2011 No. 517SA DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

In the matter of an application under the Competition and Fair Trading Act 2006, Act No 11 of 2006

BETWEEN:

NATIONAL MILLING COMPANY OF GUYANA INC, a company incorporated under the laws of Guyana with its registered office situate at Agricola, East Bank Demerara

Appellant

-and-

THE COMPETITION COMMISSION, a body corporate established by the Competition and Fair Trading Act 2006, Act No 11 of 2006

Respondent

Nov 26, Dec 17, 2013; Jan 22, Feb 21, March 14, 2014; Oct 30, 2015.

Mr. K. Ramkarran for the appellant.
Mr. T. Housty for the respondent.

RULING

This is an appeal to a judge in chambers pursuant to section 51 of the Competition and Fair Trading Act 2006, Act No. 11 of 2006 in which the appellant, National Milling Company of Guyana Inc (NAMILCO) has sought a reversal and setting aside of the decision of the Competition Commission (the Commission) made on the 15th day of August, 2011 whereby the Commission made certain findings, rulings and recommendations against NAMILCO in relation to complaints about the sale and or distribution of flour by the company being anti-competitive. The Commission ruled that NAMILCO enjoyed a dominant position as the sole manufacturer of flour in Guyana in terms of section 23(2) of the Competition and Fair Trading Act 2006 (the Act) and that this company had abused its dominant position as provided for in section 24(1)(b) and (d) of the Act. The Commission also ruled that, in contravention of section 20(2)(a) and (e) of the Act, NAMILCO had entered into anti-competitive agreements with other enterprises which had the effect of preventing, restricting or distorting competition in a market.

In addition to its ruling, the Commission made certain consequential orders including that NAMILCO cease its abusive practice within three months of the service of the decision of the Commission and, in relation to NAMILCO's entering into anti-competitive agreements, that an order be served on the company and on the persons whom the Commission found that NAMILCO had entered into anti-competitive agreements with, stating the reasons for the determination and requiring them to terminate the existing agreements within three months of the service of the order. It was further stated that failure to comply with orders would result in a fine of $50,000,000 along with imprisonment for one year.

The grounds of the appeal are as follows:-

(i) The Commission failed, refused and/or neglected to give NAMILCO a fair hearing before arriving at its decision on the 15th day of August, 2011 in that:
   (a) the Commission failed, refused and/or neglected to properly and fully apprise NAMILCO of the case made out against it;
   (b) the Commission failed, refused and/or neglected to make NAMILCO fully aware of the evidence which Commission had before it and considered;
   (c) the Commission failed, refused and/or neglected to allow NAMILCO to address the evidence which it considered in its findings;
   (d) there was the real possibility of bias in the process of arriving at the decision of the Commission.

(ii) The Commission failed, refused and/or neglected to take into consideration relevant matters put forward to it by NAMILCO in arriving at its findings, rulings and recommendations.

(iii) The Commission took into consideration irrelevant matters in arriving at its findings, rulings and recommendations.

(iv) The decision of the Commission was unreasonable having regard to the matters placed before it by NAMILCO.

(v) The Commission failed, refused and/or neglected to properly or at all to apply the statutory requirements governing its operation in coming to its decision.

(vi) The Commission acted outside of its statutory powers in making its findings and arriving at its findings, rulings and recommendations.

(vii) The Commission failed, refused and/or neglected to apply the law in making its findings and arriving at its rulings and recommendations.

(viii) The Commission made errors of law in making its findings and arriving at its rulings and recommendations.

(ix) The findings, rulings and recommendations of the Commission were unlawful and ultra vires the Competition and Fair Trading Act 2006.

(x) The exercise of investigatory and adjudicatory powers by the Commission in arriving at its findings, rulings and recommendations was in breach of NAMILCO's right to being afforded natural justice by the Commission.

Let me say at the outset that the delay in issuing this ruling is regretted. A number of factors contributed to this. The grounds raised at (i), (vi), (viii), (ix) and (x) to my mind dispose of this appeal in favour of NAMILCO.

