

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT NO: 90/11

In the matter between:

THE COMPETITION COMMISSION Applicant

and

LOUNGEFOAM (PTY) LIMITED First Respondent

GOMMAGOMMA (PTY) LIMITED Second Respondent

VITAFOAM SA (PTY) LTD Third Respondent

**STEINHOFF AFRICA HOLDINGS (PTY)
LTD** Fourth Respondent

**STEINHOFF INTERNATIONAL
HOLDINGS LTD** Fifth Respondent

FELTEX HOLDINGS (PTY) LIMITED Sixth Respondent

KAP INTERNATIONAL HOLDINGS LTD Seventh Respondent

SIXTH RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION3

Chronology of events3

 The initiating documents3

 The complaint referral5

 The amendment application6

 The Tribunal decision and the appeal6

The structure of these heads of argument.....7

WHAT IS THE COMMISSION’S CASE? 10

The Commission’s argument that the complaint was initiated 11

The Commission’s alternative argument based on asymmetry..... 11

THE COMMISSION’S ARGUMENT THAT THE COMPLAINT WAS INITIATED AGAINST FELTEX 15

The Commission’s reliance on the September 2007 initiating document is misplaced..... 16

The Commission’s reliance on the November 2007 initiating document is misplaced 19

Conclusion.....22

THE COMMISSION’S ALTERNATIVE ARGUMENT BASED ON ASYMMETRY..23

The complete asymmetry argument is without merit.....23

 The argument is at odds with section 50(1)23

 The argument is at odds with section 67(1)30

 The argument is at odds with section 50(3)(a)(iii).....32

 The argument undermines the rule of law.....35

 The police analogy is misconceived.....38

The partial asymmetry argument is without merit39

Conclusion.....42

THE APPLICATION FOR LEAVE TO APPEAL43

Peremption of appeal.....43

Section 63(2) of the Competition Act45

Condonation for lateness.....49

PRAYER.....50

INTRODUCTION

1. This is an application for leave to appeal by the Competition Commission (“the Commission”) against a judgment of the Competition Appeal Court (“the CAC”). The CAC upheld two appeals against a decision of the Competition Tribunal (“the Tribunal”) granting an application to amend the complaint referral made by the Commission against the respondents. In its judgment, the CAC referred to the appeals before it as “the Feltex appeal” and “the Steinhoff appeal”. We adopt that description in these heads of argument.
2. These heads of argument are filed by the sixth respondent (“Feltex”). Feltex opposes the application for leave to appeal against that part of the CAC’s decision which upheld the Feltex appeal.

Chronology of events

The initiating documents

3. There are three initiating documents that are relevant to this application for leave to appeal:

- 3.1. On 30 September 2007,¹ the Commissioner initiated a complaint in terms of section 49B(1) of the Competition Act 89 of 1998 (“the Competition Act”) against the first respondent (“Loungefoam”) and the third respondent (“Vitafoam”). Feltex was not mentioned in this document (“the September 2007 initiating document”).
- 3.2. On 27 November 2007,² the Commissioner issued a document in which he expanded the investigation against Vitafoam and Loungefoam so as to include Feltex (“the November 2007 initiating document”). The complaint against Feltex related to a restraint-of-trade covenant in a sale-of-business agreement between Loungefoam and Feltex. The restraint-of-trade covenant was alleged to give rise to market division in contravention of section 4(1)(b)(ii) of the Competition Act.
- 3.3. On 26 May 2008,³ the Commissioner issued a document in which he expanded the investigation to include the fifth

¹ Record: Form CC1 and initiation statement volume 6 page 581

² Record: Form CC1 and initiation statement volume 6 page 582

³ Record: Form CC1 and initiation statement volume 6 page 583

respondent and the seventh respondent (“the May 2008 initiating document”).

4. These documents indicate that only one complaint was ever initiated against Feltex. That complaint concerned Feltex’s alleged involvement in market division in contravention of section 4(1)(b)(ii) of the Competition Act by virtue of the restraint-of-trade covenant.

The complaint referral

5. The Commission filed a complaint referral on 25 September 2008.⁴
6. Although the complaint referral identified four aspects of prohibited conduct, only one of them concerned Feltex (viz. the restraint-of-trade covenant that was alleged to give rise to market division in contravention of section 4(1)(b)(ii)).⁵ The complaint referral did not allege that Feltex was involved in the joint purchasing of chemicals in a manner that constituted price-fixing in contravention of section 4(1)(b)(i).⁶

⁴ Record: notice of motion volume 1 pages 1 to 2 and founding affidavit Vol 1 pages 6 to 23

⁵ Record: Nontombana volume 1 page 15 para 30

⁶ Record: Nontombana volume 1 page 13 para 29.5

The amendment application

7. On 16 February 2010, the Commission applied to amend the complaint referral.⁷ One of the amendments sought to connect Feltex to the allegations of price-fixing in respect of the joint purchasing of chemicals.⁸ We refer to this as “the Feltex amendment”.
8. Feltex opposed the Feltex amendment.⁹

The Tribunal decision and the appeal

9. The Tribunal granted the Commission leave to effect the various amendments, including the Feltex amendment.¹⁰
10. Feltex appealed to the CAC against the Tribunal's decision to allow the Feltex amendment.¹¹ The basis for the appeal was that the Feltex amendment was incompetent in law and, accordingly, the Tribunal

⁷ Record: notice of application volume 2 pages 148 to 150 and founding affidavit volume 2 pages 151 to 180

⁸ Record: Nontombana volume 2 page 157 para 10.2

⁹ Record: Theunissen volume 2 page 198 to volume 3 page 205

¹⁰ Record: Tribunal decision volume 3 pages 249 to 273

¹¹ Record: notice of appeal volume 3 pages 290 to 300

had erred in allowing it. The CAC upheld the Feltex appeal.¹² This is one of the decisions of the CAC against which leave to appeal is sought by the Commission in these proceedings.

