

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CCT CASE NO: 81/11

In the matter between:

**THE COMPETITION COMMISSION**

Applicant

and

**YARA (SOUTH AFRICA) (PTY) LIMITED**

First Respondent

**OMNIA FERTILIZER LIMITED**

Second Respondent

**SASOL CHEMICAL INDUSTRIES LIMITED**

Third Respondent

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**SECOND RESPONDENT'S HEADS OF ARGUMENT**

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## **INTRODUCTION**

1. The applicant (the “Commission”) has applied for leave to appeal directly to this Court against a judgment of the Competition Appeal Court (“CAC”) relating to a referral of a complaint initiated by “Nutri-Flo” (the “Nutri-Flo complaint referral”).<sup>1</sup> The Competition Tribunal (the “Tribunal”) had granted the Commission leave to amend the Nutri-Flo complaint referral, and had dismissed a counter-application by the second respondent (“Omnia”) for an order that the prohibited conduct which Omnia was alleged to have committed was not permissible before the Tribunal.<sup>2</sup> The CAC overturned both decisions, and issued an order dismissing the application for amendment and declaring that no complaint was pending against the first respondent (“Yara” or “Kynoch”) or Omnia.<sup>3</sup>
  
2. There are three main issues which need to be addressed:
  - whether the Commission should be granted condonation for its various infractions of the rules;
  - whether the Commission’s application for leave to appeal should be granted; and

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<sup>1</sup> The complaint was lodged by Nutri-Flo CC and Nutri-Fertilizer CC, which have for convenience been referred to together as Nutri-Flo.

<sup>2</sup> The Tribunal’s determination, dated 24 February 2010, is at Record: 15: 1413-1434.

<sup>3</sup> The CAC’s judgment, handed down on 14 March 2011, is at Record: 15A: 1509-1534. It is also reported at [2011] 1 CPLR 78 (CAC).

- whether, in the event of the Commission both being granted condonation and being given leave to appeal, the appeal should be upheld.
3. The questions of condonation and the merits of the application for leave to appeal should logically be addressed first. The Commission has not, however, dealt with the issues in this way. It has instead relegated “leave to appeal” and “condonation” to short sections at the end of its heads (at pp45-46, and 47-49, respectively), and concentrated almost exclusively on the merits of its desired appeal, thereby creating the incorrect impression that the merits are the only aspects of importance requiring consideration by this Court. By doing so, the Commission has skirted or glossed over a number of matters which should, it is submitted, lead to this application being dismissed.
  4. These heads will deal first with condonation and the application for leave. Thereafter, the merits of the appeal which the Commission hopes to be permitted to bring directly to this Court will be considered.

### **CONDONATION**

5. The Commission has consistently failed to comply with the rules applicable to appeals from CAC judgments.

- The Commission lodged an application for leave to appeal the *Yara/Omnia* judgment with the CAC on **19 April** 2011<sup>4</sup> – 25 court days after the CAC had handed down that judgment, and 15 court days later than the deadline prescribed by the CAC Rules for delivering any application for leave to appeal.<sup>5</sup>
- The Commission lodged an application for leave to appeal the *Yara/Omnia* judgment with this Court on **24 August** 2011 – 110 court days after the *Yara/Omnia* judgment was delivered, and 95 court days outside the time period prescribed by the Constitutional Court Rules.<sup>6</sup>
- The Commission then filed the record in this Court one day late. It also filed its heads one day late, and failed to comply with the directive that written argument not be longer than 50 pages and be in 14-point font.<sup>7</sup>

6. The Commission’s explanation for its delay in bringing this application for leave to appeal is contained in one paragraph of the affidavit it filed in support of this application,<sup>8</sup> and is barely addressed in its heads.<sup>9</sup> There is a separate short affidavit asking for condonation for the late filing of the

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<sup>4</sup> The application for leave – in which the Commission seeks leave to appeal to the Supreme Court of Appeal (the “SCA”) – is at Record: 15B: 1638-1654

<sup>5</sup> In terms of CAC Rule 29(1)(a)(ii), read with s 63(5) of the Competition Act, 89 of 1998 (the “Competition Act”), the Commission had 10 court days to bring an application to the CAC for leave to appeal to the SCA or the Constitutional Court, and thus had to lodge any such application by Tuesday, 29 March 2011.

<sup>6</sup> In terms of Constitutional Court Rule 19(2), read with s 167(6) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), an application for leave to appeal directly to this Court had to be delivered by Tuesday, 5 April 2011.

<sup>7</sup> The Commission’s heads, including chronology, are 59 pages in 11-point font.

<sup>8</sup> Record: 15A: 1507-1508 para 73

<sup>9</sup> Commission’s heads pp 47-48 para 91. The Commission brushes off the points made in *Omnia*’s opposing affidavit in one sentence (para 91.2) before addressing the question of s 63(2) of the Competition Act (although that issue was addressed by *Omnia* in the course of motivating its opposition to the application for leave to appeal [Record: 15A: 1585-1588]).

Commission's written argument in this Court. Condonation for the late filing of the record is sought in the Commission's heads,<sup>10</sup> and an indulgence for the length of the heads is sought in the Commission's practice note.<sup>11</sup>

7. The principles relating to condonation are well-established.<sup>12</sup> A litigant which does not comply with the rules is required to apply for condonation, and show "*sufficient cause*" why the rules should be relaxed.<sup>13</sup> Where a time period has not been complied with, a full and frank explanation must be provided.<sup>14</sup> Factors to be considered by the Court when considering whether to grant condonation include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, whether it is in the public interest that the matter be heard, and the applicant's prospects of success on the merits.
8. The explanation proffered by the Commission for delivering its application for direct leave to appeal 95 days out of time is in essence that:<sup>15</sup>

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<sup>10</sup> Page 48, para 92

<sup>11</sup> At page 9

<sup>12</sup> See e.g. *Van Wyk v Unitas Hospital and another* 2008 (2) SA 472 (CC) at paras 20, 22 & 30-34, and the cases cited at fn6; *S v Basson* 2007 (3) SA 582 (CC) at paras 155-156. See, too, *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 40I-41E.

<sup>13</sup> Constitutional Court Rule 32(1); Practice Direction of 17 May 2010, para 6(iii)

<sup>14</sup> *Van Wyk supra* at para 22; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC) at para 20

<sup>15</sup> Record: 15A: 1507 para 73

- It “*initially intended to follow the “usual appeal process”*”, and so delivered an application to the CAC for leave to appeal to the SCA on 19 April 2011. (No explanation is given for why that application was itself well outside the time prescribed for applications for leave to appeal by both the CAC Rules and the Constitutional Court Rules.)
- Thereafter, the CAC handed down its *Loungefoam* decision,<sup>16</sup> which allegedly compounded the uncertainty around the Commission’s powers of investigations and referral. The Tribunal set aside the complaint referral in the *SAB* case<sup>17</sup> on the basis of the principles set out in the SCA decision in *Woodlands*<sup>18</sup> and the *Yara/Omnia* judgment.
- The Tribunal has received “*a slew of challenges*” to its current investigations and pending referrals,<sup>19</sup> with the result that it “*became clear that this matter required urgent attention from a higher court*”.
- On “*being advised that an application for direct access to this Court was possible, the Commission caused these papers to be prepared as expeditiously as possible*”.

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<sup>16</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>17</sup> *South African Breweries Limited and others v Competition Commission* (CT Case No. 134/CR/DEC07)

<sup>18</sup> *Woodlands Dairy (Pty) Ltd and another v Competition Commission* 2010 (6) SA 108 (SCA)

<sup>19</sup> The Commission has provided no details about these challenges. It has merely stated in para 17 of its application for leave [Record: 15: 1470] that it faces complaints in 12 out of 34 referrals pending before the Tribunal in the light of *Woodlands*, *Loungefoam* and *Yara/Omnia*. This Court and the respondents are thus not able to assess whether any of the jurisdictional complaints or challenges are meritorious, or whether any such challenges or complaints would stand to be upheld in the light of the *Yara/Omnia* judgment.