Although, neither counsel referred to this, en passant, I note that the document detailing the 'Findings' of the Commission which are subsequently referred to as a 'report' under the heading 'Recommendations', is intituled – "Findings of the Commission in W. Murray (et al) v NAMILCO Case" which suggests that the case was also brought by Mr. Murray when this was not so. Mr. Murray was counsel for the complainants. The document should have referred to the specific complainants.

Facts

Mr. Roopnarine Sukhai, also known as Bert Sukhai, the Managing Director/Company Secretary of NAMILCO deposed to the affidavit in support of the appeal while Mr. Ramesh Dookhoo, Chairman of the Commission swore to the affidavit in answer on behalf of the Commission. In addition, an affidavit in support of the appeal was sworn to by Ms. Eileen Cox, then Vice-Chair of the Consumers Association while Mr. Pat Dial, Chairman of this Association who is a member of the Commission, swore to an affidavit in response to that of Ms. Cox.

In summary, Mr. Sukhai deposed as follows:

> The proceedings against NAMILCO by the Commission were commenced by letter dated September 14, 2010, to which was attached a summons by which Mr. Sukai was summoned by Mr. Dookhoo, to attend a hearing on September 20, 2010, at the Commission, pursuant to

s 7(8) of the Act, "to investigate claims of preferential pricing" brought against NAMILCO. Attached to the letter was a letter dated August 5, 2010 written by Mr. Winston Murray, Attorney-at-Law, to Mr. Dookhoo complaining to the Commission on behalf of sixteen named persons that they paid higher wholesale prices than other wholesale purchasers for flour from NAMILCO and that such a situation would clearly jeopardize the viability of the flour business of these persons.

NAMILCO through its representatives attended the offices of the Commission on September 20, 2010. It is claimed that before the representatives of NAMILCO were seen by the members of the Commission, Mr. Winston Murray, Attorney-at-Law, and a few of the persons purportedly complaining against NAMILCO met with the Commission. The representatives of NAMILCO did not then or at any time thereafter meet the complainants or hear their complaints and no transcript of the meeting was ever provided by the Commission to NAMILCO detailing the precise nature and extent of the evidence given to the Commission by the complainants. NAMILCO claims that it complained that it was not made aware of the specifics of the charges or complaints being leveled against it, nor of the sections of the Act which it was alleged to have contravened. It was also asserted that despite protestations on its behalf, on August 15, 2011, the Commission delivered a ruling in the matter, finding that NAMILCO enjoyed a dominant position in terms of s 23(2) of the Act as the sole manufacturer of flour in Guyana and that NAMILCO abused its dominant position in accordance with ss 24(1)(b) and (d) of the Act. As regards that part of the ruling on August 15, 2011, that the agreements made by NAMILCO and its agents and distributors were in breach of s 20(2)(a) and (e) of the Act in that those agreements contained provisions that directly or indirectly fixed purchase or selling prices or determined other trading conditions and that those agreements applied dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, it was contended that this finding did not address the assertions made on behalf of NAMILCO that each of the persons with whom NAMILCO had agreements were afforded those prices in consideration for their performing various duties and conditions above and beyond that performed by other customers of NAMILCO in order to secure the improvement of the supply and distribution of flour. It was also complained that the Commission did not apprise NAMILCO in advance that it was considering the application of s 20(2) of the Act which, if it had done so, would have allowed NAMILCO to apply for an authorization to carry out its agreements and practices in relation to the distribution and pricing of flour pursuant to Part V of the Act. It was further contended that the Chairman of the Commission responded to the contentions by NAMILCO by reiterating that the Commission was not a court of law.