11. Prior to applying for leave to appeal directly to this Court, the Commission launched an application for leave to appeal against the CAC's decision to the Supreme Court of Appeal. In that application for leave to appeal, the Commission appealed only against the CAC's order upholding the Steinhoff appeal.¹³ It elected not to appeal against the CAC's order upholding the Feltex appeal.¹⁴

The structure of these heads of argument

12. The matter has been set down for argument on the application for leave to appeal, as well as the merits of the appeal. As a result, we address both these issues in our heads of argument.
13. Our heads of argument are structured as follows. We deal first with the issues on the merits. In this section of the argument, we set out

¹² Record: CAC judgment volume 4 page 374 to volume 5 page

¹³ Record: Frigerio volume 7 page 658 para 40 read with Bonakele volume 7 page 677 para 12.

¹⁴ Record: Bonakele volume 7 page 677 para 12.

the Commission's case on the merits and we then deal with each of those arguments in turn:

13.1. We submit that the Commission is incorrect to contend that it, in fact, initiated a complaint against Feltex in relation to the subject matter of the Feltex amendment.

13.2. We submit that the asymmetry argument advanced by the Commission:

13.2.1. is inconsistent with the plain meaning of the Competition Act;

13.2.2. is inconsistent with the three-year time bar in section 67(1) of the Competition Act; and

13.2.3. creates the potential for abuse by the Commission of its powers of investigation of a complaint.

14. In the second section, we deal with the Commission's application for leave to appeal. We argue that leave to appeal ought not to be granted because:

- 14.1. the Commission previously elected to abide the order of the CAC upholding the Feltex appeal;
- 14.2. the Commission has ignored the mandatory provisions of section 63(2) of the Competition Act; and
- 14.3. the Commission's explanation for the delay in bringing this application for leave to appeal is inadequate.

WHAT IS THE COMMISSION'S CASE?

15. The Commission applied to the Tribunal for leave to amend (*inter alia*) “the founding, supplementary and replying affidavits in the complaint referral”.¹⁵ The CAC held that this was incompetent, and that the proper procedure was for the Commission to apply under Rule 18(1) to amend the referral form CT1(4) and simultaneously to deliver a supplementary affidavit in support of the amended allegations.¹⁶ The Commission does not contend in its heads of argument or in its application for leave to appeal that this aspect of the CAC’s judgment was incorrect. We submit that it was manifestly correct. We nevertheless accept that if this Court grants the application for leave to appeal, then it would be desirable for it to deal with the issue raised by the appeal on its merits. The submissions below are made on that basis.
16. The CAC held that the Feltex amendment is jurisdictionally incompetent because it seeks to refer to the Tribunal a complaint that has not been initiated against Feltex. The Commission contends that

¹⁵ Record: notice of motion volume 2 page 149 prayer 1

¹⁶ Record: CAC judgment volume 4 page 382 para 16

this finding was incorrect, but its reasons for advancing this contention have shifted as the case has progressed. The Commission now advances the following contentions in its heads of argument.

The Commission's argument that the complaint was initiated

17. The Commission's first argument is that it *did* "properly [initiate] a complaint into Feltex's involvement in the chemical cartel and the Feltex amendment should [therefore] have been allowed".¹⁷

The Commission's alternative argument based on asymmetry

18. The Commission's alternative argument is that it does not matter whether the subject matter of the Feltex amendment was foreshadowed in the initiating documents, because "initiation is a prerequisite for investigation, but not for referral".¹⁸ In other words, "the Act does not require symmetry between the initiating document and the referral"¹⁹ because "the Commission can refer prohibited practices that it uncovers during its investigation without amending

¹⁷ Commission's heads of argument para 55.2

¹⁸ Commission's heads of argument para 58.

¹⁹ Commission's heads of argument para 3.1

the initiating document or preparing a new initiating document each time it discovers new prohibited practice”.²⁰

19. It is unclear from the Commission’s heads of argument whether it requires symmetry between the initiating document and the scope of the investigation conducted in terms of section 49B(3) of the Competition Act. In the previous case of *Competition Commission v Yara South Africa (Pty) Ltd and Others* CCT No. 81/11 (“Yara”), the Commission argued that such symmetry was indeed required and we have therefore approached these heads of argument on the assumption that the Commission will continue to advance that argument. On that argument, the Commission accepts that it may not exceed the ambit of the initiating document when it exercises its powers to investigate a complaint. The Commission nevertheless contends that, if it fortuitously discovers evidence of prohibited conduct that does not fall within the scope of the initiating document, it may refer a complaint regarding such conduct to the Tribunal. On its own terms, therefore, the Commission’s argument is

²⁰ Commission’s heads of argument para 49

schizophrenic: it accepts the need for symmetry in the case of *the investigation* but not in the case of *the referral*.

20. There is a further level of imprecision in the Commission's heads of argument because it is unclear whether the Commission requires *any symmetry at all* between the initiating document and the referral.

20.1. At times, the Commission contends that the Competition Act "does not require symmetry between the initiating document and the referral".²¹ This appears to suggest that the referral may contain complaints which were not foreshadowed in the initiating document at all. We refer to this as "the complete asymmetry argument".

20.2. At other times, however, the Commission says that "there cannot be rigid symmetry between the formulation of a complaint in respect of a prohibited practice in the initiating document on the one hand, and its formulation in the referral to the Tribunal on the other".²² This suggests that *some* level of symmetry is indeed required, albeit less than complete

²¹ Commission's heads of argument para 42

²² Commission's heads of argument para 39 (emphasis added)

symmetry. We refer to this as “the partial asymmetry argument”.

20.3. These arguments are, on their own terms, mutually exclusive.

It is not logically possible for the Competition Act both to permit complete asymmetry between the initiation and the referral, while at the same time requiring partial symmetry between the initiation and the referral. Thus to the extent that the Commission seeks to advance both the arguments, its position is internally inconsistent. The inconsistency exists because, at times, the Commission accepts that the complaint in the referral must be substantially the same as the complaint in the initiating document, but at other times the Commission contends that no such similarity is required.

