

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT NO 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

FIRST RESPONDENT'S WRITTEN ARGUMENT

BACKGROUND

1. Nutri-Flo CC and Nutri-Flo Fertilizer CC (“Nutri-Flo”) initiated a complaint with the applicant, being the Competition Commission (“the Commission”) against the third respondent (“Sasol”). This complaint comprised of the prescribed Form CC1, together with an affidavit.

2. The complaint had been based on the alleged abuse of dominance and price discrimination by Sasol in some fertilizer markets, constituting prohibited practices in terms of sections 8 and 9 of the Competition Act 89 of 1998 (“the Act”).
3. Nutri-Flo had cited the first respondent [Yara South Africa (Pty) Ltd] (“Yara”) and second respondent (Omnia Fertilizer Limited) (“Omnia”), although no relief was sought against Yara and Omnia.
4. Nutri-Flo had in passing made a cryptic reference to alleged cartel activities of Sasol, Yara and Omnia.
5. The Commission after investigation referred alleged prohibited restrictive vertical practices against Sasol and alleged prohibited restrictive horizontal practices (in terms of section 4 of the Act) to the Competition Tribunal (“the Tribunal”), against Sasol, Yara and Omnia.
6. Sasol and the Commission had reached a consent and settlement agreement regarding Sasol’s involvement.
7. The Commission applied for the amendment of the referral, by adding new allegations concerning the section 4-practices. Yara and Omnia objected,

with Omnia simultaneously lodging a counter-application that the section 4-referral be held incompetent, as not forming part of Nutri-Flo's initial complaint.

8. The Tribunal allowed the amendment and dismissed the counter-application.
9. Yara and Omnia appealed against the said ruling to the Competition Appeal Court ("CAC"). The appeal was successful and the CAC declared that no complaint was pending against Yara and Omnia.
10. The Commission on 19 April 2011 lodged an application in the CAC for leave to appeal to the SCA, enrolled for 5 December 2011.
11. The Commission subsequently on 25 August 2011 lodged the present application for leave to appeal directly to the Constitutional Court.
12. This Honourable Court has directed that this application be set down on 24 November 2011, calling for written argument on the application as well as the merits, should leave to appeal be granted.
13. Yara opposes the application for leave to appeal on the following grounds:

- 13.1 The application for leave to appeal is excessively late, with the Commission failing to fully explain this delay. The application for condonation should therefore be dismissed.
- 13.2 It is not in the “interests of justice” that leave be granted for such direct appeal¹.
- 13.3 The application for leave to appeal should therefore be dismissed, with costs.
14. Alternatively, Yara opposes the appeal on the merits, *inter alia* on the following grounds:
- 14.1 The belated objection against Omnia’s “piecemeal review” is unfounded; does not raise a constitutional issue; cannot convey legality to *ultra vires* actions; and in any event has no impact on Yara’s objection.
- 14.2 The Commission is a creature of statute and may only exercise such powers afforded it in terms of the Act.

¹ In terms of section 167(6)(b) of the Constitution 2006

- 14.3 The Act therefore stands to be interpreted, regardless whether the proper interpretation might impact on the Commission's functions.
- 14.4 The Commission does not have general powers to investigate anti-competitive conduct, which powers may only be exercised in defined circumstances.
- 14.5 A valid referral to the Tribunal therefore has to comply with the jurisdictional requisites.
- 14.6 Such referral namely has to be preceded by a valid complaint against a prohibited practice, such complaint being initiated either by the Commission or a complainant.
- 14.7 There is a clear distinction between the initiation/submission of a complaint by a complainant and the submission of information, determined by the intention of such party.
- 14.8 The initiation of such complaint has important implications for a respondent and therefore the complaint needs to make reference to specific prohibited practices, although specific terminology and/or the specific sections of the Act are not required.

14.9 Such complaint triggers an investigation by the Commission and should other prohibited practices and/or parties be discovered, the Commission needs to initiate a further complaint.

