

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: CCT 81/11**

In the matter between:

**THE COMPETITION COMMISSION OF SA**

Applicant

and

**YARA SOUTH AFRICA (PTY) LTD**

First respondent

**OMNIA FERTILIZER LIMITED**

Second respondent

**SASOL CHEMICAL INDUSTRIES (PTY) LTD**

Third respondent

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**APPLICANT'S SUBMISSIONS**

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## INTRODUCTION

1. This application for leave to appeal arises out of a judgment by the Competition Appeal Court (“the CAC”) in which it set aside the referral of a complaint to the Competition Tribunal (“the Tribunal”) by the applicant (“the Commission”) against the respondents (“Sasol”, “Omnia” and “Yara”), for alleged contraventions of s 4(1)(b) of the Competition Act 89 of 1998. The Commission’s referral was based on an initiating complaint submitted to it by Nutri-Flo CC and Nutri-Flo Fertilizer CC (“Nutri-Flo”), which alleged, among other things, that the respondents were engaged in cartel conduct in respect of certain fertilizer products.
2. In setting aside the referral, we respectfully submit that the CAC erred in three respects:
  - 2.1. First, it considered and determined a challenge to the validity of the referral at a time when Omnia – the party that pursued that challenge by instituting a counter-application – was precluded from impugning the validity of the referral. Omnia had previously tried, unsuccessfully, to review and set aside the referral, and was not entitled to advance new grounds in a further attempt to procure the same relief.
  - 2.2. Second, the CAC incorrectly interpreted the Competition Act to find that when the Commission refers a complaint to the Tribunal, its referral

may not go wider than the initiating complaint on which it is based. In fact, as we set out below, the Commission is entitled to add new particulars to an initiating complaint that it has received from a third party when it refers that complaint to the Tribunal.

- 2.3. Third, the CAC mistakenly found that Nutri-Flo had not intended the allegations of collusive conduct contained in its initiating complaint to form part of its complaint to the Commission. That finding is at odds with the fact that Nutri-Flo submitted an initiating complaint to the Commission on the prescribed form, to which it annexed an affidavit in which it alleged, among other things, that Yara and Omnia were engaged in cartel conduct with Sasol. In those circumstances, we submit that Nutri-Flo's initiating complaint duly and properly alleged that Yara and Omnia were engaged in cartel activities with Sasol in breach of s 4(1)(b) of the Competition Act.
3. We shall submit that the CAC's findings were based on a misapprehension of both the purpose of the initiating complaint and the scope of the Commission's powers of referral, which had evolved out of the CAC's interpretation of the complaint procedure stipulated by the Act.
4. In these submissions, we will begin by setting out the facts that give rise to this application for leave to appeal. (For the convenience of the Court, we have also prepared a chronology, which will be filed with these submissions.) We then turn to the procedural objection to the CAC's findings, namely that it allowed

Omnia improperly to pursue a piecemeal review. Next, we address the merits of the appeal by describing both the complaint procedure prescribed by the Act and the CAC's interpretation of it, before setting out the flaws with its approach. Finally, we will address the interests of justice in granting the Commission leave to appeal and the issue of condonation.

5. Our submissions on the merits are supported by, and advance, the Tribunal's stance in the recent decision in *South African Breweries Limited and Others v Competition Commission* ("SAB").<sup>1</sup> In that matter, the Tribunal dismissed a referral against SAB based on the CAC's reasoning in the present matter, but went on to describe the manner in which the current jurisprudence "*threaten[s] to undermine the rights of complainants and the public*"<sup>2</sup> and to propose an alternative approach to considering complaints and referrals. A copy of the SAB judgment (which has not yet been reported) will also be filed with these submissions.
  
6. We will refer to the complaint submitted to the Commission by Nutri-Flo as "*the initiating complaint*" and the referral made by the Commission as "*the referral*", in order to distinguish between the two.

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<sup>1</sup> Case no 134/CR/DEC07, 16 September 2011

<sup>2</sup> Part B of the judgment, p 26-42 para 97-158

## THE FACTS

7. Sasol, Yara and Omnia are all active in blending and supplying fertilizer. In particular, they use (among others) potassium chloride (KCL), ammonium nitrate and derivatives, such as limestone ammonium nitrate (LAN), to produce fertilizers, which they sell to farmers, in competition with each other. Sasol is the dominant supplier of ammonium nitrate solution and LAN at the wholesale level and supplies to Yara and Omnia (collectively referred to in these heads as “the respondents”), as well as their competitors. The fertilizer products supplied include urea which was imported, following the closure of local production around 2000.<sup>3</sup> Urea was viewed as an alternative product to LAN.

### The Nutri-Flo complaint initiation

8. In November 2003, Nutri-Flo submitted an initiating complaint to the Commission, which consisted of a completed CC1 form (the prescribed form on which complaints are submitted) and an annexed affidavit.<sup>4</sup> That affidavit had originally been prepared by Nutri-Flo in support of an application for an urgent interim interdict to prevent Sasol from increasing the price of certain products that it supplied to them, and was submitted in its entirety in support of the complaint.

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<sup>3</sup> In a previous incarnation. Both Omnia and Yara have undergone a variety of changes in corporate structure. Thus, Omnia is sometimes referred to in the papers as Nitrochem and Yara as Kynoch. The details of these corporate changes are not material in these proceedings and the parties are referred to by their current appellations throughout.

<sup>4</sup> Nutri-Flo Form CC1, vol 1, p 1; complaint affidavit vol 1, pp 1-100

9. The following statements were made in the affidavit to describe the relationship between Yara, Omnia and Sasol:

*“47. KCL and Urea are imported by a cartel (“the cartel”), of which SASOL is a member and which cartel collusively controls the price at which these products are sold in the local market. The other members of the cartel are the Third Respondent [Yara] and the Fourth Respondent [Omnia].*

*...*

*53. Although Urea and KCL are not produced locally, the importation of these products by the cartel, which exclusively controls the prices, collusively, of these products in South Africa, gives SASOL considerable market power in relation to these products.*

*54. The collusive dealings between members of the cartel to fix the price of Urea and KCL is evidenced from what is stated herein.”<sup>5</sup>*

10. Through these allegations and in the remainder of the affidavit, Nutri-Flo alleged that Sasol, Omnia and Yara agreed to control the import of urea (and accordingly its price) in order to limit the extent to which urea could be used as a substitute for LAN. Thus, it claimed, Omnia and Yara assisted Sasol to attain a dominant position in respect of urea and LAN, in exchange for a secured supply of those products to Omnia and Yara at an agreed price.<sup>6</sup>

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<sup>5</sup> Complaint affidavit, vol 1, p 23 para 47; p 26-27 para 53-54

<sup>6</sup> See, for example, Nutri-Flo complaint affidavit, vol 2, p 64 para 140; p 70 para 153