**THE COMMISSION'S ARGUMENT THAT THE
COMPLAINT WAS INITIATED AGAINST FELTEX**

21. We begin by dealing with the Commission's argument that the subject matter of the Feltex amendment was in fact initiated. In its heads of argument, the Commission contends that "the September 2007 initiating document, as extended to include Feltex by the November 2007 initiating document, properly initiated a complaint into Feltex's involvement in the chemical cartel".²³
22. This is the first occasion before this Court on which the Commission has nailed its colours to the mast of a particular initiating document. In its affidavit seeking leave to appeal to this Court, the Commission did not identify the initiating document on which it relied but stated airily that "a fair reading of the initiation documents should have led to the conclusion that the complaints against these particular respondents in respect of the prohibited conduct at issue, had been initiated".²⁴ In the complaint referral, the Commission had explicitly

²³ Commission's heads of argument para 55.2 (emphasis added)

²⁴ Record: Bonakele volume 6 page 73 para 73

identified the November 2007 initiating document as the document “which initiated the complaint against [Feltex]”.²⁵

The Commission’s reliance on the September 2007 initiating document is misplaced

23. The September 2007 initiating document identified Vitafoam and Loungefoam as the parties “whose conduct is the subject of this complaint”.²⁶ It made no reference to Feltex at all.
24. On what basis, then, can the Commission suggest that a document which makes no reference to Feltex nevertheless had the effect of “properly [initiating] a complaint into Feltex’s involvement in the chemical cartel”?²⁷ As we understand it, the Commission’s argument is that the September 2007 initiating document initiated a complaint in relation to the so-called “chemical cartel” that was not limited to Loungefoam and Vitafoam, but extended to other parties who were not identified.²⁸ In other words, the Commission argues that it may initiate a complaint without identifying the parties to be

²⁵ Record: Nontombana volume 2 page 123 para 6.1

²⁶ Record: Form CC1 volume 1 page 20 line 5

²⁷ Commission’s heads of argument para 55.2 (emphasis added)

²⁸ Commission’s heads of argument para 55.1 read with para 43.2

investigated. We submit that this argument is without merit for the reasons that follow.

25. If it were competent for the Commission to initiate an open-ended investigation against parties who are not identified, it would be entirely destructive of the rule of law. This is because the initiating document would be incapable of placing any meaningful limit on the ambit of the investigation it authorises. Given that the Commission accepts that the purpose of an initiating document is to circumscribe the Commission's investigative powers, it must also accept that the initiating document cannot be so open-ended as to permit investigations into the conduct of unidentified parties.
26. In effect, this is the ratio of *Woodlands*.²⁹ There the Commissioner had purported to initiate "a full investigation into the milk industry" in terms of section 49B(1).³⁰ The SCA held that this was incompetent. Were the position otherwise, the initiation would have imposed no meaningful constraints on the Commission's investigative powers since the Commission would have been at large to use its "far-reaching invasive powers ... for purposes of a fishing

²⁹ *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 6 SA 108 (SCA)

expedition”.³¹ It would have amounted to an abuse of power, inimical to the protection of the rights guaranteed in the Bill of Rights.³²

27. In any event, section 49B(1) of the Competition Act provides that the Commission may initiate a complaint “against an alleged prohibited practice”. A “prohibited practice” is defined in section 1 as “a practice prohibited in terms of chapter 2”. All of the practices prohibited in terms of chapter 2 are practices engaged in by a particular firm. As a matter of jurisdiction, the Commissioner has no power to initiate a complaint “in the air”. He is required to initiate a complaint in relation to a particular prohibited practice by describing a practice engaged in by an identified party.
28. The fallacy in the Commission’s argument is exposed by its reliance on the jurisprudence regarding the meaning of a “debt” under the Prescription Act. The Commission contends that this jurisprudence establishes that a complaint is not required to set out “all the parties

³⁰ Quoted in para 26 . The SCA referred to this as “the 2005 complaint initiation”.

³¹ Woodlands para 20.

³² This is the very point made by the CAC: see CAC judgment volume 4 pages 397 and 398 paras 44 and 45

allegedly party to the prohibited practice”.³³ But it is inconceivable that there could ever be a “debt” within the meaning of the Prescription Act that is not coupled to a specified debtor. In the same way that a debt cannot exist “in the air”, it is not possible for there to be a complaint “in the air”.

The Commission’s reliance on the November 2007 initiating document is misplaced

29. The November 2007 initiating document does at least mention Feltex. However, it makes no reference to the conduct that forms the subject matter of the Feltex amendment. It refers only to the restraint covenant in the sale-of-business agreement. It states that the sale-of-business agreement “remains in force ... and establishes reason to believe that Feltex, Loungefoam and Vitafoam are dividing markets in contravention of section 4(1)(b)(ii) of the Competition Act”. It does *not* state that Feltex is suspected of contravening section 4(1)(b)(i), which is the allegation made in the Feltex amendment.

³³ Commission’s heads of argument para 45

30. The reason why the November 2007 initiating document did not do so is apparent: it was only during the course of preparing for trial shortly before the amendment application that the Commission became aware of Feltex's alleged involvement in price-fixing relating to the joint purchasing of chemicals.³⁴ The Commission did not initiate an investigation regarding Feltex's involvement in price-fixing in November 2007 for the simple reason that it had no reason to suspect Feltex of any involvement at that time.
31. In an effort to get around this problem, the Commission contends that the November 2007 initiating document initiated an open-ended complaint against Feltex that "did not limit the scope of the initiation or exclude Feltex from investigation for other possible contraventions of section 4(1)(b)(i) or (ii)".³⁵ But this contention is bad in law for the reasons that follow.
32. It would undermine the rule of law if it were competent for the Commission to initiate an open-ended complaint that does not "limit the scope of the initiation".³⁶ This is because the Commission

³⁴ Record: Bonakele volume 5 page 479 para 20

³⁵ Commission's heads of argument para 55.2

³⁶ Commission's heads of argument para 55.2

accepts that the purpose of the initiating document is to circumscribe its investigative powers. That purpose would be negated if the initiating document could trigger an investigation into any conduct that falls foul of the Competition Act, since this would impose no limitation at all on the Commission's investigative powers. Given that the Commission accepts that the purpose of an initiating document is to circumscribe its investigative powers, it must also accept that the initiating document cannot be so open-ended as to constitute a "blank cheque".

33. The SCA in *Woodlands* also held that it is a jurisdictional requirement for the initiating of a complaint in terms of section 49B(1) 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",³⁷ since otherwise there could not be a "rational exercise of the power".³⁸ In the present circumstances, however, the Commissioner had no reason to suspect

³⁷ *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 6 SA 108 (SCA) para 13.