9. That cursory overview of the period between 14 March 2011, when the *Yara/Omnia* judgment was delivered by the CAC, and 24 August 2011, when this application was delivered, leaves a number of things unexplained. It also provides a misleading picture of the events which supposedly prompted the bringing of this application for direct leave to appeal.
10. The relevant timeline is apparent from the following chronology:

<u>DATE</u>	<u>EVENT</u>
13-09-2010	SCA delivers the <i>Woodlands</i> judgment
14-03-2011	CAC delivers the <i>Yara/Omnia</i> judgment
29-03-2011	Period prescribed by CAC Rule 29(1)(a) for applications for leave expires
05-04-2011	Period prescribed by Constitutional Court Rule 19 expires
07-04-2011	Tribunal dismisses the <i>SAB</i> complaint referral
19-04-2011	Commission files with CAC an application for leave to appeal to the SCA
06-05-2011	CAC delivers the <i>Loungefoam</i> judgment
28-06-2011	Commission's attorneys (Cheadle Thompson & Haysom Inc.) inform CAC – in response to a request about availability for a hearing in the Commission's application for leave to appeal to the SCA – that the Commission is “available in the first week of December” <sup>20</sup>
24-08-2011	Commission files an application for leave to appeal to this Court

11. The Commission thus knew by the first week of May 2011 about the *Loungefoam* decision, the *Yara/Omnia* judgment and the *Woodlands* judgment, as well as the alleged consequences of the latter two judgments

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<sup>20</sup> Record: 15A: 1655-1656

for the *SAB* referral. The Commission nevertheless took no steps to prosecute an appeal to the Constitutional Court at that stage. Nor did it even attempt to expedite its pending application for leave to appeal to the SCA. Instead, when asked by the CAC at the end of June 2011 to indicate its availability for a hearing in September 2011 or November 2011, the Commission responded that it was available for a hearing in the first week of December 2011.

12. The cryptic explanation that has been provided by the Commission in an attempt to cover the whole 95 days by which its application is late is thus manifestly unsatisfactory and inadequate.<sup>21</sup> This Court is left to speculate about what accounts for about 80% of the delay (the time between 6 May 2011 and 19 August 2011). There is also little explanation for what occurred immediately after 14 March 2011, other than that the Commission did not seem overly concerned about compliance with time periods at that stage either.
13. The argument that it purportedly became clear, in the light of *Loungefoam*, *SAB* and other unspecified cases in which challenges were raised, that the “*matter required urgent attention from a higher court*” also does not assist the Commission. The Commission already had had a

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<sup>21</sup> The unsubstantiated allegation, repeated in the Commission’s heads (at p47 para 91.1), that the Commission approached this Court “*as expeditiously as possible*” [Record: 15A: 1508 para 73.6] is not supported by the few facts which the Commission has disclosed.

pending application for leave to appeal to the SCA, which it acknowledges is the “*usual*” appellate court in respect of decisions of the CAC. All the Commission therefore had to do was attempt to expedite that application, or even simply have it heard in the first of the slots offered by the CAC (12-23 September 2011). The Commission chose not to do this, and instead to adopt a passive – even supine – approach towards that application.

14. The Commission faces another difficulty as well. It initially brought an application for leave to appeal to the SCA, as opposed to seeking leave to appeal to the Constitutional Court, because, on its own version, it considered the SCA route to be the appropriate one. At that stage it was well-acquainted with the *Woodlands* decision (in respect of which it had lodged an application for leave to this Court, which was subsequently withdrawn). The Commission also knew of the fate of the *SAB* referral – which had been dismissed almost two weeks before lodging its application for leave to appeal to the SCA. The Commission nevertheless made a deliberate decision not to attempt to appeal directly to this Court. It should not be allowed to resile from that election without a compelling and fully-motivated explanation.
15. The first reason why this application was late was consequently because the Commission decided that it should not bring such an application, but

instead attempt to appeal to the SCA. The Commission subsequently changed its mind, seemingly in part in the light of the CAC's *Loungefoam* judgment. The *Loungefoam* judgment does not however follow from the *Yara/Omnia* judgment, and in fact only refers to *Yara/Omnia* once, in a footnote.<sup>22</sup> The *Loungefoam* judgment therefore did not warrant a change of tack by the Commission in respect of *Yara/Omnia*. But even if one were to assume not only that *Loungefoam* justified the Commission reconsidering its stance in relation to *Yara/Omnia*, but also that it could permissibly do so, the Commission has not explained why it took so long after the handing down of the *Loungefoam* judgment to approach this Court. Nor, arguably even more significantly, has the Commission explained why it did not simply try to inject some urgency into its pending application for leave to the SCA in the light of any developments after 19 April 2011.

16. The purported need for clarity about the Commission's powers in investigations and complaint referrals – something of which the Commission makes much play in other contexts<sup>23</sup> – also does not justify the Commission's non-compliance being overlooked. A decision by this Court to decline to hear the Commission's desired appeal (whether on the basis of refusing condonation or dismissing the application for leave to

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<sup>22</sup> At fn39 (at para 53)

<sup>23</sup> See, for example, pages 45-46 of the Commission's heads.

appeal) would not leave the Commission in a state of flux. The Commission has a pending application for leave to appeal to the SCA which is due to be heard on Monday, 5 December 2011. If that application were to be upheld, the *Yara/Omnia* judgment would be considered by the SCA. If that application were to be dismissed, the Commission could either apply to the SCA itself for leave to appeal or again approach this Court – this time armed with reasons from the CAC as to why, notwithstanding the Commission’s new arguments (relating, for example, to *Loungefoam* and *SAB*, and the “proper interpretation” of s 50 of the Competition Act) it is satisfied that *Yara/Omnia* would not be overturned.

17. The question of the Commission’s prospects of success (another factor potentially relevant to condonation) is addressed later in these heads. As is submitted there, the Commission’s arguments lack merit and provide no basis for disagreeing with the CAC’s judgment. What should however be emphasized at this juncture is that, even if the *Yara/Omnia* judgment were to be thought to be wrongly decided, the refusal of condonation would not have the consequence of allowing a flawed decision to remain. The consequences of a refusal to hear the Commission’s proposed appeal would merely be that the Commission is required to proceed with its pending application for leave to appeal to the SCA (or, in other words, to follow what it accepts is the “usual appeal process”); and if the

*Yara/Omnia* judgment were really to have been wrongly decided, then the Commission should be confident both of the CAC granting leave, and of the SCA overturning the CAC's judgment. This is therefore not the kind of case where a court might legitimately take the view that, although there has been a long and inadequately justified delay, it would nevertheless be appropriate to consider the merits of the matter because it would not be in the interests of justice to let a wrong decision stand.

18. The Commission has therefore not made out a case for the condonation of its non-compliance. The application should thus be dismissed, alternatively struck off the roll, for this reason alone.

### **THE APPLICATION FOR LEAVE TO APPEAL**

19. A consideration of an application for leave to appeal requires an assessment of whether the matter involves a “*constitutional matter*”,<sup>24</sup> as well as whether it would be in the interests of justice for the appeal to be heard by the Constitutional Court.<sup>25</sup> The “*interests of justice*” criterion, in turn, involves a consideration of a number of factors,<sup>26</sup> including: the importance of the determination of the constitutional issue; whether the

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<sup>24</sup> Section 167(3)(b) of the Constitution, and Rule 19(1) of the Constitutional Court Rules

<sup>25</sup> Section 167(6)(b) of the Constitution

<sup>26</sup> For a discussion of relevant considerations, see for example *Mabaso v Law Society, Northern Provinces and another* 2005 (2) SA 117 (CC) at para 26, and the cases referred to in fn28 thereof. See, too, the oft-cited dicta in *MEC, Development Planning & Local Government v Democratic Party* 1998 (4) SA 1157 (CC) at para 32 (referred to e.g. in *Kaunda and others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at paras 15-16).

matter has been considered by the SCA or any other appellate courts; whether, if the applicant seeks to bypass the SCA there would be any advantages or disadvantages in a direct appeal; whether the constitutional matter involves the development of any law on which the views of the SCA would be of assistance; whether the evidence in the proceedings is sufficient to enable the Court to deal with the matter; the applicant's prospect of success in any appeal; and, if an appeal is sought directly to this Court, whether the matter could potentially be decided on non-constitutional issues.

20. There is some overlap between the factors relevant to the "*interests of justice*" enquiry and those considered in the context of condonation. But, as is apparent from a comparison between the list of factors referred to above and the previous section of this affidavit, certain additional factors fall to be addressed under the "*interests of justice*" rubric.
21. It is accepted that the appeal which the Commission desires to bring would raise a constitutional matter. The Commission is an organ of state and the *Yara/Omnia* judgment dealt with the extent of the Commission's powers with regard to the referral of complaints initiated by private complainants, and held that the Commission in this instance acted *ultra vires*. The Commission's characterisation of the matter as a constitutional one is nevertheless a belated one. The Commission did not refer to any

constitutional dimensions when arguing the matter before the Tribunal or the CAC,<sup>27</sup> and approached the matter as one involving simply conventional statutory interpretation. The Commission first raised constitutional aspects in its notice of application for leave to appeal to the SCA.<sup>28</sup> The framing of the relevant issues in a constitutional light has therefore been done in an attempt to expand the appeal avenues open to the Commission.