## **The referral to the Tribunal**

11. The Commission investigated the Nutri-flo initiating complaint and, on 4 May 2005, referred a complaint to the Tribunal against Sasol, Omnia and Yara, alleging that they had engaged in collusive conduct in breach of s 4(1)(b) of the Act.<sup>7</sup>
  
12. Among other things, the Commission alleged that between 1996 and 2004, the respondents had used various industry associations of which they were the sole members (namely the Import Planning Committee, the Nitrogen Balance Committee and the Export Club) to fix the prices of, and divide the market for, LAN and other fertilizer products, and to police their collusive agreements. Although the referral was amended twice, the basis of the complaint remained consistent in each draft.<sup>8</sup>

## **Omnia's review of the referral**

13. In June 2005, Omnia instituted review proceedings to have the referral against it set aside.<sup>9</sup> In both its replying affidavit and its heads of argument, it contended that Nutri-Flo had not submitted a complaint against it and that consequently the allegations of collusive conduct by it, Yara and Sasol could

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<sup>7</sup> The referral also alleged that Sasol had abused its dominance in various respects, but those complaints are not relevant in these proceedings.

<sup>8</sup> See, for example, first referral, vol 10, p 985 para 4.6; p 986 para 4.8.2; third referral, vol 2, p 160 para 8

<sup>9</sup> Sasol also instituted review proceedings to set the referral aside, but its review is not relevant in these proceedings.

not have been validly investigated and referred.<sup>10</sup> It did not, however, pursue this argument in the CAC hearing.<sup>11</sup>

14. The CAC dismissed the review on 28 April 2006.<sup>12</sup> It did not address Omnia's contention that the referral was *ultra vires* because the initiating complaint did not disclose a complaint against it.

### **Sasol's settlement with the Commission**

15. On 18 May 2009, the Commission and Sasol entered into a consent and settlement agreement, in terms of which Sasol admitted that it had acted in contravention of s 4(1)(b) of the Competition Act by agreeing various pricing formulae for, and discounts applicable to, the products that it, Yara and Omnia manufactured and/or supplied,<sup>13</sup> and making collusive arrangements in certain provinces.<sup>14</sup> It provided the Commission with details on how these agreements were reached and enforced,<sup>15</sup> and undertook to co-operate with the Commission in prosecuting Yara and Omnia.

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<sup>10</sup> Omnia's Replying Affidavit in its 2005 review, vol 14, p 1375-1376 para 5; p 1377 para 6.3. See also Commission's Answering Affidavit to Counter-Application, vol 14, pp 1356-1357 para 9.1-9.4

<sup>11</sup> Commission's Answering Affidavit to Counter-Application, vol 14, pp 1356-1357 para 9.5

<sup>12</sup> The judgment is reported as *Omnia Fertilizer Ltd v Competition Commission and others; Sasol Chemical Industries Ltd v Competition Commission and others* [2006] 1 CPLR 27 (CAC)

<sup>13</sup> Settlement agreement, vol 10, p 919 clause 4.4; pp 920-922 para 5.1

<sup>14</sup> Settlement agreement, vol 10, p 919 clause 4.4; pp 920-922 para 4.5 and 5.4.

<sup>15</sup> Settlement agreement, vol 10, pp 920-922 para 5.1.3-5.1.9

16. The Commission, together with Sasol, then applied to have the consent and settlement agreement made an order of the Tribunal. Omnia opposed that application. It contended, both on affidavit<sup>16</sup> and in argument,<sup>17</sup> that the settlement agreement related to – and implicated Omnia in – conduct that was not properly part of the referral. Its objection was, however, dismissed by the Tribunal.<sup>18</sup>

### **The Commission's attempt to amend its referral**

17. The Commission subsequently included details of the information that Sasol had provided to it in its witness statements (filed pursuant to directions issued by the Tribunal)<sup>19</sup> and in further particulars that it provided to the respondents (on their request).<sup>20</sup>
18. When both Yara and Omnia indicated to the Commission that they considered the information provided by Sasol to go beyond the scope of the amended complaint referral,<sup>21</sup> the Commission notified them of its intention to amend its

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<sup>16</sup> Omnia Affidavit opposing the Settlement Order, vol 8-9, pp 796-816

<sup>17</sup> Transcript of Tribunal proceedings, vol 9, pp 826-847

<sup>18</sup> Transcript of Tribunal proceedings, vol 9 p 847

<sup>19</sup> Commission's Witness Statements, vol 13, pp 1212-1262. See, for example, p 1216 para 11, p 1217-1219 para 14-17 and p 1241-1242 para 15.

<sup>20</sup> Omnia's Request for Further Particulars, vol 12-13, pp 1197-1201; Commission's Response to Omnia's Request for Further Particulars, vol 13, pp 1201-1211

<sup>21</sup> See, for example, correspondence from attorneys for Omnia and Yara respectively, vol 8, pp 785 and pp 786-789 respectively.

referral to include particulars of the collusive meetings disclosed by Sasol, in support of its existing complaint that the respondents had engaged in price fixing.<sup>22</sup>

19. Both Omnia and Yara objected to the proposed amendment.<sup>23</sup>
20. The Commission accordingly launched a substantive application for leave to amend the referral (“the amendment application”).<sup>24</sup>
21. Both Omnia and Yara opposed the amendment application, primarily on the basis that the proposed amendment travelled beyond the scope of the Nutri-Flo initiating complaint. In essence, Omnia and Yara contended that:
  - 21.1. Nutri-Flo had had no intention to bring a complaint in respect of their conduct; rather it intended to submit a complaint against Sasol and, in the course of doing so, provided information about Omnia and Yara’s conduct.
  - 21.2. Alternatively, to the extent that Nutri-Flo had an intention to bring a complaint regarding cartel conduct, such intention was limited to a complaint in respect of particular product markets identified by Nutri-Flo (that is, urea and KCL, and not LAN or any other product). The

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<sup>22</sup> Notice of intention to amend, vol 7-8, pp 694-700

<sup>23</sup> See Omnia’s Notice of Objection, vol 8, pp 703-722; Yara’s Notice of Objection, vol 8, pp 735-740

<sup>24</sup> Commission’s affidavit in support of the application to amend; vol 8, pp 723-734

Commission was not, they claimed, entitled to extend the scope of that complaint in its referral.

- 21.3. The initiation document consequently did not afford the Commission jurisdiction to investigate and refer a complaint against them into the products identified, or at all. On this argument, the referral to the Tribunal was said to be *ultra vires*.
22. In addition, Omnia brought a counter-application to have the referral set aside, again on the basis that Nutri-Flo had not submitted a complaint in respect of collusive behaviour by it and Yara, and that the complaint was therefore not properly before the Tribunal for adjudication.<sup>25</sup>
23. The Tribunal granted the Commission's amendment application and dismissed Omnia's counter-application.<sup>26</sup> On appeal, however, the CAC found that the referral was invalid and set it aside.<sup>27</sup>
24. We turn now to address the procedural irregularity inherent in its decision.

