in price fixing cases of this nature fall to be calculated as being the difference between the actual price and the "but for" price, that is, the price that would have been charged "but for" the unlawful price fixing conspiracy …'.

[6] Before us their counsel found himself confined, in view of the form in which the case was presented in the founding affidavit, to advancing the claim as one founded upon breach of s 22 of the Bill of Rights, though that was sought to be linked to rights that are said to flow from the Competition Act. For present purposes, in favour of the appellants, I will not confine myself in the same way, and I approach the matter on the basis that they need show a legally tenable claim founded either upon s 22 of the Constitution, read together with the Competition Act, or under the common law. In my view any such claims are indeed untenable and I need deal with the issue only briefly. At the outset I should observe that there is no evidence that prices to distributors would indeed have been lower but for the unlawful conduct but I will assume that that would indeed have been so.

[7] Section 22 of the Bill of Rights guarantees to all citizens the right to freely choose his or her trade, profession or occupation. While on its face the right is expressed to be one to enter a trade, profession or occupation, it was submitted that once the trade, profession or occupation has been entered the section extends to protecting the practise of that trade, profession or occupation.

[8] I do not find it necessary in this case to examine in any detail the contents of that right. It is sufficient to say that there are considerable hurdles to be overcome in establishing a claim on that basis. The first is that the right is guaranteed only to citizens and it is by no means clear that the individuals on behalf of whom the class action is to be advanced are indeed citizens. The second is that, on the face of it, the right is accorded to individuals and it seems that some, if not most, of the proposed claimants will be juristic persons. But if those hurdles are indeed overcome I think there is a further hurdle that altogether blocks the way. For once having entered the trade, profession or occupation, I find no basis for finding that s 22 also guarantees the outcome of having done so. Indeed, that would be inconsistent with competition, which necessarily entails that enterprises might be unprofitable and fail. Far from supporting the appellants' constitutional claims, the Competition Act, which the appellants find themselves linking to their constitutional claim, altogether undermines it.

[9] The Competition Act does not purport to protect the profits that an enterprise will make. On the contrary, at least so far as the distribution of bread is concerned, it is designed to protect consumers against excessive prices emanating from anti-competitive behaviour. The effect of the appellants' claims is to assert that it was they, instead of the producers, who were entitled to reap the rewards of the prohibited conduct. They assert a right to transfer to themselves the profits that the producers made, which in my view is simply untenable.

[10] Reliance upon delictual claims takes the matter no further. It can be taken now to be well established that the recognition of claims for pure economic loss

is heavily policy laden.[2] Nothing was advanced on behalf of the appellants to suggest that public policy calls for recognition of a claim to maximise profits from the sale of bread, least of all to reap the rewards of price fixing. The fact alone that the fixing of prices for bread is prohibited is sufficient to dispose of any suggestion that policy requires a claim to be recognised for the recovery of profits from the practice. Indeed, the corollary of our finding in the *Trustees'* case that a claim by consumers is potentially plausible is destructive of the distributors' case.

[11] But there is a further ground upon which the claim for certification by the distributors must in any event fail. The justification for recognising class actions is that without that procedural device claimants will be denied access to the courts. The class action the appellants wish to commence in this case is one that is sometimes called an 'opt-in' action. By that is meant that the class to be represented in the action is confined to claimants who come forward and identify themselves as claimants – in this case by written notification to the appellants' attorney.

[12] Once the class is confined to claimants who choose positively to advance their claims, and are required to come forward for that purpose, I can see no reason why they are not capable of doing so in their own names, and they need no representative to do so on their behalf. Rule 10 of the Uniform Rules expressly allows multiple plaintiffs to join in one action if

'the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were to be instituted, would arise on such action'.

---

[2] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 22; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 10 and 11.

[13] Claims that have sufficient commonality to qualify for a class action will necessarily qualify for a joint action under that rule, and the converse also applies. That the plaintiffs might be numerous – in this case it is said that there might be 100, although there is no reason to think that all will join – is in itself no reason to preclude a joint action.[3] Perhaps there will be more paper – though even that is not necessarily true – but that is no more than administrative inconvenience. In both a class and a joint action the plaintiffs will necessarily be represented by the same legal representatives and are in no worse position than they would be in a class action. I might add that even administrative inconvenience of a joint action under Rule 10 might be overcome if the claims were all ceded to a single plaintiff, which is a further reason why a class action is not called for to advance their claims.

[14] The only advantage that was advanced on the appellants' behalf for proceeding by way of a class action in such cases, instead of a joint action or one that is brought in reliance upon a cession of claims, was that an action brought through representation would immunise them against personal liability for costs. That does not seem to me to be a good reason for allowing a class action. On the contrary, the potential for personal liability for costs will often serve as a salutary restraint upon frivolous actions that are brought oppressively for the purpose of inducing defendants into financial settlements, which is one of the dangers to be avoided in certifying class actions. Indeed, the court that becomes seized of the case has a wide discretion to determine where the costs should fall, taking account the merit of the claim and the conduct of the litigation, and is better placed to do so than a certifying court. Although I do not close the door to an 'opt in' class action in my view the circumstances would

[3] In the United States a class action is not competent if all the claimants can be joined. Rule 23(a) of the Federal Rules of Civil Procedure require a party seeking certification to demonstrate, amongst other things, that 'the class is so numerous that joinder of all members is impracticable'.

need to be exceptional before one would be allowed, and nothing exceptional has been shown in this case.

[15] On both grounds the claim to certification in this case must fail and the appeal must be dismissed. In view of the novelty of the claim, and its close association with the *Trustee's* case in which the main points were in any event argued on behalf of the respondents, I think it would be just if each party were to pay its own costs.

[16] The appeal is dismissed.

_____

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	R P Hoffman SC C D Shone Instructed by: Knowles Husain Lindsay Inc, Bellville Honey Attorneys, Bloemfontein
For 1st respondents:	S Burger SC P McNally SC J Cassette Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton Symington & De Kok, Bloemfontein
For 2nd respondents:	J Dickerson SC M O'Sullivan R Garland Instructed by: Edward Nathan Sonnenbergs, Cape Town Matsepes Inc, Bloemfontein
For 3rd respondents:	D Unterhalter SC M du Plessis I Goodman Instructed by: Nortons Inc, Sandton McIntyre & Van der Post, Bloemfontein