22. Omnia's answering affidavit in answer to the application for leave to appeal mentions a number of grounds (in the context of the "*interests of justice*" criterion) on which it is contended that leave should be refused.

These are:

- the Commission's pending application for leave to appeal to the SCA, and the appropriateness of having that application decided first – thereby obtaining the CAC's views as to whether the Commission's criticisms of the *Yara/Omnia* judgment have any merit;<sup>29</sup>
- the absence of any basis for undermining the Commission's application for leave to appeal to the SCA, not least because the purported need to obtain clarity about the Commission's powers as a matter of urgency could have been addressed by the Commission prosecuting its pending application for leave with due expedition;<sup>30</sup>

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<sup>27</sup> Record: 15B: 1635 para 124

<sup>28</sup> Record: 15B: 1651-1652

<sup>29</sup> Record: 15A: 1577-1578 paras 7-10

<sup>30</sup> Record: 15A: 1578-1583 paras 11-17

- the undesirability of abandoning the usual appeal process and thereby depriving this Court of the views of the SCA<sup>31</sup> – more particularly in circumstances where:
  - the Commission has complained of a supposed inconsistency between the SCA’s *Woodlands* judgment and the CAC’s *Yara/Omnia* judgment;
  - the Commission has also brought an application for leave to appeal to the SCA against the *Loungefoam* judgment, and the SCA could therefore also potentially address any supposed inconsistencies between *Yara/Omnia* and *Loungefoam*; and
  - the determination of the matter involves an exercise in statutory interpretation, performed against the backdrop of a number of SCA and CAC decisions;
- the Commission’s non-compliance with s 63 of the Competition Act;<sup>32</sup>
- the deficiencies in the Commission’s application for condonation;<sup>33</sup>
- the Commission’s impermissible attempt to alter the judgments in *Woodlands*, *Loungefoam* and *Yara/Omnia*, “read cumulatively”, in an appeal of the *Yara/Omnia* judgment;<sup>34</sup> and
- the Commission’s absence of reasonable prospects of success in any appeal.<sup>35</sup>

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<sup>31</sup> Record: 15A: 1578-1579 para 12; 1583-1585 paras 18-20

<sup>32</sup> Record: 15A: 1585-1588 paras 21-26

<sup>33</sup> Record: 15A: 1588-1593 paras 27-42

<sup>34</sup> Record: 15A: 1593-1596 paras 43-47

<sup>35</sup> Record: 15A: 1596ff

23. Those arguments have been set out at some length in Omnia's answering affidavit. Some have also been dealt with above, under condonation. It suffices to emphasize a few points in these written submissions, and to make an additional point in relation to the Commission's new "*piecemeal review*" contention.
24. The Commission argues that the application raises "*issues of crucial importance*" regarding its powers of investigation and referral.<sup>36</sup> However, the Commission also now contends in its heads that the *Yara/Omnia* appeal should have been disposed of on the basis that the counter-application was purportedly not competent.<sup>37</sup> That contention is case-specific and involves no point of general principle. A decision in the Commission's favour on that point would not clarify any of the matters that the Commission says are of such fundamental importance that they require the prompt attention of this Court. The merits of the case also involves factual questions (relating for example to the ambit of the Nutri-Flo complaint) which could be decisive of the case, and render any comprehensive legal analysis academic.
25. Insofar as the Commission seeks a definitive ruling on the nature of the complaint investigation and complaint referral process, and the

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<sup>36</sup> Commission's heads p 45 para 86

<sup>37</sup> Commission's heads pp 14-17

Commission's powers in relation thereto, it moreover seeks to obtain that guidance on the basis of arguments:

- which were mostly not advanced before the CAC in the appeal which led to the *Yara/Omnia* judgment (and which have thus largely been formulated by the Commission and its lawyers after that judgment was delivered);
- which, in a number of instances, were not even articulated in the Commission's application for leave to appeal to this Court;
- which in significant part rely on lengthy *obiter dicta* by the Tribunal in its *SAB* determination, which the CAC has not yet had occasion to address or consider;
- which have thus, with a few exceptions, not been considered by the CAC;
- which have not been considered at all by the SCA, whose *Woodlands* judgment is alleged to be inconsistent with *Yara/Omnia*.

26. The Commission thus wants this Court to lay down a binding precedent regarding the ambit of its powers, and qualify or overrule the CAC's case-law from *Sappi* (2003)<sup>38</sup> to *Loungefoam* (2011), without knowing:

- what the specialist court that was established to deal with competition matters (the CAC) thinks about the Commission's criticisms of the *Yara/Omnia* judgment, or the new contentions which the Commission has now developed (in part in relation to

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<sup>38</sup> *SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and another* [2003] 2 CPLR 272 (CAC)

other decisions of the CAC), or the approach advanced by the Tribunal in *SAB*; or

- what the SCA, the usual appellate court for parties unhappy with decisions of the CAC, considers about, for example, the Commission's criticisms of *Yara/Omnia*, the Commission's submissions about *Woodlands*, the Commission's criticisms of *Loungefoam*, the Commission's contentions about *Yara/Omnia* being inconsistent with *Woodlands* and *Loungefoam*, and the Commission's contentions about the proper interpretation of Chapter 5, Part C (ss 49B-51) of the Competition Act.

27. The Commission moreover seeks to side-line the CAC and leapfrog the SCA when its pending application for leave to appeal is due to be heard by the CAC on 5 December 2011 (and could have been heard earlier if the Commission had shown even a modicum of interest in having that application set down expeditiously).

28. The Competition Act, which establishes the Commission, the Tribunal and the CAC, requires a party in the position of the Commission to approach the CAC, in the first instance, to seek leave to appeal – whether to the SCA or this Court.<sup>39</sup> The Commission submits that, although s 63(2) of the Competition Act states this in terms, it should not in fact be

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<sup>39</sup> Section 63(2) of the Competition Act, which provides that:

“An appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal, or, if it concerns a Constitutional matter, to the Constitutional Court, only –

(a) with the leave of the Competition Appeal Court; or

(b) if the Competition Appeal Court refuses leave, with leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be”.

read in this way. According to the Commission, s 63(2) provides that an appeal from a decision of the CAC in respect of a constitutional matter lies to the SCA or the Constitutional Court, “*subject to section 63 and their respective rules*”, and Constitutional Court Rule 19 permits an applicant to apply for leave to appeal to this Court without first applying for leave from the court *a quo*.<sup>40</sup> That is not an interpretation to which the relevant provisions of the Competition Act are reasonably susceptible, as s 63 makes it clear that leave must first be sought from the CAC before the SCA or Constitutional Court is approached.<sup>41</sup> But, irrespective of whether s 63 of the Competition Act could be distorted in the way in which the Commission contends, what is undeniable is that Parliament considered it appropriate for the views of the specialist competition court to be canvassed first, prior to any application for leave to appeal being brought to the Constitutional Court. Where the Commission has set in motion just such a process – and the CAC’s views can furthermore be expected to be provided in the coming weeks – it would accordingly not be in the “*interests of justice*” for the CAC application process contemplated by the Competition Act to be circumvented.

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<sup>40</sup> Commission’s heads, pages 47-48 para 91.2

<sup>41</sup> It is submitted that the respective rules of the SCA and this Court govern procedures in those courts where applicable. Section 62(4) makes an appeal to this Court subject to s 63 and (not “*or*”) the rules of this Court. The rules of this Court would thus govern an application under s 63(2)(b) following refusal of leave by the CAC. The rules of the SCA and of this Court cannot override the terms of national legislation.