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<sup>25</sup> Omnia's counter-application, vol 8 p 742 prayer 2

<sup>26</sup> Tribunal Judgment, vol 15, pp 1413-1434 para 60

<sup>27</sup> CAC Judgment, vol 15A, p.p 1509-1544 at para 43

## OMNIA'S PIECEMEAL REVIEW

25. Omnia sought to have the referral against it declared invalid and set aside as early as 2005. It now pursues the same relief in its counter-application.<sup>28</sup> We submit that this amounts to an improper attempt to pursue a piecemeal review, that should have been disallowed by the CAC.
26. It is well-established that a party is not entitled to pursue litigation on a piecemeal basis.<sup>29</sup> It must advance its case once and for all in a single application (or action).<sup>30</sup>
27. Where a litigant fails to advance grounds in support of the relief that it seeks, it is precluded from doing so in due course (unless it can raise special circumstances that justify departure from the ordinary rule). The SCA has adopted this formulation of the proposition:

*"where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even*

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<sup>28</sup> Although Omnia frames the relief differently (by seeking, in its counter-application, to have the referral "dismissed" rather than set aside – see vol 8, p 742 para 2), its cause of action is the same: it contends that the referral is ultra vires and invalid.

<sup>29</sup> *Edwards v Clarke* 1905 T.S. 337 at 340; *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) 45F-G

<sup>30</sup> *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835; *Symington and Others v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA) para 26

*accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*"<sup>31</sup>

28. The rule is designed to bring litigation to finality without undue delay, by preventing a multiplicity of actions based on a single cause of action.<sup>32</sup>
29. In the present case, Omnia challenged the validity of the referral against it and Yara in its 2005 review proceedings. At that stage, it was aware of both the contents of the initiation document<sup>33</sup> and the Commission's allegations that it had colluded with Yara and Sasol, through the vehicle of industry associations, to maintain Sasol's dominance in the market, and to fix prices and allocate markets for various products.<sup>34</sup> Omnia could, at that stage, have advanced its contention that the initiating complaint did not submit a complaint against it and could therefore not have given rise to a referral against it.

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<sup>31</sup> Henderson v Henderson (1843) 3 Hare 100 at 114–115; [1843–1860] All ER Rep 378 at 381–382, cited with approval in Janse van Rensburg NO and Others v Steenkamp and Another; Janse van Rensburg NO and Others v Myburgh and Others 2010 (1) SA 649 (SCA) paras 27-30. See also National Sorghum Breweries National Sorghum Breweries Ltd (t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA)

<sup>32</sup> Evins 835; Symington para 26

<sup>33</sup> The Nutri-Flo CC1 form was attached to the first referral and the affidavit in support thereof was served on the respondents in the interdict proceedings - see Founding Affidavit in support of the Referral, vol 10, p 984 para 4.1

<sup>34</sup> See Commission's Founding Affidavit in support of referral, vol 10, p 985 para 4.7; p 986 para 4.8.2; pp 991-995 para 5.13-5.17; pp 997-999 para 8

30. In fact, Omnia raised the very case that it pursues in these proceedings in its replying affidavit and heads of argument in the review, but abandoned that argument at the hearing of the matter.<sup>35</sup>
31. Having elected not to pursue this ground of review, it is not entitled to revive it at this late stage in proceedings, in a further attempt to have the referral set aside.
32. In the circumstances, we submit that Omnia was precluded from pursuing the relief in the counter-application in the manner that it did. On that basis, there was no competent application before the CAC seeking the dismissal of the referral, and we respectfully submit that the CAC erred in setting the referral aside. On this basis alone, we submit that the appeal should be upheld, the counter-application dismissed and the matter referred back to the Tribunal for adjudication on the merits.
33. We turn now to address the merits of the appeal.

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<sup>35</sup> Commission's Answering Affidavit to Counter-Application, vol 14, pp 1356-1357 para 9.1-9.5

## THE MERITS OF THE APPEAL

### The CAC's ratio

34. The CAC's ratio in this case, is captured by its conclusion in paragraph 39 of its judgment:

*“Further, the Legislature must have intended that the Commission should only refer to the Tribunal such a complaint as initiated by or submitted to it. Consequently only the particulars of the complaint as submitted by the Nutri-Flo should have been referred to the Tribunal. The information relating to cartel activity and collusion was not intended by Nutri-Flo to be a complaint. And, as I have stated, the allegations relating thereto do not form facta probanda of the complaint. The Commission was not entitled to refer to the Tribunal any complaint or particulars of any complaint other than those relating to a complaint submitted to it by Nutri-Flo.”*

35. The CAC's ratio is thus based on two legs:

35.1. The first is that, when the Commission refers a complaint to the Tribunal, its referral may not go wider than the complaint on which it is based. The complaint sets the outer limits of what the Commission may refer.

35.2. The second is that the allegations in Nutri-Flo's initiating complaint that Yara and Omnia had engaged in collusive cartel activities with Sasol, had not formed part of its complaint because they did not form part of

the *facta probanda* of the complaint Nutri-Flo intended to submit against Sasol.

36. The first leg concerns the proper interpretation of the Competition Act. The second concerns the proper interpretation of Nutri-Flo's complaint. We shall submit with respect that the CAC erred on both legs. Before doing so, we describe the legal framework of the complaint procedure under the Competition Act and the CAC's evolving interpretation and application of it.

### **The complaint procedure**

37. The complaint procedure prescribed by ss 49B to 51 in Part C of the Competition Act, regulates the manner in which complaints of prohibited practices in terms of ss 4 to 9 of the Competition Act are initiated, investigated and prosecuted in the Tribunal.

38. Section 49B provides for the ways in which complaints against alleged prohibited practices may be initiated:

- 38.1. The Commissioner may initiate a complaint in terms of s 49B(1). The Competition Act, and the rules made under it, do not prescribe the form in which the Commissioner must do so.

- 38.2. Anybody else may submit a complaint to the Commission in terms of s 49B(2)(b). Such a complaint must be “*in the prescribed form*”, that is, Form CC1 prescribed by the Commission’s rules.
39. When the Commissioner initiates or receives a complaint, he “*must direct an inspector to investigate the complaint as quickly as practicable*” in terms of s 49B(3). A complaint accordingly triggers a duty on the Commission to investigate it. Its powers of investigation are described in ss 46 to 49A. They are powers of search and seizure in terms of ss 46 to 49 and summons and interrogation in terms of s 49A. As appears from ss 46(1)(b) and 49A(1), the Commission may exercise these powers for purposes of an investigation in terms of the Competition Act, which includes one triggered by a complaint in terms of s 49B(3).
40. Sections 50 and 51 govern the referral of complaints to the Tribunal. They distinguish between,
- the Commission’s referral of its own complaint;
  - the Commission’s referral of a complainant’s complaint; and
  - a complainant’s referral of its own complaint.
41. Section 50(1) provides that the Commission may refer its own complaint to the Tribunal at any time after initiating it. Its freedom to do so is not subject to any restriction.