NAMILCO became aware that while the Commission was considering the matter concerning the company, Ms Eileen Cox on behalf of the Guyana Consumers' Association wrote a letter dated March 9, 2011 addressed to the Minister of Trade, Tourism and Industry. The letter complained about the pricing policy of NAMILCO and asserted, among other things, that "[NAMILCO] is known to give large discounts to certain large purchasers which presumably is made up for by higher prices charged to ordinary consumers. If that is not so, then it is clear that [NAMILCO] could sell at the same discount price to ordinary consumers and still make a good profit". The said letter of the Guyana Consumers' Association petitioned the Minister and the Government of Guyana, among other things, to require [NAMILCO] "to accurately and transparently reveal its various price structures offered to various categories of customers. This information would point to a number of important facts – it could be collated with the alleged profitability figures; or to assess a fairer price to ordinary customers; or to assess to what extent, if any, the ordinary consumer is subsidizing the concessionary prices". It was pointed out that Mr. Pat Dial, the President and an executive member of Guyana Consumers' Association, who had been long associated with this Association, is also a member of the Commission, and that he had been actively involved in the matter concerning NAMILCO before the Commission. It was asserted that despite the letter written by the Guyana Consumers' Association taking a strong position against NAMILCO, Mr Dial continued to sit in the proceedings of the Commission against NAMILCO and took part in the delivery of its decision on August 15, 2011.

NAMILCO was never given the opportunity to address the Commission on either ss 23 (2) and 24(1)(b) of the Act, which deal with abuse of dominant position, nor was it aware through the correspondence sent to it by the Commission that the Commission intended to consider those sections of the Act in arriving at its decision. NAMILCO also complained that the Commission arrived at its decision although it had produced evidence that there were other importers of flour who were its competitors in the market. It was contended that the Commission did not conduct a proper and full investigation as required by section 26 of the Act so as to be satisfied that NAMILCO controlled more than 40% of the market.

Ms. Cox, in her affidavit, supported the issues raised by NAMILCO in relation to Mr. Dial and the letter written on behalf of the Guyana Consumers' Association. Mr. Dial admitted in his affidavit in answer that in his capacity as president of the association he had indeed prepared the letter which Ms. Cox had signed, though he contended that there would have been no bias by his participation in the deliberations of the Commission in relation to NAMILCO. He asserted that a fair-minded and informed observer would not think that he was apparently, likely, or possibly in any way biased against NAMILCO in the deliberations of the matter before the Commission and that NAMILCO had not provided any or any sufficient facts to support its contentions in this regard. He also stated that the said letter in no way contained any information which was relevant to the matters engaging the attention of the Commission; that no information gained through the proceedings before the Commission was utilised in the preparation of the letter and that the letter related to the direct interaction between NAMILCO and its final consumers.

Mr. Dookhoo admitted that on August 15, 2011 there were findings in relation to NAMILCO but contended that it was made within and pursuant to the powers conferred on the Commission under the Act. He deposed that the findings were made based on a fair and mature deliberation and consideration of all relevant materials and information before the Commission based on information received from relevant parties, including NAMILCO's representatives as well as from documentary information.

Mr. Dookhoo also admitted the accuracy of the description of the manner in which the investigation of NAMILCO progressed and was carried out as outlined by Mr. Sukhai but contended that "the matters complained of ... represent a misconception of the manner in which matters of this nature are handled by the defendant when exercising its powers of investigation and other powers under the Act." He further stated that NAMILCO was provided with information regarding the nature of the allegations as evidenced by the documents exhibited to NAMILCO's affidavit in support of appeal. It was further asserted that NAMILCO had misconstrued the nature and adaptability of the concept of a hearing before the Commission.

Mr. Dookhoo contended that the letters of complaint that were received formed part of the information obtained, contained and revealed in the investigative process of the Commission, and that they were given proper consideration and due weight in the deliberations of the Commission. Mr. Dookhoo further stated that the Commission was advised that there is no absolute duty or obligation to disclose the information discovered as part of its investigative process and that the Commission was under no duty to communicate its findings pursuant to its investigative power under s 26 of the Act. Further, it was contended that NAMILCO had not denied, proposed or suggested any evidence to contradict that it possessed a less than a 40% market share in the supply of the relevant product in the relevant marketplace. Mr. Dookhoo admitted that Mr. Dial participated in the proceedings of the Commission and took part in the delivery of the decision on August 15, 2011.