³⁸ *Ibid*

Feltex of involvement in price-fixing in relation to chemical procurement in November 2007. This provides another reason why the November 2007 initiating document cannot be construed as a “blank cheque” authorising the Commission to investigate an open-ended complaint against Feltex that “did not limit the scope of the initiation or exclude Feltex from investigation for other possible contraventions of section 4(1)(b)(i) or (ii)”.³⁹ If the initiating document were to be construed in this manner, it would mean that the Commissioner did not exercise his powers rationally in November 2007.

Conclusion

34. For all of these reasons, we respectfully submit that there is no merit in the Commission’s argument that it initiated a complaint against Feltex regarding the subject matter of the Feltex amendment.

³⁹ Commission’s heads of argument para 55.2

**THE COMMISSION'S ALTERNATIVE ARGUMENT BASED
ON ASYMMETRY**

35. We turn now to deal with the Commission's alternative argument based on asymmetry. We submit that the argument is unsustainable in both its guises, that is (a) in the guise which is based on *complete* asymmetry between the initiation and the referral and (b) in the guise based on *partial* asymmetry between the initiation and the referral. We address these arguments in turn.

The complete asymmetry argument is without merit

The argument is at odds with section 50(1)

36. Section 50(1) of the Competition Act envisages that the same "complaint" will be initiated by the Commission and referred to the Tribunal:

36.1. The process begins with

- the "initiating" of a complaint by the Commission⁴⁰ or

⁴⁰ Section 49B(1)

- the submission of “information” or a “complaint” by a private person.⁴¹

36.2. In the present case, the Commission relies exclusively on section 49B(1). In other words, this was a self-initiated complaint. It is therefore unnecessary to consider what the position would have been if a third party had submitted information or a complaint in terms of section 49B(2).

36.3. Upon the initiation of a complaint in terms of section 49B(1), the Commissioner must direct an inspector “to investigate the complaint”.⁴² What must be investigated is the complaint “against an alleged prohibited practice”, as referred to in section 49B(1). The Commission accepts that its investigation may not travel outside the terms of that complaint.

36.4. In the case of a self-initiated complaint, the Commission may at any time “refer the complaint to the Tribunal”.⁴³ What must be referred to the Tribunal is the complaint “against an alleged prohibited practice”, as referred to in section 49B(1). The

⁴¹ Section 49B(2)

⁴² Section 49B(3)

Commission itself accepts that section 50(1) provides “for the Commission to refer its own complaint to the Tribunal at any time after initiating it”.⁴⁴ In other words, what the Commission refers to the Tribunal is the same complaint that it initiated.

36.5. The Tribunal is required to conduct a hearing “into every matter referred to it in terms of this Act”.⁴⁵ The Tribunal only has jurisdiction to adjudicate prohibited conduct if such conduct has been referred to it in terms of Part C of Chapter 5. It does not have a free-floating power to investigate prohibited conduct of its own accord.

37. The centrepiece of the procedure described above is the “complaint against an alleged prohibited practice”, as referred to in section 49B(1). It is this complaint that must be initiated, investigated and referred to the Tribunal. The plain language of section 50(1) means that the Commission has no power in law to refer to the Tribunal a complaint that has *not* been initiated in terms

⁴³ Section 50(1)

⁴⁴ Commission’s heads of argument at para 31 (emphasis added).

⁴⁵ Section 52(1)

of section 49B(1). That is fatal to the complete asymmetry argument.

38. We respectfully submit that the plain language of the Competition Act cannot be avoided. It is trite that when courts interpret legislation for conformity with the Constitution they are constrained by the language of the statute, and must avoid an interpretation which is unduly strained.⁴⁶ Words may only be given interpretations which they are reasonably capable of bearing.⁴⁷ In *South African Police Service v Public Servants Association*, this Court held that:

“Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.”⁴⁸

⁴⁶ Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; I In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) paras 23 to 24

⁴⁷ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) para 24; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20

⁴⁸ 2007 (3) SA 521 (CC) para 20

39. This Court made the same point in *S v Zuma and Others*,⁴⁹ when it “cautioned against using the Constitution to interpret the language of legislation to mean whatever a court wants it to mean”.⁵⁰
40. How, then, does the Commission seek to get around this obvious textual difficulty? It does so by seeking to argue that, although section 49B(1) refers to the initiation of “a complaint” and although section 50 refers to the referral of “the complaint”, this does not require symmetry between the initiating document and the referral because a “complaint” is “a broad term that encompasses more than just the cause of action”.⁵¹ In support of this contention, the Commission relies on case law under the Prescription Act. We submit, however, that the Commission’s reliance on the Prescription Act carries the seeds of its own destruction since it necessarily means that the complete asymmetry argument collapses into the partial asymmetry argument:

⁴⁹ 1995 (2) SA 642 (CC) paras 17 to 18

⁵⁰ This is the description of the *Zuma* decision given by the SCA in *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA) para 27

⁵¹ Commission’s heads of argument para 42

40.1. The jurisprudence under the Prescription Act requires a comparison to be made between the allegations in the original particulars of claim and the allegations in the amended particulars of claim in order to see if “the debt” is substantially the same.⁵² The question is whether the right of action relied on in the amendment “is recognisable as the same or substantially the same as that relied upon in the particulars of claim in its original form”.⁵³ The mere fact that there is some overlap of factual allegations in the pre-amendment and post-amendment particulars of claim is not enough. The right of action disclosed in the amended particulars of claim “must at least be recognisable as the same or substantially the same as the right disclosed in the original claim”.⁵⁴

40.2. The Commission ignores this comparative assessment when it contends that the analogy to the Prescription Act means that a complaint in terms of the Competition Act “need only identify the outcome or effect complained of, but would not need to set

⁵² CGU Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 (SCA)

⁵³ Firstrand Bank Ltd v Nedbank (Swaziland) Ltd 2004 (6) SA 317 (SCA) para 4

⁵⁴ Firstrand Bank Ltd v Nedbank (Swaziland) Ltd 2004 (6) SA 317 (SCA) para 9

out all the material facts giving rise to the effect, or plead the formal elements of a prohibited practice, including all the parties allegedly party to the prohibited practice, or link the complaint to a particular provision of the Act”.⁵⁵ The Prescription Act jurisprudence to which the Commission refers is relevant to the question whether a proposed amended pleading will introduce a claim which has prescribed. The jurisprudence does not speak to the question of what degree of particularity is required in the original pleading.