42. The Commission does not have the same freedom in its referral of a complainant's complaint:

42.1. In terms of ss 50(2) and (4), the Commission must within one year (or within such longer period as it might agree with the complainant or the Tribunal might permit) either refer the complaint to the Tribunal or issue a notice of non-referral. If it does neither, it is deemed in terms of s 50(5), to have issued a notice of non-referral of the complaint.

42.2. Section 50(3) allows the Commission some flexibility in the formulation of its referral of a complainant's complaint. We discuss it in greater detail below.

43. When the Commission issues a notice of non-referral or is deemed to have done so, the complainant may refer its complaint to the Tribunal in terms of s 51(1). It means that the Commission is the "*plaintiff of first choice*"<sup>36</sup> but, if it declines to prosecute a complaint, the complainant is permitted to refer it to the Tribunal.

44. We return to the flexibility s 50(3) affords the Commission in its formulation of the referral of a complainant's complaint. It is germane to the first leg of the CAC's ratio in this case, to the effect that the Commission's referral may not go wider than the complainant's initiating complaint. We submit with respect that

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<sup>36</sup> Glaxo Wellcome v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02 para 26

the CAC's approach is incompatible with s 50(3)(a). It provides that when the Commission refers a complainant's complaint to the Tribunal, it may refer all or some of the particulars of the complaint and may add particulars to it. Section 50(3)(b) goes on to say that if it omits any particulars of the complaint from its referral, it must issue a notice of non-referral in respect of the particulars of the complaint not referred to the Tribunal. The complainant may then refer the particulars left out of the Commission's referral to the Tribunal in terms of s 51(1).

45. The Tribunal pointed out in SAB that the "*particulars*" the Commission may add to or omit from its referral in terms of s 50(3), must be "*facts akin to a claim*" and not mere details.<sup>37</sup> This much is apparent from the following implications of s 50(3):

- 45.1. Section 50(3)(b) says that the Commission must issue a notice of non-referral in respect of any "*particulars of the complaint it does not refer to the Tribunal.*" The purpose of the notice is to permit the complainant to refer the "*particulars*" to the Tribunal. It cannot mean that if the Commission omits any details of the complaint from its referral, then it must issue a notice of non-referral in respect of those details so that the complainant can refer them to the Tribunal. It can only mean that if the Commission omits particulars which constitute a cognizable claim capable of prosecution in the Tribunal, then it must issue a notice of

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<sup>37</sup> South African Breweries v Competition Commission 134/CR/Dec07 paras 91 to 92

non-referral which allows the complainant to pursue the claim in the Tribunal.

45.2. The same implication arises from s 50(3)(a)(ii). It provides that the Commission may refer “*only some of the particulars of the complaint*” to the Tribunal. But this provision can obviously not have in mind particulars which do not constitute a cognizable claim that can be prosecuted in the Tribunal. It must mean that the Commission may confine its referral to some of the complainant’s claims and omit others.

45.3. When s 50(3)(a)(iii) then says that the Commission may “*add particulars*” to its referral, the “*particulars*” it may add, must bear the same meaning as it does in the rest of s 50(3). It means that the Commission may add claims to its referral which were not included in the complainant’s original complaint.

46. This flexibility created by s 50(3) recognizes that there cannot be rigid symmetry between the formulation of a complaint initiated by a complainant on the one hand and the Commission’s formulation of its referral to the Tribunal on the other:

46.1. The complainant’s complaint is formulated by a lay person, often with little knowledge of the facts.

46.2. The Commission's referral on the other hand, is formulated by an expert body after full investigation of the facts.

46.3. The Tribunal put it as follows in SAB:

*“The Commission’s interpretation is also fortified by the logic of how the Act works. The Commission receives a complaint and then investigates it. It is highly likely that, in the course of the investigation, the Commission may identify further information not covered by the complaint or may re-characterise what has been identified by the complainant in a different manner. What economists might refer to as altering the theory of harm as initially articulated by a complaint. Provided the Commission’s edition does not travel too far from the original complaint, this seems to be a legitimate course of action.”<sup>38</sup>*

46.4. The purposes of the two documents also differ in material respects. The purpose of the complainant's complaint is merely to trigger the process of investigation and referral by the Commission. The complainant may, for instance, complain about the symptoms of someone's anti-competitive conduct without identifying its cause. The Commission's referral, however, formulates the case the respondent is called upon to meet in the Tribunal. It cannot merely point to the symptoms of the respondent's conduct and has to plead all the elements of one or more specifically identified prohibited practices in terms of Chapter 2 of which the respondent stands accused.

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<sup>38</sup> South African Breweries v Competition Commission 134/CR/Dec07 para 93

47. The complainant is not given the same flexibility in the formulation of its referral. That is because the policy of the Competition Act is that a complainant may only refer a complaint after it has been referred to, investigated and considered by the Commission. That is why the CAC held in Glaxo that the Competition Act “*does not allow for a complaint to bypass these investigative procedures by adducing or adding ad hoc complaints in a referral*”.<sup>39</sup> The Tribunal colloquially made the same point in SAB where it said that “*a complainant should not be allowed to keep part of the complaint in its pocket, get a non-referral and add to the complaint that which was never told to the Commission*”.<sup>40</sup>

48. The complaint procedure thus draws clear distinctions between,

- the Commission’s referral of its own complaint;
- the Commission’s referral of a complainant’s complaint; and
- the complainant’s referral of its own complaint.

48.1. In terms of s 50(1), the Commission may refer its own complaint to the Tribunal at any time after initiating it. There are no other rules that govern such a referral. It must follow that the Commission is also not confined in its referral to the claims raised in its initiating complaint. It would be absurd to suggest that the Commission is more restricted in formulating a referral based on its own initiating complaint than it is in

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<sup>39</sup> Glaxo Wellcome v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02 para 28

<sup>40</sup> South African Breweries v Competition Commission 134/CR/Dec07 para 113

its formulation of a referral based on a complainant's initiating complaint in terms of s 50(3).

48.2. The Commission has the first option to refer a complaint submitted by a complainant. But it must do so within a period of one year or such extended period as might be agreed between the Commission and the complainant or permitted by the Tribunal in terms of ss 50(2) and (5). If it decides to refer the complaint, its referral need not match the complaint. It may omit claims from, or add claims to, its referral in terms of s 50(3).

48.3. In either case, the Commission is entitled to refer prohibited practices that it uncovers during its investigation. It is unnecessary for it to amend the initiating complaint or prepare a new initiating complaint each time it discovers new prohibited practice.