29. The Commission argues in the alternative and in any event that s 63(2) of the Competition Act infringes s 167(6) of the Constitution, and is therefore unconstitutional. Section 167(6)(b) of the Constitution requires national legislation or the rules of the Constitutional Court to allow a person “*when it is in the interests of justice and with leave of the Constitutional Court ... to appeal directly to the Constitutional Court from any other court*”. The critical question for the present matter insofar as the constitutionality of s 63(2) of the Competition Act is concerned is whether s 167(6) precludes Parliament from making provision for a person to apply to the Constitutional Court for leave to appeal directly to this Court on a constitutional matter (s 63(6) of the Competition Act), but requires the CAC first to express its views on the application (s 63(2)(b)).<sup>42</sup> One does not, however, get to that question in this case. For, whether or not ss 62 and 63 of the Competition Act are problematic,<sup>43</sup> a party cannot simply disregard statutory provisions on the

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<sup>42</sup> Another pertinent issue, albeit not directly relevant to the *Yara/Omnia* matter in the light of the Commission’s decision to apply to the CAC for leave to appeal to the SCA (as opposed to this Court), is whether it would be permissible for legislation to provide for another court to grant leave to this Court, or whether this Court must instead in all instances determine who appears before it.

<sup>43</sup> In *American Natural Soda Ash Corporation and another v Competition Commission and others* 2005 (6) SA 158 (SCA) the SCA notably expressed no reservations about s 63 insofar as it applied to appeals to this Court, stating e.g. at para 10: “*The effect of s 62(3) regarding appeals to the CC is uncontroversial, since it allows appeals on ‘any constitutional matter’, and under the Constitution the CC’s sole jurisdiction is in such matters*”. See, too, *American Natural Soda Corporation and another v Competition Commission and others* 2003 (5) SA 655 (SCA) at para 16.

basis of alleged unconstitutionality.<sup>44</sup> Section 63(2) of the Competition Act accordingly had to be complied with, in the absence of a challenge to its constitutionality; and there has been no such challenge by the Commission. In any event, the interests of justice in this case do not require a by-passing of s 63(2), for reasons already stated.

30. The Commission's prospects of success are addressed below. It merely needs to be emphasized at this point (as in the section on condonation) that this is not a case where a decision of a lower court would be left intact in the event of the Commission being refused leave to appeal. If there were to be reason to overturn the CAC's *Yara/Omnia* judgment, as the Commission contends, the SCA could be expected to do so. This is accordingly not a matter in which the prospects of success need be accorded any weight in the "*interests of justice*" evaluation.
31. The interests of justice accordingly do not warrant this application for leave to appeal being granted and the application should thus be refused.

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<sup>44</sup> *Ingladew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC) at paras 20 and 22; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29.

**THE MERITS OF THE APPEAL WHICH THE COMMISSION  
DESIRES TO BRING**

32. The Commission has advanced an entirely new *in limine* argument (under the heading “*OMNIA’S PIECEMEAL REVIEW*”), which it contends should have resulted in the counter-application being dismissed and the matter referred back to the Tribunal for adjudication on the merits.<sup>45</sup>
33. The Commission also takes issue with the CAC’s interpretation of the Competition Act and its interpretation of Nutri-Flo’s complaint. It submits that the CAC erred on both legs<sup>46</sup> and that the Commission’s referral of a complaint against Omnia and Yara were competent and ought not to have been set aside by the CAC.<sup>47</sup>
34. The Commission’s “*piecemeal review*” argument will be addressed first. Thereafter, the ambit of the Nutri-Flo referral (a factual question) will be considered. Finally, these heads deal with the “proper interpretation” of the relevant provisions of the Competition Act, and the Commission’s new arguments with regard to the meaning of these provisions. It is submitted that the Commission’s contentions are wrong, and that there is no basis for overturning the judgment of the CAC.

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<sup>45</sup> Commission’s heads pages 14-16

<sup>46</sup> Commission’s heads pages 17-18 paras 35 & 36

<sup>47</sup> Commission’s heads page 44 para 85

### A “PIECEMEAL REVIEW”?

35. The Commission contends that Omnia should have included the challenge mounted in its counter-application in the review it brought in 2005 (in which it contended that the period for referral had not been validly extended),<sup>48</sup> and that having failed to pursue that ground of review then Omnia was purportedly precluded from ever raising it again. Accordingly, so the Commission submits, “*there was no competent application before the CAC seeking the dismissal of the referral*”.<sup>49</sup>
36. The Commission’s new argument is legally misconceived. It appears to conflate and distort a number of different legal principles, more particularly the rule relating to the undesirability of piecemeal reviews,<sup>50</sup> the rules concerning *res judicata* and issue estoppel,<sup>51</sup> the “once-and-for-all” rule in actions,<sup>52</sup> and an extension of the *res judicata* rule dealing

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<sup>48</sup> The CAC’s judgment in the 2005 reviews is reported at [2006] 1 CPLR 27 (CAC).

<sup>49</sup> Commission’s heads pages 14 -16 paras 25-32

<sup>50</sup> Articulated in cases such as *Wahlhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A) at 119G; *Ismail and others v Additional Magistrate, Wynberg and another* 1963 (1) SA 1 (A) at 5H-6A. See, too, *Loungefoam* at para 29.

<sup>51</sup> The *res judicata* rule is summarized in the passage from *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45F-G, referred to fn29 of the Commission’s heads, where the Court said that, where “*a cause of action has previously been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an exceptio rei judicatae ...*”.

<sup>52</sup> See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835; and *Symington and others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 (5) SA 550 (SCA) at para 26, referred to in fn30 of the Commission’s heads. As the Appellate Division stated in *Evins*, the “once and for all” rule most often finds application in common-law actions for damages in delict or for breach of contract, and requires a plaintiff to claim in one action all damages flowing from the same cause of action.

with actions which are an abuse of process.<sup>53</sup> None of those rules is applicable on the facts of the matter. There is also no overarching legal principle which can be extracted from them, let alone one which is germane to the facts of the present case.

37. The argument is in any event incapable of being advanced by the Commission at this stage. The argument is an entirely new one. It was not advanced before the Tribunal; it was not advanced before the CAC; it was not included in the Commission's application for leave to appeal to the SCA; and it was not even foreshadowed (let alone developed) in the Commission's application for leave to appeal to this Court. That is a fatal impediment to the Commission, as a contention of that kind is in the first instance a factual one, and so should have been expressly pleaded in the Commission's answer to the counter-application in order to be entertained.<sup>54</sup> That was in fact expressly stated in *Janse van Rensburg*,<sup>55</sup> a case on which the Commission places some store.

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<sup>53</sup> *Janse van Rensburg and others NN.O. v Steenkamp and another; Janse van Rensburg and others NN.O. v Myburgh and others* 2010 (1) SA 634 (SCA) at paras 27-30, where reference was made to an extension of the *res judicata* rule, to cover situations in which it “*becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings*”. (The Commission has quoted a passage from an English judgment (*Henderson v Henderson*) quoted in para 27 of *Janse van Rensburg*, and has stated that the SCA has adopted the proposition quoted. That is not quite accurate; the SCA in fact expressed its unequivocal approval for a passage from the Privy Council judgment in *Brisbane City Council v Attorney-General for Queensland*, quoted at para 29 of *Janse van Rensburg*.)

<sup>54</sup> Not only did the Commission not “plead” such an allegation, in order to allow Omnia to answer it, but the 2005 review applications of Sasol and Omnia were not even before the Tribunal or the CAC, or concomitantly this Court. All that has been included in the record is the answering

38. The Commission has furthermore overlooked the consequences of the principle of legality,<sup>56</sup> and ignored the fact that, because the contentions advanced in the counter-application related to whether the Commission had lawfully referred the Nutri-Flo complaint (insofar as Omnia is concerned) to the Tribunal and thus whether the Tribunal had the jurisdiction to consider it, they could have been raised by the Tribunal or the CAC *mero motu* at any stage of the proceedings.<sup>57</sup>

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affidavit of Nutri-Flo (the fourth and fifth respondents) [Record: 12: 1181] and the replying affidavit of Omnia [Record: 14: 1371-1378].

<sup>55</sup> See paragraph 30 of *Janse van Rensburg*, where the SCA stated that a contention to that effect (i.e. that the conduct of a party has reached the level of an abuse) depends “*on the facts of each matter, for how else should a court determine whether the conduct of a party has reached the level of an abuse? That being so it is for the party who relies on the application of the rule pertinently to plead such reliance and lay a foundation in fact which would enable the opposing parties to deal with such reliance*”.

<sup>56</sup> For a recent application of this principle in a competition context, see *Senwes Ltd v Competition Commission* [2011] 1 CPLR 1 (SCA) at paras 51, 53 and 59.