40.3. The Commission is therefore incorrect to claim that the jurisprudence on which it relies establishes that *less* rather than *more* particularity is required in the original pleading. The jurisprudence is only relevant to the question whether the complaint disclosed in the initiating document (which is akin to the original pleading) is the same or substantially the same as the complaint disclosed in the referral (which is akin to the amended pleading). If it is not substantially the same, then the Prescription Act analogy indicates that the referral is not

⁵⁵ Commission’s heads of argument para 45

competent, just as a proposed amendment which seeks to introduce a new claim would not be permitted.

The argument is at odds with section 67(1)

41. The argument based on complete asymmetry is inconsistent with section 67(1) of the Act, which provides as follows:

“A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.”

42. Section 67(1) means that after a prohibited practice has ceased, the Commission has three years within which to initiate a complaint into that practice. Unless there is a requirement of symmetry between the initiation of a complaint and its referral, the time bar on the initiation of a complaint would be undermined. This is because, if it were competent to include in the referral a complaint which was not contained in the initiation, then it would also be competent to include in the referral a complaint which relates to practices which ceased more than three years prior to the referral.
43. This is precisely the effect of the Commission’s complete asymmetry argument. On that argument, the Commission is constrained to

initiate (and hence commence the investigation into) a complaint within three years after a prohibited practice has ceased.⁵⁶ However, because there is no symmetry required between the initiation of a complaint and its referral,⁵⁷ the Commission is at liberty to refer a complaint to the Tribunal at any time notwithstanding the fact that the practice ceased more than three years previously.

44. According to the Commission, “there is no time limit imposed by section 50(1) on the period within which the Commission may refer a complaint that is has initiated to the Tribunal”.⁵⁸ Although section 50(1) does not expressly refer to a time limit, it does state that a complaint cannot be referred in the absence of an initiation. The section provides that “at any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal”.⁵⁹ The initiation of a complaint is therefore a jurisdictional prerequisite to the referral of that complaint.

⁵⁶ Commission’s heads of argument para 27

⁵⁷ Commission’s heads of argument para 42

⁵⁸ Commission’s heads of argument para 54

⁵⁹ Emphasis added

45. We therefore submit that section 50(1) of the Competition Act must be interpreted to require symmetry between the initiation and the referral. Without this symmetry, the legislature's clear decision to time-bar investigations into prohibited practices (which the Commission accepts is a legitimate purpose)⁶⁰ would be undermined.⁶¹ In effect, the Commission could short-circuit the time bar in section 67(1) by the simple device of not initiating a complaint into the referred conduct at all.
46. In the alternative, if the Court is persuaded to adopt the Commission's asymmetry argument, we submit that at the very least the Court should build in the protection that only complaints in relation to practices which occurred within the three years prior to the referral, may be referred.

The argument is at odds with section 50(3)(a)(iii)

47. Section 50(3)(a)(iii) of the Act provides that the Commission may "add particulars to the complaint as submitted by the complainant" when it refers a third-party initiated complaint to the Tribunal. Since

⁶⁰ Commission's heads of argument para 27

the Commission's express power to "add particulars to the complaint as submitted by the complainant" does not apply in the case of a self-initiated complaint, this means that the Commission is deprived of such a power. This is fatal to the complete asymmetry argument, which seeks to give the Commission a power that the legislature has denied.

48. The Commission seeks to avoid this conclusion by contending that the power referred to section 50(3)(a)(iii) must be implied in the context of a self-initiated complaint. It relies on the general principle that "the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given".⁶² But the general principle can hardly apply where Parliament has expressly conferred the power to add particulars in the case of a third party-initiated complaint but not in the case of a self-initiated complaint. If the power to add particulars were "necessary" to give effect to the Commission's express powers, there would have been no need for section 50(3)(a)(iii) in the first place.

⁶¹ Record: CAC judgment volume 5 page 401 para 50

⁶² *Matatiele Municipality v President of the RSA* 2006 5 SA 47 (CC) para 50

Put simply, the implied power for which the Commission contends, is inconsistent with the express power in section 50(3)(a)(iii).

49. The Commission also contends that section 50(3)(a)(iii) of the Competition Act must be interpreted to permit it to add “claims to its referral which were not included in the complaint’s initial complaint”.⁶³ However, the very jurisprudence under the Prescription Act on which the Commission relies, makes it clear that what cannot be introduced by way of an amendment more than three years after the debt was due is a new “claim”.⁶⁴ Therefore, the proposition that section 50(3)(a)(iii) must be interpreted to permit new *claims* to be introduced is in fact inconsistent with the Prescription Act jurisprudence. In addition, as we set out above, the proposition undermines the time bar of three years which the Legislature has placed on investigations into prohibited practices because it would permit new “claims” to be introduced under section 50(3)(a)(iii) of the Competition Act in relation to practices which had ceased more than three years previously.

⁶³ Commission’s heads of argument para 33.2.3

⁶⁴ *Rustenburg Platinum Mines v Industrial Maintenance Painting Services* [2009] 1 All SA 275 (SCA) para 13

The argument undermines the rule of law

50. Thus far we have concentrated on the language of the Competition Act. At the level of principle, however, the complete asymmetry argument undermines the rule of law since it creates the potential for Commission to abuse its investigative powers. The point may be illustrated by having regard to the Commission's power to summon a person to an interrogation in terms of section 49A:

50.1. The Commission accepts that its powers of interrogation may only be exercised in relation to the subject matter of the investigation, as delineated by the initiating document.

50.2. On the *Woodlands* line of authority, the Commission has little incentive to ask questions that exceed the subject matter of the investigation (as delineated by the initiating document). The reason is that, even if the Commission were to secure an answer that provides evidence of additional cartel behaviour, it could not refer that cartel behaviour to the Tribunal without initiating a fresh complaint.