48.4. Only if the Commission decides not to refer the complainant's complaint or fails to do so within the prescribed period, may the complainant refer the complaint in terms of s 51(1). Unlike the Commission, the complainant may not go beyond its initiating complaint in the formulation of its referral.

49. Section 67(1) provides that,

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

We submit that the purpose of this provision is to limit the period within which a complaint may be initiated because the initiation of the complaint triggers an investigation in terms of s 49B(3) which, in turn, triggers the Commission's investigative powers in terms of ss 46 to 49A. It is understandable that the legislature put a time limit on the period during which the Commission may trigger its investigative powers.

The purpose of s 67(1) is not to limit the period during which a complaint may be referred to the Tribunal. There is nothing in the Competition Act to suggest that the legislature intended such a limitation. On the contrary, s 50(1) says that the Commission may refer its own complaint at any time after initiating it and s 51(1) does not impose any limit on the time within which a complainant may do so.

50. This complaint procedure blends public and private prosecution of prohibited practices. Complaints may be publicly or privately initiated. The Commission is however the investigator and prosecutor of choice. But after it has investigated a complaint and decided not to prosecute it, the private complainant who submitted the complaint in the first place, may do so.

51. The complainant's "*ownership*" of its complaint does not merely entitle it to prosecute the complaint if the Commission does not do so. It is also afforded limited protection pending the Commission's investigation and prosecution of the complaint. The complainant may, for instance, apply for interim relief in

terms of s 49C, must consent to an award of damages in terms of a consent order in terms of s 49D(3) and may participate in the hearing of its complaint in the Tribunal in terms of s 53(a)(ii)(aa).

52. It is against this background, that the Tribunal made the point in SAB that the purpose of the rules that govern a private initiating complaint submitted to the Commission, is to regulate the inter-relationship between the complainant and the Commission in relation to the complaint, and not to confer procedural rights on the respondent on referral to the Tribunal to have the complaints against it struck out. But that is what the CAC's approach to the interpretation and application of the complaint procedure has in effect done:

*“Whilst the existence of a complaint was a necessary prior jurisdictional fact to referral, its content was intended to regulate this inter-relationship and not meant to confer rights upon a respondent, which the respondent could then rely upon to have a complaint dismissed or struck out. Yet this is precisely what happened. Whilst we have no decided case in which we have had to adjudicate on a dispute between a complainant and the Commission over ownership of the referral, there have been several challenges to date at the instance of a respondent and many more are pending at the time of these reasons.*

*The initiating document has become transformed into something it was never intended to be. The complaint in [and] of itself, does not require a respondent to answer. There is no obligation for it to do so under the Act, and no procedure for this under the rules. It may ignore a complaint without any legal prejudice to its rights. Secondly, the initiating document may only partially find its way into the eventual referral. Whatever was disposed of, unless referred by the complainant in the event of a private referral, does not see the light of day before the Tribunal. The initiating document is therefore not a pleading or an initiation document in legal proceedings. There is not even a requirement that a respondent know of its existence before the case is referred.*

*Yet the implications of the present case law – although the cases never say this – are that unless the initiating document is as*

*close in precision to an eventual referral, respondents will pick holes in it and the referral will be susceptible to dismissal or striking out.”<sup>41</sup>*

## **The CAC’s application of the complaint procedure**

### *Introduction*

53. We shall describe the evolution of the CAC’s interpretation and application of the complaint procedure of which the Tribunal made mention in SAB in the paragraphs quoted above. We focus on the CAC’s approach to,

- the requirements for a complaint submitted by a complainant to the Commission in terms of s 49B(2)(b);
- the requirements for the Commission’s referral of such a complaint in terms of s 50(2)(a); and
- the relationship between the two.

We do so because these are the issues that arise in this appeal.

### *Sappi*

54. The CAC held in Sappi that the Commission “*is not empowered to investigate conduct which it generally considers to constitute anti-competitive behaviour*”.

It may only investigate a complaint which “*can only relate to an alleged*

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<sup>41</sup> South African Breweries v Competition Commission 134/CR/Dec07 paras 109 to 111

*contravention of the Act as specifically contemplated by an applicable provision thereof by that complaint”.*<sup>42</sup>

### *Glaxo*

55. The CAC’s judgment in *Glaxo*<sup>43</sup> has in subsequent cases been understood to establish a general rule that a referral of a complaint to the Tribunal is confined to, and may not go wider than, the initiating complaint upon which it is based. The referral may not include claims which were not included in the initiating complaint. The CAC moreover adopted a strict approach to the interpretation of the initiating complaint for purposes of identifying the claims raised by it.
56. What is often overlooked, however, is that *Glaxo* was concerned with the referral of a complaint by a private complainant. The complaint procedure clearly contemplates that such a complainant is confined to the four corners of its own initiating complaint because it does not allow the private complainant to by-pass the Commission<sup>44</sup> by “*keeping part of the complaint in its pocket*”, getting a non-referral from the Commission and then adding the part withheld

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<sup>42</sup> *SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another* [2003] 2 CPLR 272 (CAC) para 39

<sup>43</sup> *Glaxo Wellcome v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02

<sup>44</sup> *Glaxo* para 28

from the Commission to the referral.<sup>45</sup> Glaxo was not concerned with the Commission's referral of its own complaint or that of a complainant.

57. The CAC held in paragraphs 30 to 33 that a complainant is confined in its referral of its complaint to the Tribunal, to the prohibited practices complained of in its originating complaint:

*"The proper approach is to determine first what conduct is alleged in the complaint and what prohibited practices such conduct may be said to invoke or to be rationally connected to. Then, consideration is given to the referral to see whether the conduct there alleged is substantially the same".<sup>46</sup>*

58. It initially adopted a reasonably generous approach to the interpretation of the complainant's originating complaint. It said in paragraph 15 that a complainant *"is not required to pigeonhole the conduct complained of with reference to particular sections of the Act"*. It added in paragraph 16 that all that is required, is *"a rational or recognisable link between the conduct referred to in the complaint and the prohibitions in the Act"*.

59. The CAC however then went on to make the following ambiguous statement in paragraph 19:

*"When a complaint is referred to the Tribunal in terms of the Act, section 50(3) consistently provides that what must be referred are particulars of the complaint 'as submitted by the complainant'. Again a clear reference to the conduct by the complainant and which amount to the facta probanda necessary to establish a prohibited practice"*.

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<sup>45</sup> South African Breweries v Competition Commission 134/CR/Dec07 para 113

<sup>46</sup> Glaxo para 33

It is not clear why the CAC drew on s 50(3), which regulates the Commission's referral of a complainant's complaint, in its determination of the requirements for the complainant's own referral of its complaint. Be that as it may, we submit that, in the light of its earlier statements, the CAC said no more than that,

- the initiating complaint need do no more than lay a rational or recognizable link between the conduct complained of and the prohibitions under the Act, and
- the referral must then include the *facta probanda* of those prohibitions.