<sup>57</sup> The investigation and referral of the initiated complaint are jurisdictional facts which must be present for the Tribunal to consider a referral. See the determination of the Tribunal in *Glaxo-Wellcome (National Association of Pharmaceutical Wholesalers and others v Glaxo Wellcome (Pty) Ltd and others* 45/CR/Jul01) and the judgment of the CAC in the same case, which held that one must determine what conduct was alleged in the complaint and compare such conduct with the conduct alleged in the referral to see whether they are “*substantially the same*” (para 88 of the Tribunal’s determination and para 33 of the CAC’s judgment). Applying this test, the CAC found (para 34) that the complaint submitted by the complainants had not covered excessive and predatory pricing (thus upholding the Tribunal’s decision that it did not have jurisdiction in respect of that part of the referral) and also found (paras 39ff) that the complaint had not covered an alleged refusal to give access to an essential facility. The CAC’s finding was said by the court to deprive the Tribunal of jurisdiction to determine the alleged prohibited practices (paras 29-30 and 35-36). The matter not covered by the initiated complaint was thus struck out. (See, too, the Tribunal’s determination in *Woodlands* at paras 13 and 114-129.)

Regarding the concept of jurisdictional facts in general, see *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) at 34 *in fine* – 35C; *Kimberley Junior School and Another v Head of Northern Cape Education Department and Others* 2010 (1) SA 217 (SCA) at paras 11-14. In *Papercor CC v Finewood Papers (Pty) Ltd and Others* [1999-2000] CPLR 250 (CT) the Tribunal held that the prior initiation of a complaint was a jurisdictional prerequisite to enable it to entertain an application for interim relief. A useful comparison would be those cases which have held that the existence of a dispute regarding an unfair dismissal or an unfair labour practice, and the referral of such dispute to conciliation, are jurisdictional facts without which the industrial court or labour court cannot determine the alleged unfair dismissal or unfair labour practice: see, for example *NUMSA and Others v Driveline Technologies (Pty) Ltd* 2000 (4) SA 645 (LAC) at

39. The Commission has in addition ignored the explanation given by Omnia in its counter-application for why the counter-application was brought at that time, and the fact that the Commission did not take issue with that explanation in its answer. The Commission has also failed to take account of the fact that the permissible ambit of the Nutri-Flo complaint referral arose squarely in the last quarter of 2009 in the context of the Commission's October 2009 application to amend, and thus was properly raised in that context.

#### **A COMPARISON OF NUTRI-FLO'S COMPLAINT AND THE NUTRI-FLO COMPLAINT REFERRAL**

40. The key elements of Nutri-Flo's complaint, on the one hand, and the Nutri-Flo complaint referral, on the other, have been summarized in Omnia's affidavit in opposition to the Commission's application for leave to appeal.<sup>58</sup> That opposing affidavit also contains a brief comparison of the differences between the two.<sup>59</sup>
41. The ambit of the complaint will first be considered, followed by an analysis of the conduct referred by the Commission.

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paras 68-81; and *EOH Ebantu (Pty) Ltd v CCMA and Another* [2008] 7 BLLR 651 (LC) at paras 7-10.

<sup>58</sup> See Record: 15B: 1614-1621 paras 87-92, & 95 for the Nutri-Flo complaint, and Record: 15B: 1620 para 94 and 1622-1624 para 99 for the Nutri-Flo complaint referral.

<sup>59</sup> Record: 15B: 1625-1626 para 102

### **The ambit of the complaint**

42. The task of identifying the complaints is facilitated by the fact that Nutri-Flo was assisted in submitting its document to the Commission by its attorneys; that Nutri-Flo used the prescribed CC1 Form; and that the form referred to an attached affidavit which was very full and carefully crafted with the obvious assistance of Nutri-Flo's lawyers. The only conclusion to be drawn from these documents is that Nutri-Flo intended to be a complainant only in respect of three alleged abuses of dominance by Sasol, namely [a] exclusionary pricing by Sasol in violation of s8(c) [b] excessive pricing by Sasol in violation of s 8(a) and [c] price discrimination by Sasol in violation of s 9(1)(c). Nutri-Flo signalled no intention to be a complainant in respect of any alleged conduct prohibited by s 4.

### **The CC1 Form**

43. The CC1 Form<sup>60</sup> stated that the complaint was one concerning two identified Sasol companies. The complaint was not stated to concern Nitrochem (or Omnia), or Kynoch.

44. A complainant might not know the full range of alleged colluders and therefore need not necessarily identify every supposed participant in the

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<sup>60</sup> Record: 1: 1

conduct in every instance. However, when, as in the present case, a complainant states that its complaint only concerns one firm (Sasol), that is a very powerful indicator that the complainant (Nutri-Flo) had no intention of being a complainant in respect of s4(1)(b) conduct (as Sasol could not have colluded with itself).

45. This is in any event not a case where it could be suggested that, although Nutri-Flo intended to be a s 4(1)(b) complainant it did not know the names of the firms with whom Sasol had supposedly colluded. If Nutri-Flo had intended to be a s 4(1)(b) complainant it could and would have named Kynoch and Nitrochem in its CC1 Form, since the names of those firms were stated in passing in the accompanying affidavit with reference to the supposed cartel.

46. In the part of the CC1 Form headed “*Description of the Complaints*” Nutri-Flo stated:

“The respondents (Sasol) have imposed price increases in respect of raw materials it supplies to the complainants, to such an extent as to render its continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached hereto.”

47. The important features of this description are the following:

- The respondents are identified as the two Sasol companies. It is only their conduct which is said to be the subject of the complaint.
- That one is concerned with unilateral conduct by Sasol is reinforced by the use of “*imposed*”.

- The complaint is said to concern the raw material prices charged by Sasol to Nutri-Flo, rather than prices charged by Sasol and other members of a cartel to customers.
- The attached affidavit is referred to in amplification of *Sasol's* conduct. The reader is told that the prohibited conduct which Sasol has perpetrated will be found more fully identified in the attached affidavit.
- As is apparent from a consideration of the affidavit, the brief summary in the CC1 Form is a clear reference to the various abuses of dominance which Sasol is alleged to have perpetrated when increasing its prices to Nutri-Flo with effect from 1 September 2003.

#### The accompanying affidavit

48. The attached affidavit<sup>61</sup> places beyond doubt that the intended complaint was an abuse of dominance complaint against Sasol.
49. The structure and contents of the affidavit, including the relevant allegations in the sections headed “A” to “M”, have been extensively analysed in Omnia’s opposing affidavit,<sup>62</sup> and so shall not be repeated here.
50. It need merely be added that (i) the affidavit was also intended to form the basis of an application for interim relief, and thus contains some material

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<sup>61</sup> Record: 1: 2-100; 2: 101-116

<sup>62</sup> Record: 15B: 1616-1620 para 92

not directly germane to the initiating of a complaint; and (ii) the notice of motion, which related to the interim relief application, sought relief only against Sasol in respect of raw material prices charged to Nutri-Flo, and specifically identified ss8(a), 8(c) and 9(1) as being the prohibited practices on which Nutri-Flo relied.<sup>63</sup>

51. It is submitted that an examination of the CC1 Form and the accompanying affidavit places the matter beyond doubt. Nutri-Flo intended to be a complainant in respect of three abuse of dominance complaints against Sasol. Assisted by its lawyers, Nutri-Flo put the matter so clearly that nobody could reasonably have thought otherwise. Certainly Nutri-Flo did not signal its intention to be a complainant in respect of a s 4(1) case against Sasol, Kynoch and Nitrochem (or Omnia). In *Clover*<sup>64</sup> the Tribunal said in its judgment that it is not uncommon for private parties to prosecute abuse of dominance cases but that it is “*exceedingly rare*” for a private party to prosecute cartel conduct. In this case, however, one does not need to rely on inferential factors of this kind because Nutri-Flo made its limited intentions perfectly plain in its complaint submission. Furthermore, Nutri-Flo’s document would have been hopelessly deficient as a s 4(1)(b) complaint because it provided no

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<sup>63</sup> Whether this notice of motion, as distinct from the founding affidavit, was attached to the CC1 Form is unclear, but either way the Commission had the notice of motion because the Commission was cited as the fifth respondent in the interim relief application.

<sup>64</sup> *Clover Industries Ltd and others v The Competition Commission In re: Competition Commission v Clover Industries Ltd and others* [2008] 2 CPLR 312 (CT) at para 29

information concerning the supposed s 4(1)(b) conduct (the cartel was stated as a conclusion without any accompanying facts).<sup>65</sup> Given that the document was prepared with the assistance of lawyers and was, in respect of abuse of dominance, extremely full, the terse passing reference to the cartel could never have been intended as a complaint.