50.3. The position would be different if the complete asymmetry argument were to be upheld. In this case, the potential exists that the Commission may ask questions that travel outside the ambit of the investigation (as delineated by the initiating document) because it could refer any additional cartel behaviour to the Tribunal without initiating a fresh complaint. A person being interrogated without legal assistance would have no way of knowing whether a question was legitimate (i.e. within the ambit of the initiating document) or illegitimate (i.e. outside the ambit of the initiating document). Where a person being interrogated is represented by a lawyer who objects to a question as being illegitimate, it would be necessary to secure an immediate ruling from the Tribunal as to the legitimacy of the question because it would no longer be possible to object to the referral at a later stage on the basis that it includes a complaint which was not identified in the initiating document.

51. In short, the *Woodlands* line of authority creates a prophylactic rule which ensures that the Commission is constrained to act within the

terms of the initiating document. This is particularly important in circumstances where (as the CAC pointed out) the Commission's powers "are capable of being abused by the Commissioner as past experience has regrettably demonstrated".⁶⁵ The application of the *Woodlands* rule means that if the Commission, during the course of an investigation into prohibited practice X discovers information that prohibited practice Y has also been committed, it would be required to initiate a further investigation into prohibited practice Y before the investigation could cover facts related to prohibited practice Y. This procedure would have an important disciplining effect on the conduct of investigations.

52. By contrast, if the complete asymmetry argument were to be upheld, that disciplining effect would disappear. Its disappearance would be inimical to the rule of law since the whole purpose of circumscribing the Commission's powers of investigation is "to protect the rights of those subjected to investigation".⁶⁶

⁶⁵ Record: CAC judgment volume 4 page 397 para 44, citing Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA)

⁶⁶ Record: CAC judgment volume 4 page 398 para 45

The police analogy is misconceived

53. In support of the complete asymmetry argument, the Commission contends that it would be “surprising if the Commission were to be held to a higher standard than the police in this regard”.⁶⁷ But the only thing that is surprising is the contention itself, since it is so obviously at war with the case advanced by the Commission in its application to this Court for leave to appeal. There the Commission contended that “the analogy with criminal procedure ... is simply not warranted by the Competition Act”.⁶⁸ Indeed the Commission saw fit to criticise the CAC’s police analogy as involving a “narrow, formalistic interpretation of the Commission’s powers to initiate, investigate and refer a complaint of prohibited practice”.⁶⁹
54. In any event, the investigative powers of the Commission differ from those of the police because they are generally exercised without judicial oversight.⁷⁰ The point is that the Commissioner is “both the gamekeeper striving to catch the perpetrators of anti-competitive

⁶⁷ Commission’s heads of argument para 38.2

⁶⁸ Record: Bonakele volume 6 page 504 para 62

⁶⁹ Record: Bonakele volume 6 page 503 para 60

conduct and the gatekeeper to the exercise by inspectors on the Commissioner's staff of the power of interrogation and some powers of entry, search and seizure".⁷¹ There is accordingly good reason to circumscribe the powers of the Commission more narrowly than the police.

The partial asymmetry argument is without merit

55. We have indicated that, in parts of its argument, the Commission does not contend for complete asymmetry. In these places, the Commission's heads of argument invoke the "analogy" of the Prescription Act⁷² and decry a need for "rigid symmetry".⁷³ On this argument, the Commission accepts that it may not refer a complaint to the Tribunal unless the complaint was foreshadowed in the initiating document (in the same way that a private litigant may not amend its particulars of claim in order to introduce a prescribed claim that was not foreshadowed in the original particulars of claim).

⁷⁰ Record: CAC judgment volume 4 page 397 para 44

⁷¹ Ibid

⁷² Commission's heads of argument para 44

⁷³ Commission's heads of argument para 39

This is what we have referred to as the “partial asymmetry argument”.

56. All of our submissions in relation to the complete asymmetry argument apply equally to the partial asymmetry argument. In other words, all of the reasons why complete asymmetry is inconsistent with the Competition Act and the rule of law, apply equally to partial asymmetry.

57. There is, however, an additional reason why the partial asymmetry argument is misconceived on the present facts. The Commission’s reliance on the analogy of the Prescription Act is destructive of its case against Feltex because the service of legal proceedings against debtor X could never interrupt the running of prescription against another debtor Y. We make this submission for the following reasons:

57.1. As Ramsbottom J pointed out more than 50 years ago,

“a right has its origin in some transaction or relationship. A right may arise out of a contract between A and B which A can enforce against B. And a right may arise out of a contract between C and B which

C can enforce against B. A's rights and C's rights are different rights."⁷⁴

57.2. The same principle applies to the debtor side of the equation: a debt owed by X to Z and a debt owed by Y to Z are two different debts. It is inconceivable that the service of legal proceedings on debtor X could ever interrupt the running of prescription against debtor Y. Similarly, if a process seeks to enforce two debts, it will only interrupt prescription in respect of both debts if it is effective as a means of commencing legal proceedings in respect of both. If it is effective only in respect of one, then this will not enure for the benefit of the creditor in respect of the other.⁷⁵

57.3. Once this is accepted, the Commission's case self-destructs. As soon as the Commission concedes that the complaint disclosed in the referral must be "the same or substantially the same" as the complaint disclosed in the initiating document (by analogy to the Prescription Act), it can have no case

⁷⁴ Park Finance Corporation (Pty) Ltd v van Niekerk 1956 (1) SA 669 (T) at 673H

⁷⁵ Evins v Shield Insurance Co Ltd supra 842F-G. Cf Park Finance Corporation (Pty) Ltd v Van Niekerk 1956 1 SA 669 (T) 673A-C; Erasmus v Grunow 1978 4 SA 233 (O) 245E

against Feltex in relation to the subject matter of the Feltex amendment. This is because the September 2007 initiating document initiated a complaint in relation to price fixing in relation to procurement *against Vitafoam and Loungefoam*. In contrast, the Commission now seeks to refer to the Tribunal that complaint *against Feltex*. This is manifestly not “the same or substantially the same” complaint that was disclosed in the September 2007 initiating document, since the “debtor” is different in each case.

Conclusion

58. For the reasons set out above, we submit that the Commission’s argument based on asymmetry is without merit. The complete asymmetry argument is inconsistent with the plain language of the Competition Act and undermines the rule of law. The same objections apply to the partial asymmetry argument, which is also unsustainable on the facts.