We submit, in other words, that the CAC did not say that a prohibited practice is only legitimately raised in an initiating complaint if it discloses all the *facta probanda* of the prohibited practice in terms of the Act. This is however how the CAC has subsequently interpreted this statement in Glaxo.

60. Whatever the correct interpretation of Glaxo however, we emphasize that it was confined to the rules that govern a complainant's referral of its own complaint. It was not concerned with the Commission's referral of a complainant's complaint subject to the flexibility created by s 50(3), and even less with the Commission's referral of its own complaint.

### Woodlands

61. The SCA's judgment in Woodlands<sup>47</sup> concerned the validity of two summonses issued by the Commission pursuant to an investigation of firms in the milk industry. It considered the validity and scope of the initiating complaint to determine whether the summonses issued pursuant to the investigation of the complaint, were valid. The SCA said in paragraph 20 of the Commission's powers of summons and interrogation that,

*"I do not accept the submission on behalf of the Commission that these far-reaching invasive powers may be used by the Commissioner for purposes of a fishing expedition without first having initiated a valid complaint based on a reasonable suspicion."*

62. It added in paragraph 35 that the initiating complaint need merely "*survive the test of legality and intelligibility*" for the following reasons:

*"The first is that any interrogation or discovery summons depends on the terms of the initiation statement. The scope of a summons may not be wider than the initiation. Furthermore, the Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the Tribunal. It could hardly be argued that the Commission could have referred an investigation into anti-competitive behaviour in the milk industry at all levels to the Tribunal."*

63. We emphasize that the SCA's focus was on the role of the initiating complaint in setting the parameters of the investigation for purposes of which the Commission may invoke its investigative powers. Its focus was not the degree of correlation there had to be between the initiating complaint on the one hand,

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<sup>47</sup> Woodlands Dairy v Competition Commission 2010 (6) SA 108 (SCA)

and the ultimate referral on the other. It merely said in passing that the Competition Act presupposes that the complaint as initiated will be referred to the Tribunal. But it added in the same sentence that the initiating complaint was “*subject to possible amendment and fleshing-out*”. It repeated in paragraph 36 that, if the Commission discovers further information in the course of its investigation, “*it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation*”.

64. Woodlands must accordingly not be understood as endorsement by the SCA of a general rule that the Commission is confined in its referral of a complaint to the Tribunal, to the prohibited practices raised in the initiating complaint, whether its own or that of the complainant.

#### *Netstar*

65. The CAC adopted the strictest position thus far on the relationship between the initiating complaint and the referral in Netstar.<sup>48</sup> It seems to have proceeded from the premise that there must be complete symmetry between the referral and the initiating complaint which means that the complaint has to be judged by the same standards as those applicable to a referral. It said in paragraph 26 that,

*“The Tribunal’s jurisdiction is confined to a consideration of the complaint so referred, and the terms of that complaint are*

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<sup>48</sup> Netstar v Competition Commission of SA 2011 (3) SA 171 (CAC)

*likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person.”*

66. Having conflated the standards applicable to the initiating complaint and the subsequent referral, it described those standards in paragraph 27:

*“What is required is that the conduct said to contravene the Act must be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is, and be able to prepare to meet and rebut it. It is true that the competition issues upon which the Tribunal is called upon to adjudicate may be broader, more general and less clear-cut than those that arise in a conventional civil case in the High Court. That does not mean, however, that broad and unspecific generalities should take the place of a properly articulated complaint before the Tribunal to which the target of the complaint can respond.”*

67. Having set these exacting standards for both the initiating complaint and the subsequent referral, the CAC held in paragraph 26 that, if the initiating complaint related to a “*prohibited agreement*” in terms of s 4(1) of the Competition Act, the Tribunal could not determine the subsequent referral to it on the basis of a “*concerted practice*” in terms of the same section:

*“Accordingly, if the original ground for the complaint is that there was a prohibited agreement, the Tribunal cannot determine it on the basis that there was a concerted practice or vice versa”.*

Yara

68. The Tribunal said in SAB that the CAC’s judgment in the present case “*represents the apogee of the strict approach to the relationship between the initiation document and the referral*”.<sup>49</sup>

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<sup>49</sup> South African Breweries v Competition Commission 134/CR/Dec07 para 62

69. The CAC took an even stricter approach to the interpretation of an initiating complaint than it had done before. It did so in paragraphs 30 to 35 of the judgment, by holding that the Commission may only refer to the Tribunal those prohibited practices raised in the initiating complaint which the complainant intended to constitute distinct complaints “*in the sense of a separate cause of action within the complaint; as opposed to further information concerning the initial complaint*”.<sup>50</sup> It illustrated this point by the following example:

*“For example, information relevant to a section 8 case against X may point to a section 4 contravention by X, Y and Z. However, if the information is supplied by the complainant solely in support of the section 8 case and, in circumstances where the private party did not signal an intention also to be a complaint in respect of a section 4 case, the submission of the information does not constitute the initiation of a section 4 complaint.”*<sup>51</sup>

70. The court moreover held in paragraphs 38 and 39, contrary to the SCA’s statements in *Woodlands*, that it is not competent to amend a complaint:

*“In competition cases, the parties look to the CC1 Form for details of the complaint(s) against them. Therefore, if it appears in the CC1 Form together with accompanying statements, where relevant, that no complaint lies against a particular party, such a party may assume that it is not a true party to the proceedings. It is therefore improper to bring such a party within the ambit of the complaint by way of either a referral or an amendment thereto.”*<sup>52</sup>

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<sup>50</sup> Yara para 30

<sup>51</sup> Yara para 35

<sup>52</sup> Yara para 38

71. We submit with respect that this further restriction is wholly unwarranted. It is simply not correct to say that the parties look to the initiating complaint for details of the complaints against them and are entitled to assume that they are not and will not be a party to any of the ensuing proceedings in the Tribunal. The purpose of an initiating complaint is to trigger an investigation which might ultimately lead to a referral. It is not a notice to the suspects and need never come to their attention. If they do become aware of it, they have no reason to assume that its scope will never be broadened by amendment of the initiating complaint, by the initiation of fresh complaints or by the exercise of the Commission's flexible powers to add additional causes of action in terms of s 50(3). The court's approach is based on a misconception about the purpose of an initiating complaint and the role it plays in the complaint procedure.
72. An analogy can be drawn between the Commission's investigative powers and those of the police. Both rely on a complainant's allegations to define the original scope of their investigation. This does not imply, however, that only those contraventions identified by a complainant will ultimately be put before a court for adjudication. The role of an investigative body is to uncover unlawful conduct and have it adjudicated and penalised, where appropriate.