14.10 The Act namely does allow for the addition of particulars to the prohibited practice forming the subject matter of the complaint, but not for the addition of other prohibited practices and/or parties.

14.11 The latter is based on a proper interpretation of the Act and not any “technical” or “broader” interpretation.

14.12 This interpretation has been the subject matter of several decisions, which on a proper analysis are not in conflict and support the interpretation submitted above.

14.13 *In casu* Nutri-Flo did not submit a complaint against prohibited section 4-practices and, in addition, had no intention to do so.

14.14 The referral of the section 4-practices was therefore not covered by the Nutri-Flow complaint and incompetent, with the Commission prohibited from adding same to the complaint.

14.15 Any inconvenience that may be caused the Commission by the correct interpretation of the Act, should be addressed by the legislator and not the courts.

14.16 The appeal should therefore be dismissed, with costs.

15. These submissions shall be amplified hereinafter to the extent necessary and/or prudent.

CONDONATION

16. Condonation for the late lodging of the present application for leave to appeal is with respect not a mere formality, even though the Commission deals with this aspect very superficially.

17. Condonation may namely only be granted “on sufficient cause shown”², which the Commission with respect has failed to establish.

18. In the exercise of the discretion whether to condone, the following considerations are with respect relevant:

² Constitutional Court (“CC”) Rule 32(1)

"[156] The crucial factors that have to be considered include the degree of non-compliance and the explanation therefor, the importance of the case and prospects of success."³

19. The delay in casu is with respect excessive, given the following:

19.1 The Yara judgment in the CAC was handed down on 14 March 2011, with the present application to this Honourable Court to have been lodged within 15 (fifteen) business days⁴, i.e. on or before 5 April 2011.

19.2 The Commission however elected to rather in the CAC lodge an application for leave to appeal to the SCA which should have been lodged by 29 March 2011⁵.

19.3 The Commission lodged the latter application on 19 April 2011⁶.

19.4 The present application was only lodged on 25 August 2011⁷, almost 5 months out of time.

³ S v Basson 2007 (3) 582 (CC) para [156]

⁴ CC Rule 19(2)

⁵ CAC Rule 29(1)(a)(ii)

⁶ Record Vol 15B pp1638-1654

⁷ Record Vol 15 p1455

20. Despite the excessive delay, the Commission offers a very cryptic explanation⁸, not covering this long period. In essence the Commission explains that the Loungefoam⁹-decision compounded the uncertainty and its powers of investigation, with the SAB¹⁰ referral also set aside by the Tribunal. The Commission had subsequently received “a slew of challenges in its current investigations and to its pending referrals.”¹¹
21. It is respectfully submitted that this cryptic explanation with no particulars, is insufficient:
- 21.1 The said challenges had been know to the Commission all along and/or had at least been foreseeable; and
- 21.2 The Commission nevertheless elected to apply for leave to appeal to the SCA, in stead of lodging the present application timeously.
22. The above submissions are with respect borne out by the chronological sequence of events.

⁸ Record Vol 15A pp1507-1508

⁹ Loungefoam (Pty) Ltd and Others v Competition Commission and Others; Feltex Holdings (Pty) Ltd v Competition Commission and Others [2011] 1 CPLR 19 (CAC)

¹⁰ South African Breweries v Competition Commission 134/CR/Dec07

¹¹ Record Vol 15A p1508 para 73.5

23. The Woodlands¹²-decision was already handed down on 13 September 2010, requiring strict compliance with the Act by the Commission. An application for leave to appeal to this Honourable Court was lodged. The Commission had at the time already been aware of respondents relying on this judgment to challenge their referrals. In this regard it should with respect be kept in mind that the subsequent judgments were invariably preceded by heads of argument based on the Woodlands-decision and other similar rulings. The Commission nevertheless withdrew the application for leave to appeal and is presently attempting to revisit this judgment. Fact of the matter however is that the Commission had since 2010 been confronted with such challenges and future challenges were without doubt foreseeable: From past experience the Commission would as a fact have appreciated that respondents facing referrals would raise these issues.
24. For example, the Netstar¹³-matter was already argued in the CAC on 29 and 30 November 2010 and the present matter also during 2010. Otherwise put, the Commission had ample warning of the challenges to its referrals.