THE APPLICATION FOR LEAVE TO APPEAL

Peremption of appeal

59. It is common cause that the Commission did not seek leave to appeal to the SCA against the CAC's decision to uphold the Feltex appeal.⁷⁶
60. There is also no dispute between the parties as to the proper legal test for peremption of an appeal. Our law establishes that in order for a party successfully to claim that its opponent has perempted an appeal, it is necessary to establish that the other party's unequivocal conduct was inconsistent with an intention to appeal.⁷⁷
61. On 3 June 2011, the Commission elected to seek leave to appeal to the SCA against only the CAC's order upholding the Steinhoff appeal.⁷⁸ Significantly, the Commission does not state that it erroneously failed to appeal against the CAC order upholding the Feltex appeal or that an instruction to appeal against that order was not carried out by its legal representatives. Instead, it explains that on

⁷⁶ Record: RA Vol 7 page 677 para 12

⁷⁷ Government of the Republic of South Africa and Others v Van Abo 2011 (5) SA 262 (SCA) at para 15

⁷⁸ Record: application for leave to appeal to the SCA volume 5 pages 414 lines 1 to 9

3 June 2011 it “decided” not to appeal against the CAC order upholding the Feltex appeal.⁷⁹

62. We submit that there can be no clearer indication that a party does not intend to appeal against one order than that it seeks leave to appeal only against another order in the same case. If the court *a quo* grants order A and order B and if a litigant seeks leave to appeal against B only, it has demonstrated an intention not to appeal against A.⁸⁰ This is, in essence, what occurred in the present case.

63. The Commission’s response is to say that it “has never accepted the correctness of certain findings in the *Woodlands* decision”.⁸¹ But an appeal lies against the substantive order of the court *a quo*, not against the reasons for its order.⁸² In the present case, the Commission had a clear opportunity to appeal against the CAC’s order upholding the Feltex appeal but it “decided” not to do so. That

⁷⁹ Record RA Vol 7 page 677 para 12

⁸⁰ Cf *Lynn & Main Inc v Mitha* 2006 (5) SA 380 (N) para 10, where the court held that “the withdrawal of the application for leave to appeal is an unequivocal notice that the respondent acquiesced in the judgment of Baqwa AJ”.

⁸¹ Record RA Vol 7 page 678 para 12.2. This is repeated in paragraph 83.1 of the Commission’s heads of argument.

⁸² *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 395G; *South African Reserve Bank v Khumalo* [2011] 1 All SA 26 (SCA) para 4.

is a final and unequivocal indication that it did not intend to appeal against the CAC's order upholding the Feltex appeal.

64. Notwithstanding the Commission's suggestion to the contrary, it is not permitted to change its mind. Feltex has objected to its attempt to do so⁸³ and the Commission's decision not to appeal was not a mere statement of intention which the law permits a party to change prior to it being carried out.⁸⁴ On the contrary, the Commission "decided" not to appeal against the CAC's order upholding the Feltex appeal and any appeal against that order was accordingly perempted.

Section 63(2) of the Competition Act

65. Section 63(2)(a) of the Competition Act provides that an appeal to the Constitutional Court against a decision of the CAC may only be brought with leave of the CAC.

⁸³ The exception to the general principle that a party may change his or her mind which is highlighted by the Commission in paragraph 83.2 of its heads of argument was therefore met in this case.

⁸⁴ *Fick v Walters and Another* 2005 (1) SA 475 (C) at para 32 citing *Clarke v Bethal Co-operative Society* 1911 TPD 1152 with approval

66. In this case, no such leave was obtained.⁸⁵ A mandatory provision of the Competition Act was therefore ignored by the Commission and on that basis alone the application for leave to appeal is not properly before this Court.
67. In its founding papers, the Commission sought to avoid this consequence by asserting that section 63(2) of the Competition Act was inconsistent with section 167(6) of the Constitution and therefore unconstitutional.⁸⁶
68. In its heads of argument, the Commission appears to have abandoned this argument. Instead, it now claims that the inconsistency between section 63(2) of the Competition Act and section 167(6) of the Constitution can be “reconciled” through an act of interpretation.⁸⁷
69. This approach is inconsistent with this Court’s long line of authority on the proper limits of interpretation which we set out above at paragraphs 38 and 39. That jurisprudence makes it clear that collateral attacks to the constitutionality of legislation through the

⁸⁵ Record: Bonakele volume 6 page 533 para 105

⁸⁶ Record Bonakele volume 6 page 534 para 105.3

⁸⁷ Commission’s heads of argument para 87.5

guise of interpretation are illegitimate.⁸⁸ Where the words cannot reasonably accommodate the contended meaning, they must be declared unconstitutional. To hold otherwise would undermine the principle of the separation of powers and usurp the position of the legislature.⁸⁹

70. The question in this case is therefore whether a legislative provision which stipulates that a decision of the CAC may *only* be appealed to this Court with leave of the CAC, may be interpreted to permit appeals to this Court where no such leave has been obtained. The only way in which that outcome could be achieved, is by deleting the word “only” in section 63(2). We respectfully submit that this result could only be achieved through the remedy of striking-out and not through an exercise of interpretation.

71. The Commission seeks to counter this conclusion by relying on the SCA’s decision in *American Natural Soda Ash Corporation v Competition Commission (2)* 2005 (6) SA 158 (SCA) (“Ansac”) at

⁸⁸ Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) at para 43

⁸⁹ South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA) para 29

paras 13 to 15.⁹⁰ To the extent that *Ansac* held that there was no express provision of the Competition Act which ousted the SCA's jurisdiction over the interpretation and application of chapters 2, 3 and 5 of the Competition Act, we respectfully submit that the SCA erred. Section 62(3)(a) of the Competition Act expressly conferred *final* appellate authority over the interpretation and application of chapters 2, 3 and 5 of the Competition Act on the CAC. That express wording cannot be interpreted to mean that the CAC is not, in fact, the final appellate court on matters within its exclusive jurisdiction. That result could only have been achieved through finding 62(3)(a) of the Competition Act invalid. We therefore submit, with respect, that this Court should not follow the approach adopted by the SCA in *Ansac* given that it is inconsistent with this Court's own authority on the proper limits of interpretation.