### *Loungefoam*

73. In *Loungefoam*,<sup>53</sup> the Commission applied for leave to amend its referral. The respondents objected to the amendment because they said that it would introduce new matter that had never been the subject of an initiating complaint in terms of s 49B and could accordingly not be referred to the Tribunal. The CAC upheld their objection and reiterated its rule that it was not competent to refer any matter to the Tribunal which had not been the subject of an initiating complaint:

*“If no complaint has been initiated in respect of Feltex and the chemical cartel then such a complaint cannot be introduced by way of amendment, because the accepted requirements for lawful referral are not satisfied.”*<sup>54</sup>

74. The court again conflated the requirements for the formulation of an initiating complaint with those of a referral and applied the same standards to both, as appears from the following statement in paragraph 53:

*“This court has also stressed that the focus of the complaint should be the conduct that is said to be anti-competitive. We have also recently emphasized that all that is required is that the conduct said to contravene the Act be expressed with sufficient clarity for the party against whom the allegation is made to know what the charge is and be able to prepare to meet and rebut it, bearing in mind that the competition issues upon which the Tribunal is called to adjudicate may be broader, more general and less clear-cut than those that arise in a conventional civil case in the High Court.”*

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<sup>53</sup> *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications [2011] 1 CPLR 19 (CAC)*

<sup>54</sup> *Loungefoam* para 33

75. The court added a further rationale for its requirement that a claim referred to the Tribunal must have been the subject of an initiating complaint and investigation. It said in paragraph 49 that it “*affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act*”.
76. But that is with respect not so. The purpose of an initiating complaint, and the investigation that follows upon it, is not to afford the suspect firm an opportunity to put its case. The Commission is not even required to give notice of its investigation to the suspect firm, least of all engage with it on the question whether its suspicions are justified or not. The principles of administrative justice are fully observed in the subsequent referral to and hearing in the Tribunal, if there is one. That is when the law entitles the target firm to put its side of the case.<sup>55</sup> There is no justification for the CAC’s suggestion that the Competition Act requires or even contemplates that it should also be afforded a hearing in the course of the investigation and before the Commission has decided whether or not to refer the complaint against it to the Tribunal.

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<sup>55</sup> See, in this regard, *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) at para 17 (relying on *Novartis SA (Pty) Ltd v Main Street 2 (Pty) Ltd* (2) [2001–2002] CPLR 470 (CT) at para 61); *Competition Commission of South Africa v Telkom SA Ltd and another* [2010] 2 All SA 433 (SCA) at para 10, where the SCA held that the referral of a complaint by the Commission was part of investigative function that did not have the capacity to affect legal rights.

77. The CAC suggested that these strict requirements should not cause any real problem because the Commission is always at liberty to add new claims of prohibited conduct by amending the original initiating complaint:

*“Where then does the perceived problem lie? It appears to be with situations where there has been a proper initiation of a complaint, an investigation and then a referral, where either the referral relates to some anti-competitive conduct other than that referred to in the original complaint or it is sought to add another party to the alleged anti-competitive conduct.... To require the Commissioner to amend the original complaint initiation, institute an investigation (however cursory) and then refer this complaint ... to the Tribunal is said to involve an excess of formalism.”<sup>56</sup>*

78. The court rejected the complaint of excessive formalism. But in adopting the panacea of amendment, it does not seem to have been referred to its earlier judgment in Yara which held that it was not competent to amend an initiating complaint.

### *Conclusions*

79. It seems on this analysis that the CAC’s approach to the interpretation and application of the complaint procedure may be summarised as follows:

- 79.1. An initiating complaint, whether initiated by the Commission or submitted to it by a complainant, only raises complaints of prohibited practices which conform to two requirements. The first is that the complaint must disclose conduct which includes all the *facta probanda* of the prohibited practice in terms of the Act. The second is that the

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<sup>56</sup> Loungefoam para 48

complainant must intend the prohibited conduct to be the subject-matter of its complaint.

- 79.2. The Commission may only refer allegations of prohibited practices to the Tribunal which were the subject matter of an initiating complaint that raised them in accordance with the rules mentioned above.
- 79.3. It is not clear whether an initiating complaint may be amended to include allegations of prohibited practices not raised in the first place. The judgments of the CAC, including its most recent judgments in Yara and Loungefoam, seem to contradict one another on this score.
- 79.4. It follows that, when a matter is referred to the Tribunal, the respondent is entitled to have any accusations of prohibited practices struck out if they were not the subject of the initiating complaint in accordance with the foregoing rules.
80. This outcome has the incongruous result that the Commission's prosecution of an accusation of a prohibited practice before the Tribunal, depends on whether the accusation corresponds with the initiating complaint which is often formulated by a lay person with scant knowledge of the facts and not by the Commission itself after its investigation of a complaint. It speaks for itself that, measured by this standard, most of the Commission's referrals to the Tribunal are vulnerable to attack.

## Critique of the CAC's approach

81. We submit with respect that the CAC's interpretation and application of the complaint procedure are mistaken insofar as they attribute decisive significance to the initiating complaint. Its role is a far more modest one and is limited to the following:

81.1. The complaint triggers an investigation in terms of s 49B(3), which entitles the Commission to invoke its investigative powers in terms of ss 46 to 49A. The role of the complaint is thus to trigger the Commission's investigative powers and circumscribe the purposes for which they may be used.

81.2. A complaint submitted by a private complainant also serves to define the ambit of its "*ownership*" of the complaint. It circumscribes the scope of the complainant's protection pending the Commission's investigation and prosecution of its complaint and the complainant's right to prosecute the complaint itself if the Commission does not do so.

82. The CAC is with respect mistaken in attributing the further function to the initiating complaint of circumscribing and limiting the Commission's referral to the Tribunal of allegations of prohibited practices raised in the initiating complaint. Both the language and the scheme of the Competition Act militate against such a limitation:

- 82.1. When the Commission refers a complainant's complaint to the Tribunal, s 50(3) expressly permits it to go beyond the parameters of the complainant's initiating complaint. On a proper interpretation of the section, the Commission may refer claims of prohibited practices not raised in the originating complaint.
- 82.2. Section 50(1) does not expressly say that the Commission may go beyond the parameters of its own initiating complaint when it refers the matter to the Tribunal. But it must clearly have the same flexibility in doing so that it has in its referral of an initiating complaint received from a complainant.
- 82.3. An initiating complaint is usually formulated at a time when its author knows very little about the facts. Its author may moreover be a layperson who also knows very little about the law. The complaint procedure envisages that such complaint is thereafter investigated by the Commission, which then formulates the referral to the Tribunal. It is quite unrealistic to suggest that in those circumstances, the referral should still be confined to the alleged prohibited practices raised in the initiating complaint in the first place. The CAC's approach does not allow for this reality that there is seldom any symmetry between the initiating complaint on the one hand, and the Commission's referral on the other. To require symmetry between the two is entirely inconsistent with the scheme and purpose of the complaint procedure.