Fair hearing – knowledge of the case to be met

A hearing can indeed take many forms and Mr. Housty referred to the judgment of the Constitutional Court of South Africa case of Senwes v Competition Commission Case CCT 61/11 [2012] ZACC 6, to urge that participation in a hearing is sufficient to afford the parties before a tribunal a fair hearing. It is noted that in the quote from the judgment of Jafta J (cited by counsel), to be found at para [55] of the judgment, the learned judge highlighted that (1) the company in that case "received the referral which contained the complaint ... in advance and before the hearing at the Tribunal. That same complaint formed part of the issues to be determined by the Tribunal." and (2) it had "received

statements of witnesses who were going to testify in support of that complaint. All this happened before the hearing at the Tribunal." It is in this context that the Senwes company was given the opportunity to refute the complaints at the hearing. Nothing of the sort appears to have occurred in this case. Then only a few of the complainants were apparently entertained by the Commission. NAMILCO was entitled to know specifically which complainants were so entertained. It is also unclear in what manner they were heard and what form the testimony referred to in the report took. While Mr. Dookhoo deposed that the letter and intent of the Act must be interpreted purposively in the context of resources, capacities, efficiencies and capabilities which exist in Guyana and that these considerations would have informed the structure of the Act and the overall objectives of competition policy and regulation in Guyana, the fact remains that such contextual issues cannot trump natural justice principles. There ought to have been a full hearing of the case against NAMILCO. The 'Report' of their findings and ruling as the Commission referred to it, does not indicate that the company was given an opportunity to at least see any statements of witnesses who were going to testify in support of the complaint. Further, the charge in the letter of September 14, 2010 referred to a complaint in relation to pricing. There was no mention of a consideration of whether NAMILCO was abusing a dominant position. The Commission therefore could not have made findings and rulings on this basis without first having informed NAMILCO of a charge in this regard. Thus, ground (i)(a)(b)(c) of the appeal has merit.

Fair hearing – apprehension of bias in a commissioner

As regards grounds (i)(d) and (x) I find that there has been a clear breach of the appellant's right to a fair hearing of the case against it. The presence of Mr. Pat Dial at the hearing in circumstances where he had authored correspondence that in effect pre-judged the conduct of NAMILCO means that even if one were to contend that it was not inherently biased, a conclusion that is not supported by the evidence, there is at least an appearance of bias. The well known legal principle that justice must not only be done by must be seen to be done is applicable to the deliberations of the Commission. Mr. Dial's assertion that a fair-minded and informed observer would not think that he was apparently, likely, or possibly in any way biased against NAMILCO in the deliberations of the matter before the Commission is without merit and itself unreasonable. Indeed, on the issue of bias, the Privy Council in Lesage v The Mauritius Commercial Bank Ltd [2012] UKPC 41 at para 46 of the judgment of Lord Kerr cited by Mr. Ramkarran, held that "The test for the presence of apparent bias was whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal had been biased." In this case, the appellant had sent a letter to the court containing details of advice given by his lawyer to settle the case. It was further held that:

> "On the facts, despite having received the letter from the appellant containing the details of the advice that his counsel had given him to settle the case, the judges had not raised with counsel the question of whether it was proper that they should continue to conduct the trial. It was impossible to say that there was not the appearance of possible bias or unfairness. It was inevitable that the informed observer would conclude that the court had not been alert to the need for vigilance to ensure that the information in the appellant's letter did not have an unintended effect on its view of the credibility of his case. The possibility that the judges would be influenced to a subconscious disposition against the appellant's case had been inescapable. In all the circumstances, the court had created the appearance of unfairness and bias."

The case of Newfoundland Telephone Company Ltd v Newfoundland Board of Commissioners of Public Utilities [1991] 1 SCR 623, also cited on behalf of the appellant, is somewhat similar to the case at bar. In Newfoundland the Supreme Court of Canada considered "the extent to which an administrative board member may comment on matters before the board" and "the result which should obtain if a decision of a board is made in circumstances where a reasonable apprehension of bias is found." Here, a commissioner who had been a consumer affairs advocate made statements to the media both before and during a public hearing held by the board into the costs and accounts of the Newfoundland Telephone Company, giving his views on the executive pay policies of the company. The commissioner, who participated in the decision given by the commission, made the comments before the commission gave its decision in which one of the rulings disallowed the cost of an enhanced pension plan for senior executives of the company and ordered refunds to customers in

relation to expenses for those benefits. The Supreme Court held that there would be a reasonable apprehension of bias where a board member in effect pre-judges the matter before the board to such an extent that representations to the contrary would be futile. Justice Cory giving the judgment of the Court held:

> "The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator."