### Nutri-Flo's avowed intention

52. If one needs comfort that one has understood Nutri-Flo's intentions correctly, we have it from Nutri-Flo's own mouth.<sup>66</sup> On 12 August 2005 the deponent to the affidavit filed in support of the complaint, Mr Lyle, made an affidavit in answer to Omnia's review concerning the validity of the extension of the referral period. In paragraph 12 of his affidavit in the review Mr Lyle stated [underlining added]:<sup>67</sup>

“Save for pointing out that Omnia was joined in the second complaint because of its legal interest in the matter and that none of the referred prohibited practices, as submitted by Nutri-Flo, is alleged to be arising from Omnia's conduct, the content of this paragraph is admitted.”

Mr Lyle also noted at paragraph 7(a) of his affidavit that “*the Commission included in the referral prohibited practices not referred to in the complaint lodged by Nutri-Flo*”.

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<sup>65</sup> The complaint would accordingly have failed “*the test of legality and intelligibility*” insofar as it purported to relate to a s 4 complaint: see the SCA *Woodlands* judgment para 35.

<sup>66</sup> The examples which follow are referred to in Omnia's opposing affidavit [Record: 15B: 1621 para 95].

<sup>67</sup> Quoted at Record: 15B: 1621 para 95

The Commission's contentions

53. The Commission's argument as to why Nutri-Flo's 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*" is confined to one paragraph and essentially involves mentioning the three instances in which references were made in Lyle's affidavit to a "*cartel*" which allegedly controlled the prices of urea and KCL (potash).<sup>68</sup>
54. The fact that Nutri-Flo made mention of an alleged cartel in three sentences in its 241-paragraph affidavit is, however, of no moment. In order to gauge whether Nutri-Flo submitted a complaint about a cartel, one needs to look at the context in which the allegations were made, and the reasons why they were included in the affidavit which accompanied Nutri-Flo's CC1 Form.
55. The three references to a "*cartel*" are located in parts D and E of Nutri-Flo's affidavit (the parts headed "*The Relevant Product Markets*" and "*The Geographic Market*", respectively).<sup>69</sup> It is not altogether clear why those allegations were considered relevant at that point. But what is apparent is that they were merely included in order to bolster contentions

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<sup>68</sup> Commission's heads pp 43-44 para 83, referring to paragraphs 47, 53 and 54 of Nutri-Flo's affidavit. In its gloss on those quotations, the Commission consistently refers to the cartel being alleged to comprise "Omnia", whereas Nutri-Flo merely talks of "Nitrochem".

<sup>69</sup> Record: 1: 19: 23-24, 26-27

relating to Sasol's dominance and market power in the markets for the supply of ANS, LAN, urea and potash. There was no complaint that the alleged cartel was impeding Nutri-Flo from importing those products or charging too high a price for them locally. Nor is there any mention of the "cartel" in the portions of the affidavit dealing with the "*Relief Sought*" (part B),<sup>70</sup> "*The New Complaint against Sasol*" (part F)<sup>71</sup> or the crucial section of the affidavit, "*Prohibited Practices*" (part I).<sup>72</sup> Under "*Prohibited Practices*", Nutri-Flo complained about Sasol committing three prohibited practices – exclusionary pricing, excessive pricing and discriminatory pricing – and as having purportedly contravened s 8(c), s 8(a) and s 9(1)(c) of the Competition Act.

56. On a conspectus of the complaint as a whole, as well as Nutri-Flo's subsequent comments about the complaint, there cannot seriously be any doubt that the three references to a cartel in the urea and potash markets which Nutri-Flo made *en passant* in Lyle's affidavit were not intended to relate to a complaint about the alleged cartel. Instead, as the CAC found (with respect correctly),<sup>73</sup> those allegations at most amounted merely to information submitted to the Commission under s 49B(2)(a) of the Competition Act – which the Commission could have used to initiate a

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<sup>70</sup> Record: 1: 11-13

<sup>71</sup> Record: 1: 32-44

<sup>72</sup> Record: 1: 59-100; 2: 101-105

<sup>73</sup> Record: 15A: 1526 para 30, 1527-1528 para 33

complaint in terms of s 49B(1), had it considered that there was a *prima facie* case for such a complaint.

### **The conduct referred by the Commission**

57. The Nutri-Flo complaint referral contains complaints of exclusionary and excessive pricing by Sasol in contravention of s 8(a) and s 8(c) of the Competition Act.<sup>74</sup> In addition, the Nutri-Flo complaint referral (prior to amendment) contains various allegations of contraventions of s 4(1)(b) alternatively s 4(1)(a), of the Competition Act, including:

- an allegation of market division, by virtue of the 1996 ammonia supply agreement between Sasol and Omnia, and LAN toll manufacturing agreements between Omnia, on the one hand, and Sasol and Kynoch on the other;
- allegations of price-fixing and other co-ordinated conduct, with regard to potash, urea, DAP and MAP, through the Import Planning Committee (IPC);
- allegations of price-fixing and other co-ordinated conduct, with regard to “*nitrogen derivative products*” (ammonia, ANS and ANS in dilute solution), LAN, urea, MAP and DAP, through the Nitrogen Balance Committee (NBC);
- allegations of bid-rigging in respect of exports, with regard to “*nitrogen derivative products*”, and LAN.

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<sup>74</sup> The Commission’s initial founding affidavit in the Nutri-Flo complaint referral (dated 4 May 2005) is at Record: 10: 981-1000 & 11: 1001-1012; the Commission’s first amended affidavit (of November 2006) is at Record: 11: 1013-1057); the Commission’s second amended “affidavit” (which has never been signed) is at Record: 11: 1058-1100 & 12: 1101-1107.

58. None of those alleged infractions of s 4(1) of the Competition Act was covered by the complaint which Nutri-Flo submitted. Furthermore, apart from the reference to the importation and pricing of potash and urea, there was not even any mention in the Nutri-Flo complaint of the kinds of collusive conduct alleged in the Nutri-Flo complaint referral.
59. We are thus concerned in this case with a situation in which a complaint referral added causes of action (allegations of contraventions of s 4(1) of the Competition Act) which were not included in the complaint. What remains to be considered is whether the CAC was correct in holding that this was impermissible.

## **THE INITIATION, INVESTIGATION AND REFERRAL OF COMPLAINTS**

60. The provisions in the Competition Act dealing with complaints, investigations and complaint referrals have been the subject of judgments or determinations of the CAC and the Tribunal since at least 2003. The earlier case-law includes *Sappi*, *Glaxo Wellcome*,<sup>75</sup> *Clover*,<sup>76</sup> *Woodlands*,<sup>77</sup> and *Netstar*.<sup>78</sup> The judgment of the SCA in *Woodlands* was

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<sup>75</sup> *Glaxo Wellcome (Pty) Ltd & others v National Association of Pharmaceutical Wholesalers & others* 15/CAC/Feb 02

<sup>76</sup> *Competition Commission v Clover Industries Ltd & others* 78/CAC/Jul08 and 81/CAC/Jul08

<sup>77</sup> *Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd v Competition Commission* [2009] 1 CPLR 250 (CT); and 88/CAC/Mar09

<sup>78</sup> *Netstar (Pty) Ltd & others v Competition Commission & another* 2011 (3) SA 171 (CAC); [2011] 1 CPLR 45 (CAC)

consistent with that jurisprudence, and the CAC judgments in *Yara/Omnia* and *Loungefoam* not only applied principles laid down in earlier decisions of the CAC and the Tribunal, but also gave effect to the *SCA Woodlands* judgment.

61. The rest of this section contains an analysis of the rules and principles which emerge from a conspectus of that case-law and an analysis of the relevant provisions of the Competition Act (contained in Part C of Chapter 5 (ss 49B-51)). The analysis is broken up into the four distinct phases identified by the Competition Act:

- the initiation of a complaint (whether by the Commission, or a private person<sup>79</sup>);
- the investigation of a complaint by the Commission;
- the referral of a complaint by the Commission; and
- the adjudication of a complaint by the Tribunal.

### **The initiation of a complaint**

62. The legal position regarding the initiation of complaints has been set out in some detail in paragraphs 60 to 71 of *Omnia's* opposing affidavit.<sup>80</sup> The Court is referred to what is stated there. Four points are emphasized at this juncture:

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<sup>79</sup> The Competition Act refers to the initiation of a complaint by a private person as the “*submission*” of a complaint (s 49B(2)(b)); but both processes can be referred to as “*initiation*”.