### The implications for this case

83. We submit that Nutri-Flo's initiating complaint duly and properly alleged that Yara and Omnia were engaged in cartel activities with Sasol in breach of s 4 of the Competition Act:

83.1. It is clear from Nutri-Flo's Form CC1, that Sasol was the primary target of its attack.<sup>57</sup> It is also clear that its accompanying affidavit had been prepared in the first place as Nutri-Flo's founding affidavit in its urgent application against Sasol. It made it clear in its affidavit, however, that its complaint against Sasol included a complaint that it had engaged in cartel activity with Yara and Omnia.

83.2. It said in paragraph 47 that KCL and Urea are imported by a cartel "*... of which Sasol is a member and which cartel collusively controls the price at which these products are sold in the local market*". It added that Yara and Omnia are the other members of the cartel.

83.3. It said in paragraph 53 that, although Urea and KCL are not produced locally, "*the importation of these products by the cartel, which exclusively controls the prices, collusively, of these products in South Africa, gives Sasol considerable market power in relation to these products.*"

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<sup>57</sup> Nutri-Flo's complaint CC1, vol 1, p 1

- 83.4. It said in paragraph 54 that the “*collusive dealings between the members of the cartel to fix the price of Urea and KCL is evident*” from what was said in the remainder of the affidavit. It means that it relied on the remainder of the affidavit as evidence of the collusive dealings between the members of the cartel comprising Yara, Omnia and Sasol.
84. But we submit that the Commission was in any event entitled to raise a complaint of cartel conduct in breach of s 4, even if such a complaint was not duly raised in Nutri-Flo’s initiating complaint. It was permitted to do so in terms of s 50(3)(a)(iii) of the Competition Act which allows the Commission to “*add particulars to the complaint as submitted by the complainant*”. We have already submitted that the “*particulars*” the Commission is entitled to add include complaints of prohibited practices not raised in the complainant’s initiating complaint.
85. In all these circumstances, we submit that the Commission’s referral of a complaint against Omnia and Yara was competent and ought not to have been set aside by the CAC. It follows that the Tribunal’s grant of the Commission’s amendment application should have been upheld.

## LEAVE TO APPEAL

86. This application raises issues of crucial importance to the Commission. The related questions of how it must construe a complaint submitted to it and accordingly when it can exercise its investigative powers, and whether it is entitled to refer conduct that it uncovers during an investigation for adjudication, are fundamental to the manner in which it discharges its function of evaluating alleged prohibited practices and referring them to the Tribunal for adjudication. The proper scope and exercise of the Commission's powers of investigation and referral under the Competition Act are plainly constitutional issues.<sup>58</sup>
87. Both the Commission and the Tribunal consider the approach adopted by the CAC in this matter (and the related judgment identified above) to be unduly restrictive, and to undermine the public's right to have anti-competitive conduct uncovered, adjudicated and, where appropriate, penalised. Indeed, the Tribunal has taken the extraordinary step of setting out its concerns comprehensively in the SAB decision, and proposing an alternative framework to govern the investigation and referral of complaints.
88. The proper balance to be struck between advancing the public's right to have contraventions of the Competition Act adjudicated by the Tribunal, and

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<sup>58</sup> It is trite that the legality of any exercise of public power is a constitutional issue. See *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 33

protecting the respondents' right to due process in those proceedings, is also a constitutional issue.

89. In the wake of the CAC's judgment, the Commission faces a proliferation of objections to matters that it has referred to the Tribunal.<sup>59</sup> Until the issues raised in this application are resolved (and the conflicting approaches of the CAC in the various matters identified above, and the Tribunal in SAB are reconciled), the Commission is unable to determine the correct response to those objections and is hamstrung in its investigation and referral of further cases.
90. For all these reasons, we submit that this matter raises important constitutional issues that should be determined as expeditiously as possible. Furthermore, for the reasons advanced above, we submit that the Commission has good prospects of success on appeal.

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<sup>59</sup> See affidavit in application for leave to this Court, Vol. 15A p 1505 para 71.5

## CONDONATION

91. We ask that this court condone the late filing of the application for leave to appeal.

91.1. As the Commissioner has explained in his affidavit in support of leave to appeal, the Commission initially intended to follow the ordinary appeal route. To this end, it has filed an application for leave to appeal to the SCA with the CAC. However, when it realised that the effect of the CAC's judgment was to undermine its ability to perform its duties effectively, the Commission determined to seek clarification from this Court as expeditiously as possible.<sup>60</sup> We submit that this approach was proper and justified in the circumstances of this case.

91.2. None of the respondents has advanced any credible reason why condonation should be refused. Although Omnia opposes condonation on the ground, *inter alia*, that the Commission was required (and has failed) to apply to the CAC for leave to appeal to this Court in terms of s 63(2) of the Act, we submit that this provision is no impediment to the grant of leave by this Court:

91.2.1. First, s 62(4) of the Competition Act provides:

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<sup>60</sup> Affidavit in application for leave to this Court, Vol. 15A p 1504-1506 para 71

*"An appeal from a decision of the Competition Appeal Court in respect of a matter within its jurisdiction in terms of subsection (2) lies to the Supreme Court of Appeal, or Constitutional Court, subject to section 63 and their respective rules."*  
[emphasis added]

91.2.2. Rule 19 of the Constitutional Court Rules authorises an applicant to apply for leave to appeal to this Court without first applying for leave from the court a quo. Since Rule 19 gives effect to s 167(6) of the Constitution, we submit that the requirements of the Rule must "trump" those set out in s 63(2) of the Competition Act.

91.2.3. In any event, it is trite that this Court has the sole power to grant leave to appeal to it, and that it is therefore unnecessary for an applicant to apply for leave from the court below. To the extent that s 63(2) restricts this Court's powers to grant leave to appeal (without leave first being granted by the Court below), it infringes s 167(6) of the Constitution and restricts the Constitutional Court's inherent powers to regulate its own procedures, and is unconstitutional.

92. We also ask that the Court condone the filing of the record one day late. As appears from the Commission's application for condonation, the record was prepared as expeditiously as possible, but could not be filed timeously because of technical problems.

93. For all these reasons, we submit that it is in the interests of justice for this Court to condone the late filing of the application for leave to appeal (and the record), to grant the Commission leave to appeal and to determine the appeal on the merits.

**PRAYER**

94. The applicant asks for an order in the following terms:

94.1. The applicant is granted leave to appeal to this court.

94.2. The appeal is upheld.

94.3. The order of the Competition Appeal Court is set aside and replaced with an order dismissing the appeal and ordering the appellants jointly and severally to pay the respondent's costs including the costs of two counsel.

94.4. The order of the Competition Tribunal is reinstated.

94.5. The first and second respondents are ordered jointly and severally to pay the applicant's costs in this court including the costs of three counsel.

Wim Trengove SC

Gilbert Marcus SC

M J Engelbrecht

Isabel Goodman

Chambers, Sandton

11 October 2011

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