The letter of complaint by the Consumers' Association spoke directly to the pricing policy of NAMILCO and the very issue which the Commission had to determine. It does appear that by requesting Ms. Cox to sign the letter he had drafted, Mr. Dial tacitly acknowledged that it would have been improper for him to do so. In the circumstances, the drafting of the letter for someone else to sign was equally improper. And indeed, as pointed out by Mr. Ramkarran for the appellant in his submissions, there was no acknowledgement of the existence of the letter until after it came to light through Ms. Cox's affidavit. As highlighted on behalf of NAMILCO, s 9 of the First Schedule of the Act requires a member who is directly or indirectly interested in any matter which is being dealt with by the Commission to disclose the nature of his interest and to decline to take part in any deliberation or decision of the Commission with respect to that matter. Mr. Dial has not deposed as to whether he complied with this provision and the inference to be drawn from his affidavit is that he did not do so. It was incumbent on the Commission to act fairly in hearing the case against NAMILCO. As in the two cases cited above, there was a real possibility of bias and the participation of Mr. Dial in the decision making process in relation to this case created an appearance of unfairness and bias because it is impossible to determine his state of mind as an adjudicator and the influence he may have had on the other commissioners. I further hold that a reasonably informed bystander would perceive bias on the part of Mr. Dial as an adjudicator in this matter.

Statutory provisions

I turn now to the legislative framework in relation to the Commission in explaining my conclusion that grounds (vi), (viii) and (ix) have merit.

Section 5 (1) establishes a Competition Commission. The functions of the Commission are set out in s 6 (1) with the ones that are most pertinent to the case being as follows:

> "6 (1) (a) ...
>
> (b) order, on its own initiative or at the request of any person, such investigations in relation to the conduct of business as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act;
>
> (c) conduct enquiries as it may consider necessary or desirable in connection with any matter falling within the provisions of the Act;
>
> ...
>
> (e) take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise ... .
>
> (f) eliminate anti-competitive agreements;
>
> ... ."

By s 7 the Commission is empowered to hold enquiries and in doing so could summon and examine witnesses under oath and give directions as to documentation to be produced whether by affidavit or not and as to information required. Section 7 (7) also provides for the conduct of hearings in public unless otherwise ordered by the Commission. The Commission has powers as provided for in s 7 (1) to inter alia "(a) declare certain business practices to be abuses of dominant position", "(c) order the

termination of an agreement", and "(h) order enterprises to cease and desist from any form of conduct that has or is likely to have as its object or effect the lessening of competition." Failure to comply inter alia with orders of the Commission to attend a hearing to testify or provide information or obstruction of proceedings would be a summary offence pursuant to s 7(10).

Section 14 (1) empowers the Commission to order an investigation into complaints in relation to matters that fall within the purview of the Act. In this regard, with the assistance of a magistrate's order, made after an application for same, it may obtain a warrant to permit its investigators to enter and search premises and inspect and remove documents or extracts of documents in the possession or control of any person. Sections 18 and 19 provide for the attendance of witnesses and the production of documents for the purposes of an investigation.

Sections 20 to 27 speak to anti-competitive agreements and abuse of dominant position. Section 20 prohibits agreements or practices which have the effect of restricting, preventing or distorting competition, while s 21 disallows the inclusion of exclusionary provisions in agreements which have the effect of preventing, restricting, or limiting the supply of goods or services. Section 22 provides that "where the Commission determines that any agreement or trade practice referred to in sections 20 and 21 is anti-competitive, it shall serve an order on the parties stating the reasons for the determination and requiring them to (a) cease the practice, or (b) to terminate the agreement" and empowers the Commission to order the payment of compensation. This section goes onto state that failure to terminate the anti-competitive agreement or practice within the time agreed with the Commission would be a summary conviction offence attracting a penalty of fifty million dollars and imprisonment for one year. (Emphasis mine)

Section 23 (1) prohibits the abuse of a dominant position and subsec (2) provides that "For the purposes of this Act, an enterprise holds a dominant position in a market if, by itself or together with an interconnected enterprise, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors." Then pursuant to s 24(1) "an enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market" with examples of such abuse being outlined. More particularly, s 24(1) (b) and (c) state that a company abuses a dominant position if it:

> "(b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market;
>
> (c) eliminates or removes any enterprise from that or any other market; ..."

