

CLASS ACTION TO SEEK DAMAGES

Why we are talking on bread giants

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THIS week's launch of a class action in the Western Cape High Court to seek damages against major bread companies must be viewed as yet another demonstration of a strong historical determination by ordinary South Africans to draw a line in the sand when it comes to fighting corruption and violations of human rights.

In an unprecedented move, the Children's Resources Centre, Black Sash, Cosatu (Western Cape), the National Consumer Forum and five individual bread consumers, decided to launch the second class action ever undertaken in South Africa on such a large scale; and the first of its kind that seeks damages for consumers.

This class action is initially aimed at representing millions of bread consumers in the Western Cape and is instituted against Tiger Consumer Brands, Pioneer Foods, and Premier Foods. We envisage that later actions may be taken on behalf of consumers nationally.

The class action resonates with the experience of the historic consumer boycotts of the 1970s and 1980s which were directed at unscrupulous companies. While these took place at a time when there was no constitution or a legal framework to provide protection to consumers, this class action is based on our gains since 1994 – on the human rights provided by the constitution, the progressive laws passed by Parliament, and the intervention of the courts for protection.

While some may wonder whether the timing of our decision to turn to the courts is not about playing the blame game for the hardship we are all experiencing as consumers because of the economic recession, a careful consideration of facts reveals that asking for the court to provide redress to consumers is not out of line with the work of the Black Sash over the past four years.

Since the competition authorities brought to light the cartel activities of these companies, we have embarked on advocacy actions against price fixing and in favour of

measures and actions that strengthen consequences for colluding companies and compensation for consumers.

As early as 2008 we noted that there was an emerging voice among civil society organisations that was calling for class action in the light of the increasing number of companies that are involved in cartel activities. The decisions handed down by the Competition Tribunal have always been viewed as the basis of such a class action, as they provide the basic evidence needed on how and when the companies contravened the law.

The reality today is that the companies involved continue to make huge profits while evidently cutting corners on competition regulations. The outcome of the investigations by the competition authorities, upon which the merits of our case are based, confirmed what we already suspected and feared: that the increase in bread prices was not some unfortunate occurrence caused by unpredictable weather patterns or the fluctuating price of fuel.

Instead, the increase was the result of a series of immoral decisions by companies less concerned about the livelihoods of consumers than about squeezing out competitors, breaking the law, and making profit. They inflated and profited illegally from the sale of a staple food that many families, especially our children, rely on to survive. These companies have given us strong reasons to launch a class action for damages.

Also, the national government gives us additional strong reasons to seek redress from the court. After 18 months of waiting for the implementation of the Companies Amendment Act and the Competition Amendment Act, we still don't have the liability and accountability mechanisms needed to deter companies from the harm they have imposed on the public, nor to rectify uncompetitive private actions.

The overwhelming frustration for many South Africans, who continue to pay high prices for basic food items because of the uncompetitive behaviour of these companies,



SLICE OF LIFE: The cartel inflated and profited illegally from the sale of a staple food that families, especially children, rely on to survive, says the writer.

convinces us that this class action is about the vigilance we must exercise in every sector of the extensive food enterprise. Whatever the outcome of this case, one precedent from the bread cartel case that is likely to be applied is the right to stand together and protect our rights as a class.

As we turn to the court for redress, we also seek to understand what may be the value that people place on knowing that a competitive environment exists for companies who often apply for tenders from government to provide public services. We also seek to understand how can the cost of this damage caused by bread cartels be calculated?

Although the companies were given administrative penalties by the competition authorities, the ordinary consumers who are suffer-

ing the hardship of the collusive and illegal actions have not been compensated. We believe they have the right to be compensated through a mechanism that must be enforced by the court.

Sadly, most of the harm resulting from the bread cartel is essentially non-remediable, only slowly to be seen in areas such as government's inability to meet the Millennium Development Goals to reduce poverty. It is the health and wellbeing of low earners and people who use state social grants largely to buy food for their family; children who benefit from the school nutrition programmes, small-scale bread distributors and other consumers that continue to be harmed by the cartels.

The penalty fines imposed so far, (the recent one against Pioneer

Foods due for confirmation today), have missed perhaps 90 percent of the hard-to-monetise damages resulting from household food insecurity that is documented in the recent General Household Survey by Statistics South Africa. This estimated that 20 percent of South African households have inadequate or severely inadequate access to food. How will the fines imposed correct this injustice? The fines have already been swallowed up by national Treasury and used for all sorts of needs. As civil society organisations we have called for more practical justice – for fines collected to be directed towards poverty-alleviation programmes.

The most difficult type of damages to measure in cases like these are those that are not easily con-

nect to an economic activity. And these are the very damages that have created a public outcry. There is no market-based way to measure most of this loss, so some economists have turned to surveys that directly ask people how much they would hypothetically be willing to accept as compensation.

The appeal of these surveys is that they provide a value to total damages, but in this case it is the entire population of bread consumers that must be compensated in a manner that ensures that those struggling families who have been forced to buy bread at competitive prices and from different competing bakeries. For the time being, in this case we will have to opt for the establishment of a trust fund to manage

the distribution of funds to benefit poverty alleviation.

In the longer run, researchers need to develop better tools to quantify damages, and to administer their distribution over a long period of time so as to take into account the immediate and long term needs of the affected communities. Of course, it would be even better if the absence of future cartel activities rendered such tools unnecessary.

Again, if these efforts to get redress through this class action were simply a matter of placing blame, we could easily prevent future cartels by firing inefficient government officials, jailing corrupt company directors, and withholding tax incentives from offending companies. We should be doing all of these things at some level to intensify our fight against corruption, and to improve competition in the markets.

The measures proposed by the new Consumer Protection Act, Companies Amendment Act and the Competition Amendment Act are steps in the right direction. But we realised a while ago that the catch with the blame game is that it focuses our attention on immediate problems and not fundamental solutions. The fundamental solution to cartels is not merely the imposition of fines or the compensation of victims; it is not just the improvement of government agencies and the enforcement of tougher competition regulations.

The fundamental solution to cartels is instilling a culture of good corporate governance and the promotion of a policy and legislative framework on food security that will break our country's dependence on the shrinking chain of local food supply and the unhealthy reliance on food imports. It won't be cheap and it won't be easy. But if we don't do it now as a country, as a way of realising the right to food that is guaranteed by the constitution, we may later be forced to turn into playing the blame game. And when that happens, we'll have no one to blame but ourselves.

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