72. In the event that this Court finds that leave from the CAC was required, the Commission requests that the Court condone its failure to have obtained leave.⁹¹ However, a court has no power to condone

⁹⁰ Commission's heads of argument para 87.5

⁹¹ Commission's heads of argument para 88

non-compliance with a statute or to condone non-compliance with another court's processes.⁹² This request is therefore incompetent.

Condonation for lateness

73. We respectfully submit that the Commission's explanation for its delay in bringing this application for leave to appeal is inadequate. The application for leave to appeal was submitted more than four months late⁹³ and the Commission never adequately explains why four months were required to launch the application. Moreover, it never explains why there was suddenly a change in attitude to include the Feltex appeal in this application for leave to appeal when two weeks earlier it had decided not to pursue the Feltex appeal to the SCA.⁹⁴
74. We accordingly submit that condonation should not be granted.

⁹² National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) para 10

⁹³ Record: Frigerio volume 7 page 648 para 14.

⁹⁴ Record: Bonakele volume 7 page 678 para 12.3.

PRAYER

75. Feltex asks that the application for leave to appeal (*alternatively* the appeal itself) be dismissed to the extent that the Commission seeks to appeal against the following paragraphs of the CAC's order:

75.1. paragraph 1; and

75.2. paragraph 3[1](b), but only to the extent that this paragraph refused the amendments referred to in paragraph 10 of annexure A to the Tribunal's decision.

ALFRED COCKRELL SC

KATE HOFMEYR

**Chambers
Sandton
16 January 2012**

LIST OF AUTHORITIES

American Natural Soda Ash Corporation v Competition Commission (2) 2005 (6) SA 158 (SCA).....	48
CGU Insurance Ltd v Rundel Construction (Pty) Ltd 2004 (2) SA 622 (SCA).....	28
Clarke v Bethal Co-operative Society 1911 TPD 1152.....	45
Erasmus v Grunow 1978 4 SA 233 (O).....	41
Fick v Walters and Another 2005 (1) SA 475 (C).....	45
Firststrand Bank Ltd v Nedbank (Swaziland) Ltd 2004 (6) SA 317 (SCA)	28
Government of the Republic of South Africa and Others v Van Abo 2011 (5) SA 262 (SCA).....	43
Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; I In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC).....	26
Lynn & Main Inc v Mitha 2006 (5) SA 380 (N)	44
Matatiele Municipality v President of the RSA 2006 5 SA 47 (CC).....	34
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC).....	26
Park Finance Corporation (Pty) Ltd v van Niekerk 1956 (1) SA 669 (T).....	41
Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC).....	47
Pretoria Portland Cement Co Ltd v Competition Commission 2003 (2) SA 385 (SCA).....	37
Rustenburg Platinum Mines v Industrial Maintenance Painting Services [2009] 1 All SA 275 (SCA)	34
S v Zuma and Others 1995 (2) SA 642 (CC).....	27
Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk 1970 (3) SA 367 (A).....	44
South African Airways (Pty) Ltd v Aviation Union of South Africa and Others 2011 (3) SA 148 (SCA)	27
South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)	26

South African Reserve Bank v Khumalo [2011] 1 All SA 26 (SCA)	44
Woodlands Dairy (Pty) Ltd v Competition Commission 2010 6 SA 108 (SCA).....	17

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT NO: 90/11

In the matter between:

THE COMPETITION COMMISSION

Applicant

and

**LOUNGEFOAM (PTY) LIMITED
GOMMAGOMMA (PTY) LIMITED
VITAFOAM SA (PTY) LTD
STEINHOFF AFRICA HOLDINGS (PTY)
LTD
STEINHOFF INTERNATIONAL
HOLDINGS LTD
FELTEX HOLDINGS (PTY) LIMITED
KAP INTERNATIONAL HOLDINGS LTD**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

SIXTH RESPONDENT'S PRACTICE NOTE

1. Nature of the proceedings:

- 1.1. This is an application for leave to appeal by the Competition Commission ("the Commission") against a judgment of the Competition Appeal Court ("the CAC"). The CAC upheld two appeals against a decision of the Competition Tribunal ("the

Tribunal”) granting an application to amend the complaint referral made by the Commission against the respondents.

2. Issues to be argued:

2.1. Whether leave to appeal should be granted.

2.2. Whether, if leave is granted:

2.2.1. the Commission did in fact initiate a complaint against the sixth respondent into the so-called “chemical cartel”; and

2.2.2. the Competition Act 89 of 1998 (“the Competition Act”) requires symmetry between the ambit of an initiation of a complaint and the ambit of the subsequent referral of that complaint to the Competition Tribunal (“the Tribunal”).

3. Relevant portions of the record:

3.1. All except items 16, 21 and 22.

4. Estimated duration of the argument:

4.1. One day.

5. Summary of the sixth respondent’s main arguments:

5.1. Given that the matter has been set down for argument on the application for leave to appeal, as well as the merits of the appeal, we address both these issues. In so far as the merits of the Commission's case are concerned, we submit:

5.1.1. that the Commission is incorrect to contend that it, in fact, initiated a complaint against Feltex in relation to the subject matter of the Feltex amendment; and

5.1.2. that the asymmetry argument advanced by the Commission:

5.1.2.1. is inconsistent with the plain meaning of the Competition Act;

5.1.2.2. is inconsistent with the three-year time bar in section 67(1) of the Competition Act; and

5.1.2.3. creates the potential for abuse by the Commission of its powers of investigation of a complaint.

5.2. In so far as the application for leave to appeal is concerned, we submit that leave to appeal ought not to be granted because:

5.2.1. the Commission previously elected to abide the order of the CAC upholding the Feltex appeal;

5.2.2. the Commission has ignored the mandatory provisions of section 63(2) of the Competition Act; and

5.2.3. the Commission's explanation for the delay in bringing this application for leave to appeal is inadequate.

6. Main authorities on which the sixth respondent will rely:

6.1. American Natural Soda Ash Corporation v Competition Commission (2) 2005 (6) SA 158 (SCA)

6.2. Lynn & Main Inc v Mitha 2006 (5) SA 380 (N)

6.3. Rustenburg Platinum Mines v Industrial Maintenance Painting Services [2009] 1 All SA 275 (SCA)

6.4. Woodlands Dairy (Pty) Ltd v Competition Commission 2010 6 SA 108 (SCA)