Section 25 (1) permits the Commission to order an investigation where it has reason to believe that an enterprise has abused or is abusing its position of dominance in the market. On finding that there is such abuse, the Commission is then empowered pursuant to s 25 (2) to prepare a report and notify the enterprise of its findings and "direct the enterprise to cease the abusive practice immediately, or within a time period agreed with the Commission of not more than six months." The Commission appears to have applied this section in this case since it purported to hold an investigation and produced a report with findings and directions which it called recommendations. Section 25 (3) states that failure to cease an abusive practice would constitute a summary offence the penalty also being a fine of fifty million dollars and imprisonment for one year. (Emphasis mine.) The Commission may exercise similar regulatory powers in relation to exclusive dealing and market restriction with s 25 (6) permitting the Commission to prohibit such conduct. Section 26 stipulates that "the Commission shall not order an investigation in respect of an enterprise under section 25 unless it is satisfied that the enterprise controls more than forty percent of the market" and outlines how such market share is to be determined. (Emphasis mine.)

Part V permits an entity to apply to the Commission for an authorization to carry out its activities even though they would otherwise breach the provisions of the Act. Part VI provides for offences for breaches of the provisions of the Act.

Then sections 47 and 48 which fall under Part VII entitled "Enforcement, Remedies and Appeals" brings into play the High Court. Section 47 provides as follows:

"Subject to the provisions of this Act, if the High Court is satisfied on an application by the Commission that any enterprise has contravened any of the provisions of this Act, the High Court may exercise any of the powers referred to in section 48.

Section 48 outlines the powers of the High Court to order an enterprise to pay pecuniary penalties and to grant injunctions with the standard of proof in such proceedings being on a balance of probabilities. Section 49A allows the Court to take into consideration the size of an enterprise when imposing a penalty.

Models of competition commissions

Given this legislative framework, I think it is apposite to also briefly describe competition commission models in order to get a perspective on the provisions we have for the Commission in Guyana. The descriptions are taken from 'Hand Book For High Court Judges, Competition Law and Policy in Guyana' prepared by K.L. Menns Esq, November 2013. The models of competition commissions vary from country to country though many of them have similar models. The models that have been adopted can be classified as the bifurcated agency model, the bifurcated judicial model and the integrated model, with last mentioned being found primarily in non-Commonwealth countries. In some countries such as Canada, a bifurcated agency model has been adopted whereby the competition agency is divided into separate departments, with one being charged with enforcement which is an investigatory body usually called the commission, and the other being the adjudicatory body usually called a tribunal. In others, there is the bifurcated judicial model "whereby the competition agency investigates and lodges a complaint before the court for adjudication and enforcement of a remedy, or where the agency investigates, reaches an administrative finding and applies to the Court for an enforcement of a decision and the issuance of an enforcement remedy." (Menns, 60.) The integrated model sees the establishment of a commission or several bodies within the commission that are responsible for investigation or enforcement and for adjudication, however, with clear demarcations of the responsibilities of persons in order to avoid allegations of bias. (Menns, 61.) South Africa has a bifurcated agency model and a bifurcated judicial model in which there is a Competition Commission responsible for investigation and prosecution, while complaints are adjudicated by the Competition Tribunal. In addition, there is a Competition Appeal Court which is the first tier in the appellate level for hearing appeals from the Tribunal. Australia and New Zealand combine all the three models. In all the models, the adjudication or decision makers do not carry out the various administrative and investigative functions. (Menns, 69.)