<sup>80</sup> Record: 15B: 1602-1607

- First, in the case of a private individual, the Competition Act distinguishes between the submission (initiating) of a “*complaint*” (s 49B(2)(b)) and the submission of “*information*” (s 49B(2)(a)) – a distinction which the CAC accorded some importance in *Yara/Omnia*. A person can thus submit information without being a complainant.
- Secondly, a complaint in s 49B is a “*complaint against an alleged prohibited practice*” (s 49B(2)(b)). A “*complaint*” is thus equated to the perpetration of an alleged prohibited practice – what for convenience may be styled a competition-law cause of action.
- Thirdly, *intention* is decisive when it comes to determining whether a private party intended to initiate a complaint rather than provide information. An articulation of a grievance only becomes a complaint when there is some realistic basis for apprehending that the aggrieved person intends, absent a referral, to assume the role of complainant herself. The best evidence of this intention is the use of the prescribed form, but in the absence thereof one might infer intention from *inter alia* the content and context of the person’s submission.
- Fourthly, as a complaint has to relate to “*an alleged prohibited practice*” one must not simply enquire whether a private person has intended to submit a complaint, but which complaints, if any, the private party has submitted.

### **The investigation of a complaint**

63. Once a complaint has been initiated, the Commissioner must direct an inspector to investigate the complaint (s 49B(3)).<sup>81</sup> Since the duty in terms of s 49B(3) to appoint an investigator is imposed not only when a private party submits a complaint but also when the Commissioner himself initiates a complaint, it is submitted that the appointment and conduct of an investigation must be preceded by the initiation of a complaint. If the Commissioner could appoint an investigation without first initiating a complaint, there would be no point in requiring the Commissioner to initiate a complaint at all. The initiation is clearly the statutory event which triggers a lawful investigation.<sup>82</sup>
64. In *Clover* the Tribunal held that a “*complaint*” is a “*juristic act necessary to bring alleged anti-competitive conduct within the ambit of the statute’s formal procedures with Sections 49 and 50 being the first steps in the process*”.<sup>83</sup> This proposition was approved by the CAC in its judgment in *Clover*.<sup>84</sup> The first of the “*formal procedures*” referred to in the quoted passage is the appointment of an investigation in terms of s 49B(3). Earlier in its judgment in *Clover*, the CAC said that it “*cannot be*

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<sup>81</sup> One of the Commission’s functions listed in s 21(1) of the Competition Act is to investigate and evaluate alleged contraventions of Chapter 2 (s21(1)(c)).

<sup>82</sup> *Loungefoam* at para 42

<sup>83</sup> At para 18. (The reference in the quoted passage to s49 is clearly a typographical error – the reference should have been to s49B.)

<sup>84</sup> At para 12

*gainsaid that Section 49B is the only provision in the Act which gives imprimatur for the process of investigation consequent upon a complaint to be commenced by the Commission alternatively the Commission itself initiating a complaint against an alleged prohibited practice”.*<sup>85</sup>

65. The point was made even more clearly by the CAC in *Woodlands*. In that case the Commission’s counsel had argued that the initiating of a complaint was not a prerequisite for a lawful investigation into alleged prohibited conduct in terms of s21(1)(c). The CAC in response said that this construction “*appears to extend the description of the functions of the Commission into an autonomous set of powers, separate from the approach to investigations as set out in section 49B of the Act, which is the only substantive section dealing with the question*” and that the solution to the problem facing the court “*lies in an engagement with the wording of s49B rather than a contrived extension of the meaning of s21 of the Act*”.<sup>86</sup>

66. The CAC also made it clear in *Sappi* that the Commission “*is not empowered to investigate conduct which it generally considers to*

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<sup>85</sup> Para 9. The quoted phrase is formulated somewhat awkwardly. It would appear to mean that s 49B is the only section which makes provision (we paraphrase) “*for the process of investigation to be commenced by the Commission, consequent upon the submitting of a complaint by a third party or alternatively upon the Commission itself initiating a complaint against an alleged prohibited practice*”.

<sup>86</sup> Paras 35 and 36, read with paras 31 and 34

*constitute anti-competitive behaviour*".<sup>87</sup> An investigation must instead arise from, and relate to, a complaint, which itself "*can only relate to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant*".<sup>88</sup> Any other investigation by the Commission would – as in that case – be beyond the Commission's jurisdiction.

67. Those dicta of the CAC in *Sappi* were cited with evident approval by the SCA in the further appeal in *Woodlands*.<sup>89</sup> The SCA went on to say that: "*It is only during this investigation ('an investigation in terms of this Act') that the commissioner may summon persons for interrogation and production of documents (s 49A(1) read with s 49B(4)). 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 reasonable suspicion*".<sup>90</sup> The SCA also emphasized later in its judgment that an investigation following the initiation of a complaint must relate to "*the complaint filed by a complainant*",<sup>91</sup> and that "*any interrogation or discovery summons depends on the terms of the initiation*

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<sup>87</sup> At para 39

<sup>88</sup> Para 39

<sup>89</sup> At para 19

<sup>90</sup> Para 20

<sup>91</sup> Para 34

*statement*” and the “*scope of a summons may not be wider than the initiation*”.<sup>92</sup>

68. The complaint procedure thus starts with an initiated complaint – initiated against “*an alleged prohibited practice*”<sup>93</sup> – followed by a mandatory process of investigation. The appointment of the investigation may not precede nor be independent of the initiated complaint. In addition, if a complaint brings to light issues not covered by the complaint, it would be necessary to initiate a new complaint in order for there to be an investigation of such issues.

### **The referral of a complaint**

69. The legal principles pertaining to the referral of complaints are also analysed in some detail in Omnia’s opposing affidavit.<sup>94</sup> The Court is referred to what is contained there. It is emphasized here that, in the case of a complaint initiated by a private person:

- the Commission must refer, or non-refer, “*the complaint*” (s 50(2)(a));
- if the Commission refers the complaint it may refer all or only some “*of the particulars of the complaint*” to the Tribunal, and may add “*particulars to the complaint*” (s 50(3)(a));

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<sup>92</sup> Para 35

<sup>93</sup> SCA *Woodlands* judgment at para 19

<sup>94</sup> Record: 15B: 1608-1611 paras 74-81, as well as para 73

- if the Commission issues a notice of non-referral, the complainant may refer “*the complaint*” to the Tribunal (s 51(1));
- the “*particulars*” must be particulars of the complaint; they are not themselves complaints;
- any complaint must be investigated before it is referred; and any investigation can only relate to the complaint as initiated.

### **The adjudication of a complaint by the Tribunal**

70. The final stage for present purposes is the adjudication by the Tribunal consequent upon referral by the Commission or by the private party. The Tribunal only has jurisdiction to adjudicate alleged prohibited conduct if such conduct has been referred to it in terms of Part C of Chapter 5. This means that what must have been referred to the Tribunal is the initiated complaint (whether with all or some of its particulars as alleged by the complainant or with additional particulars added by the Commission). In other words, the initiation of a complaint into the alleged prohibited conduct, the subsequent mandatory investigation of such complaint pursuant to s 49B, and the referral of “*the complaint*” in terms of s 50(1), s 50(2) or s 51(1) are thus jurisdictional facts without which the Tribunal cannot competently adjudicate the alleged prohibited conduct.<sup>95</sup>

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<sup>95</sup> SCA *Woodlands* judgment at para 12. See, too, *Glaxo Wellcome* where the CAC held that the only thing which the Commission, or failing the Commission the complainant, could refer to the Tribunal was the complaint as submitted by the complainant (paras 18-23). Neither the Commission nor the complainant could refer a different complaint, and the complainant may not even add particulars to the complaint at the referral stage (para 22). The same is true where the

### **The Commission's contentions**

71. The Commission advanced four main appeal grounds in its application for leave. It is not apparent whether the Commission is persisting with all of them, but insofar as it is, they have been addressed in Omnia's opposing affidavit.<sup>96</sup>
72. The Commission's main submissions in its heads seemingly involve (i) a contention that the Commission may add new causes of action (ie particulars of different prohibited conduct to that alleged by the complainant) by virtue of its power to add "*particulars*" to the complaint;<sup>97</sup> and (ii) an argument that a complaint initiation document need not be formulated with any clarity or precision as it is merely an internal document, designed to "*trigger*" action.<sup>98</sup> Both submissions rely heavily on the Tribunal's determination in *SAB* (a determination on which the CAC has not yet had an opportunity to express any views).
73. The Commission's submission about the meaning to be accorded to "*particulars*" is incompatible with the fact that the Commission is only empowered to "*refer the complaint*" to the Tribunal (s 50(2)(a) & s 50(3)(a)) and to "*add particulars to the complaint as submitted by the*

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Commission itself initiates the complaint, since the formula of "*a complaint*" followed by "*the complaint*", which the CAC emphasised in its analysis of ss 50(2) and (3), also characterise s 50(1).