Guyana appears to have adopted both a bifurcated agency model and a bifurcated judicial model though not expressly stated in the Act. I have so concluded because of the following: a number of provisions in the Act, e.g. of ss 6, 14 and 25 empower the Commission to order an investigation into complaints in relation to matters that fall within the purview of the Act. Section 7 permits the Commission to conduct inquiries and includes a reference to hearings in s 7(9), providing for the summoning of witnesses and requests for documents and other information. While not specifically so stating, since the Commission is empowered to make findings and determinations in relation to anti-competitive conduct by companies and entities, it necessarily means that it has to perform an adjudicatory function with the attendant procedural safeguards for fairness. In this sense, as mentioned earlier, the Commission plays both investigative and adjudicatory roles. However, in addition, there is judicial oversight by the High Court whereby, as noted above, ss 47 and 48 provide for the High Court to impose penalties where the Court is satisfied on an application by the Commission that an enterprise has contravened the provisions of the Act. A reading of the Act suggests that there is no real distinction in the powers of the Commission to conduct investigations, inquiries and hearings. The lines between investigation and adjudication are clearly blurred. The fact circumstances as outlined in the affidavits filed on behalf of NAMILCO and the Commission indicate that in fact the entire Commission played both these role. What is evident is that the concentration of both the investigative and adjudicative roles in one Commission without true bifurcation is fraught with danger, opening the Commission to accusations that it is a judge in its own cause as has occurred in this case.

Investigative and Adjudicative Roles and Powers pursuant to the Act

Specifically, the contentions of Mr. Dookhoo to my mind support the view that the Commission acted as both investigator and adjudicator, for while admitting that NAMILCO sought to point out

the concerns regarding hearing the evidence and the opportunity to hear the complainants, he deposed that the concerns of NAMILCO were based on a misunderstanding and or misconception of the nature of the Commission's investigative processes as well as the scope of discretion and powers conferred on it in relation to competition related matters under the Act. It was stated that the procedures adopted by the Commission were based on fairness, reasonableness and fairness of opportunity for all parties to be heard and participate in the Commission's processes. And as mentioned earlier, Mr. Dookhoo stated that NAMILCO had misconstrued the nature and adaptability of the concept of a hearing before the Commission. What exactly was meant by this statement is unclear. These statements tend to support the contention that the Commission did not appreciate that it was also operating in a quasi-judicial capacity and had to abide by fair hearing and natural justice principles and rules. The circumstances of this case highlight the dangers of having one Commission conduct or be in control of both investigation and adjudication of complaints that are taken before it or which it initiates.

It is my understanding from counsel for the parties that the Competition and Fair Trading Rules of Procedure have not as yet been adopted. If this remains the case, regulations and rules should be formulated for the guidance of the Commission for the conduct of investigations and hearings. It does appear that it is this deficiency that has led in part to some of the issues that have arisen for determination in this case. In this vein, it is strongly advised that the investigative and adjudicatory roles of the Commission be separated so as to maintain procedural fairness.

As regards the issue of whether NAMILCO abused a dominant position, as noted earlier, there is nothing in the letter or summons of September 14, 2010 which would have alerted the company that this was a charge made against it. This apparently arose for the first time at the 'hearing'. In any event, the Commission had to first comply with section 26 (1) and make a positive finding based on evidence that this company controlled more than forty per cent of the market share before even going on to investigate whether there was abuse of a dominant position. There is no indication of compliance with s 26 (1) nor is there any indication in its decision of August 15, 2011 that there was a proper investigation in this regard. The statement in Mr. Dookhoo's affidavit about NAMILCO not having provided information to rebut the presumption that it had over 40% share of the market amounts to an ex post facto determination without an evidential basis that is reflected in the findings of the Commission. The findings of the Commission indicate that it was of the view that since NAMILCO was the only manufacturer of flour in Guyana that automatically it was in a dominant position. As such, the Commission apparently started from the position that NAMILCO did enjoy a dominant position which it had to negative. Since NAMILCO provided information as regards other suppliers of flour in the market which it claimed contradicted the claim that it had a dominant position, it was even more incumbent on the Commission to apply s 26(1) before embarking on its investigation in this regard.

The Commission has no jurisdiction or authority to impose fines or terms of imprisonment. Section 25 (3) as outlined above with its reference to summary conviction clearly contemplates that a court of law is to impose such penalties. Therefore as recounted in grounds (vi) (viii) and (ix) the Commission acted outside of its statutory powers when it imposed a fine of fifty million dollars and a term of imprisonment if its ruling was not complied with. As such there was an error of law in making its findings and in its ruling as regards the penalty that it purported to impose and as a consequence its rulings and recommendations were unlawful and ultra vires the Competition and Fair Trading Act, 2006.