<sup>96</sup> Record: 15A: 1596-1600; 15B: 1601-1614

<sup>97</sup> Commission's heads pp 20-22 paras 44-45

<sup>98</sup> Commission's heads p 23 paras 46.3-46.4, p 38 para 76

*complainant*” (s 50(3)(a)(iii)). A “*complaint*” in that context must mean a competition-law cause of action (i.e. an allegation of a particular form of prohibited conduct prohibited by the Act, e.g. price-fixing in respect of particular products in violation of s 4(1)(b)), and the “*particulars*” can only be particulars supporting and evidencing the said cause of action (for example, specific meetings and communications evidencing the price-fixing).

74. Section 50(3)(b) of the Competition Act also does not warrant a contrary interpretation. It merely recognises that the Commission may reject some though not all of the particulars advanced by the complainant in support of his complaint (i.e. in support of the conclusion that the accused firms are guilty of price-fixing).<sup>99</sup> If the Commission refers the complaint (e.g. the charge of price-fixing in respect of the product in question) to the Tribunal based on the remaining particulars (together perhaps with other particulars in support of the complaint added by the Commission), the complainant himself may also refer the price-fixing complaint to the

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<sup>99</sup> Cf. *Barnes Fencing Industries (Pty) Ltd and another v Iscor Limited (Mittal SA) and others; In re Competition Commission v Iscor Limited (Mittal SA)* [2008] 1 CPLR 17 (CT) at para 39:

“It is worth mentioning what may be meant by particulars of the complaint for the purpose of understanding section 50. If the complainants in the present case had alleged other conduct that they considered discriminatory, and which the Commission had not referred, or that the same conduct contained in the referral had taken place during a different time period to the period alleged in the referral this would constitute an example of particulars not referred. Here the particulars would not be on all fours with the Commission’s case, as they differed as to either manner or time and hence a separate referral would be necessary and would not be vulnerable to successful attack under section 67(2).”

Commission, thus including the particulars which the Commission has chosen not to press.<sup>100</sup>

75. The Commission's argument furthermore involves the untenable proposition that the Commission can investigate, issue subpoenas, and enter and search premises, in respect of alleged contraventions of the Competition Act which never form part of a complaint, and first surface in a complaint referral.<sup>101</sup>
76. The Commission's counsel concede in their heads<sup>102</sup> that there is nothing in the Act that allows the Commission to add new causes of action to a complaint initiated by itself but they say that it would be absurd to hold that the Commission cannot do so in the case of a self-initiated complaint where it is entitled to do so (by s 50(3)(a)(iii)) in respect of a complaint initiated by a third party. But the supposed "absurdity" only follows if one gives s 50(3)(a)(iii) the untenable interpretation advanced by the Commission (which equates non-referred "*particulars*" of a complaint to discrete competition-law causes of action). The simple position, it is

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<sup>100</sup> This situation is likely to be rare. The more common case, with which s 51(1) is primarily concerned, is where the Commission decides not to refer the complaint (i.e. the competition-law cause of action) at all. Where the Commission, after investigation, decides to refer the complaint but has not found evidential support for some of the complainant's particulars of the complaint, it is unlikely that the complainant would himself incur the cost of referring the complaint merely in order to establish particulars that the Commission's investigation was unable to verify. Nevertheless, Tribunal Rules 21(1) and 14(2) do contemplate that there may be multiple referring parties in respect of a complaint.

<sup>101</sup> The SCA made it clear in *Woodlands* that this would not be permitted (see paras 19, 20, 34-36 and 43). See, too, *Pretoria Portland Cement Co. Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at paras 71-73, referred to in *Woodlands*.

<sup>102</sup> Paragraphs 48.1 and 82.2

submitted, is that in respect of any particular suspected prohibited practice (i.e. “*complaint*”) which the Commission has reason to investigate and which it thus initiates, it may include in its later referral such particulars in support of the complaint as it wishes to rely on and which have come out of its investigation. There is no need for the Act to refer to the adding of particulars – indeed the Commission may have very little by way of particulars at the start. But where a private party initiates the complaint and provides particulars in support of the complaint, the Act has to regulate the inclusion of particulars in the later referral since the Commission may uncover additional particulars in support of the complaint but may also consider that some of the private party’s particulars are not correct.

77. It is to be noted, in this regard, that ss 49B, 50 and 51 are formulated in the singular and address the case of a (single) complaint against a (single) alleged prohibited practice. This naturally does not mean that the complainant may not, in a single document, allege (say) three alleged prohibited practices but the said document would then contain three complaints, each in respect of its own alleged prohibited practice (and the complainant could quite lawfully submit them separately in separate documents). However the important point for present purposes is that because the sections are formulated with reference to a single complaint against a single prohibited practice, it is – apart from the other reasons

given above – untenable to interpret additional or non-referred “*particulars*” in s 50(3) as meaning a discrete prohibited practice, i.e. a separate cause of action. That interpretation postulates that the sections have been formulated with reference to a complainant who has submitted multiple causes of action (alleged prohibited practices) to the Commission, yet s 49B explicitly is to the contrary. In the context of the formulation of the sections, “*particulars*” can only mean particulars of the single prohibited practice contemplated in s 49B.

78. The Commission’s arguments about the lack of clarity or specificity purportedly allowed in a complaint referral are also unsustainable. It should be emphasized that neither the CAC nor Omnia advocates a position where a complaint is required to replicate a referral, or contain the kind of detail expected of a pleading.<sup>103</sup> It is however necessary, both in terms of the Competition Act and the Constitution, that a complaint identify cognisable causes of action (or prohibited practices), and that there be sufficient certainty as to the nature and ambit of the complaint. A number of consequences flow from a complaint; which is therefore not merely akin to an internal memo. The contents of a complaint *inter alia*:

- circumscribe the extent of the investigation which the Commission can permissibly undertake against a respondent, as well as the information which can be sought under subpoena, the possessions

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<sup>103</sup> See e.g. *Loungefoam* at para 53.

or documents which could be seized, and the questions which can permissibly be posed to a witness summoned to testify;

- determine what issues could be referred to the Tribunal by a private party in the event of the Commission declining to refer;
- dictate whether an action in respect of an alleged prohibited practice is time-barred under s 67(1).<sup>104</sup>

79. The Commission also seeks to make something of an alleged inconsistency between *Woodlands* and *Loungefoam*, on the one hand, and *Yara/Omnia*, on the other, as to whether a complaint can be “amended”.<sup>105</sup> The Competition Act does not mention any power to amend a complaint. Nevertheless, in complaints initiated by the Commission – the kinds of complaints to which *Loungefoam* and *Woodlands* related – an “amendment” of a complaint to add a new cause of action would be unproblematic, as this would essentially involve the initiation of a new complaint by the Commission. The position is different with a complaint initiated by a private person – the kind of complaint considered in *Yara/Omnia* – where the boundaries of the complaint have been determined by the private party. The Commission would there be required to initiate its own complaint, if it were to want to introduce a new cause of action. That question is, however, academic in the present matter. For, there has been no suggestion that the

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<sup>104</sup> See *Loungefoam* at para 50.

<sup>105</sup> Commission’s heads p 35 para 70; p 39 paras 77-78

Commission amended (or sought to amend) the Nutri-Flo complaint. Instead the Commission proceeded from the assumption that it could both investigate causes of action which were not the subject of the complaint, and then refer those additional causes of action.

### **CONCLUSION AND RELIEF**

80. It is submitted that the Commission should be refused condonation, and that in any event the Commission's application for leave to appeal should be dismissed – ideally prior to Monday, 5 December 2011 so that the Commission's application for leave to appeal to the SCA could go ahead on the date on which it has been set down.
81. In the event that, contrary to what Omnia has submitted, the application for leave to appeal is granted, the appeal should be dismissed.
82. Omnia should also, it is submitted, be awarded its costs in relation to the application for leave to appeal. Although the question of the Commission's entitlement for costs should not arise, no more than the costs of two counsel were in any event appropriate.

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25 October 2011