Although the Commission has maintained that it was merely conducting investigations and that the proceedings were not such as would apply in a Court of law, the fact remains that it has an adjudicatory function which requires that it hear both sides before coming to a determination even if the mechanism to do so is less formal than that of a court. With the greatest respect to Mr. Housty, counsel for the respondent, it appears that he appreciated that the procedure adopted by the Commission was fundamentally flawed, though arguing that the appellant's appeal should be dismissed as having no merit. Mr. Housty cited Tervita Corpn & Ors v Commissioner of Competition & Ors 2013 FCA 28 where the Federal Court of Appeal of Canada briefly discussed that since the competition tribunal had requisite expertise, the court should defer to the findings of the tribunal on economic and commercial issues including the inferences drawn from the evidence. (see paras [60] –

[61] of the judgment of the Court delivered by Mainville JA.) But this presupposes that the findings of the tribunal were not arrived at pursuant to a flawed procedure and process. Mr. Housty submitted that the overriding objectives of the competition legislation are that it should be enabled by the court so as to promote the growth of competition law and to fulfil the purposes of competition legislation. However, this cannot be at the expense of (1) having proper regulations and rules for conducting hearings; (2) compliance with such rules and (3) generally abiding by fair hearing and natural justice principles.

In this vein I think it apposite to again refer to the decision of the Canadian Supreme Court in Newfoundland which is also instructive in explaining the duty of a tribunal depending on whether it is exercising an investigative or adjudicative function. The Court went onto to hold as follows:

> "There is great diversity in administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
> A member of a board which performs a policy-formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member."

As such in determining that the decision of the commission was void because of the apprehension of bias, the concluded:

> "The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of a hearing was given, the Utility was entitled to procedural fairness. At the investigative stage, the 'closed mind' test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required commission members to conduct themselves so that there could be no reasonable apprehension of bias."

Therefore, for the reasons outlined, the decision of the Commission given on August 15, 2011 in relation to the complaints against NAMILCO is set aside. I however agree with Mr. Housty that it would not be for this court to impose a decision on the Commission but that the case should be remitted to the Commission to be dealt applying directions to the Commission on how the case should be dealt with. As a consequence of my findings, but cognizant that judicial deference should be exercised in favour of competition related issues specifically being within the purview and expertise of the Commission, IT IS ORDERED THAT this matter be remitted to the Commission, pursuant to s 51(2)(b) of the Act, with the direction that the Commission generally reconsider the entire case to which this appeal relates. In doing so, the Commission is directed to:

(1) properly formulate any charge, including a reference to the provision of the Act contravened, and serve same on or notify NAMILCO so that the company has an opportunity to answer the charge(s);
(2) properly consider any charge of which NAMILCO is notified;
(3) investigate whether in fact the complainants are or were customers of NAMILCO;

(4) investigate and consider the merits of the assertion by NAMILCO that one of the complainants was charged for conspiracy to steal from NAMILCO and whether such a case affected the merits of the complaint of this particular complainant and whether this affects all the complaints generally;
(5) serve witness statements on NAMILCO by and on behalf of complainants;
(6) (if pursued) comply with s 26(1) by determining whether NAMILCO has met the threshold of 40% of the market share as a condition precedent to the conduct of investigations and a hearing on whether NAMILCO is abusing a dominant position;
(7) hold an inquiry or hearing so that NAMILCO can confront complainants and produce or lead evidence in its defence;
(8) ensure that findings and rulings pertain to the charge(s) of which NAMILCO has been informed and for which there was a hearing;
(9) adhere to fair hearing and natural justice principles;
(10) keep a full transcript of the hearing;
(11) have Mr. Dial recuse himself from participating in any investigations or deliberations of the Commission as regards the specific complaints in this case against NAMILCO.
(12) refer the case to the High Court for required action, if necessary, pursuant to ss 47 and 48 of the Act.

Judgment for the appellant with costs in the sum of $100,000.

Roxane George
Puisne Judge
October 30, 2015