¹² Woodlands Dairy v Competition Commission 2010 (6) SA 108 (SCA)

¹³ Netstar v Competition Commission 2011 (3) SA 171 (CAC)

25. The Netstar-judgment was handed down on 15 February 2011, setting requirements for complaints and referrals. The Yara-judgment was handed down on 14 March 2011, limiting a referral to the prohibited practice forming the subject matter of the initial complaint and disallowing amendments to include further practices. These two judgments without a doubt would have forewarned the Commission as to future challenges to its referrals.

 26. The SAB ruling on which the Commission now relies for support was handed down on 7 April 2011, being practical proof of the impact of the said judgments. Further challenges had most probably already been received at the time (the Commission failed to furnish any particulars of the “slew of challenges”) or, at the very best for the Commission, had been foreseeable and to be expected.

 27. In addition, the Loungefoam-decision on which the Commission now relies for condonation, was already handed down on 6 May 2011. This decision again set requirements for the complaint and subsequent referral.
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28. It is therefore respectfully submitted that at the time the Yara-judgment was handed down, such (similar) challenges had already been pending and/or certainly foreseeable. The existence of such challenges with respect do not explain the delay until 25 August 2011, in as much as these very circumstances already existed on 14 March 2011.
29. The latter aspect is furthermore very relevant when considering the Commission's subsequent actions: The Commission, being aware of such pending challenges and/or foreseeing such challenges, took an informed decision to lodge an application in the CAC, for leave to appeal to the SCA. The Commission having resolved to challenge the decision, clearly decided against a direct appeal to the CC. This is especially relevant as the Commission already in the application for leave to appeal to the SCA, had expressly recorded that the grounds of appeal raised constitutional issues¹⁴.
30. Any subsequent challenges to the Commission's referrals had at the time either been pending and/or foreseeable. The Commission resolved that this did not warrant a direct appeal.

¹⁴ Record Vol 15B pp1652-1653

31. It is therefore respectfully submitted that the Commission has not shown sufficient cause for the delay, especially not for the entire period.
32. The Commission will not suffer irreparable prejudice, should condonation not be granted. The pending application in the CAC for leave to appeal remains available, as well as other remedies should this not be granted.
33. It is furthermore in the interest of the public and of justice that the CAC and SCA be afforded an opportunity to pronounce on the issues now raised for the first time. In addition, the SCA should be afforded an opportunity to pronounce on the alleged conflicting rulings (which are nevertheless disputed).
34. It is furthermore respectfully submitted that the appeal has no reasonable prospects of success on the merits, as set out more fully hereinafter when dealing with the merits. It is therefore respectfully requested that the application be dismissed, with costs.

DIRECT APPEAL NOT IN THE INTEREST OF JUSTICE

35. A direct appeal to this Honourable Court is allowed when it concerns a constitutional matter and it is in the interest of justice¹⁵.

36. The “interest of justice” inter alia include the following¹⁶:

“Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the SCA is bypassed.”

37. With regard to the constitutional issue, it should be kept in mind that the Commission had not raised any such issues a quo. The interpretation of the Act was argued, together with material factual issues. This specifically involved the interpretation of the Nutri-Flo complaint and whether this was intended to constitute a complaint concerning prohibited horizontal practices.

38. The CAC had therefore not had the opportunity to express its view on these new constitutional issues, for the first time raised in the application for leave to appeal. It is with respect in the interest of justice that their view

¹⁵ The Constitution of the Republic of South Africa Act 108 of 2006: Section 167(6)

¹⁶ Member of the Executive Council for Development Planning and Local Government; Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC) para 32

be obtained. The CAC is regarded as a specialist court, appointed to pronounce on matters of competition law. The constitutional issues now raised directly involve and/or may impact on competition principles. These constitutional issues are included in the Commission's notice of appeal and shall afford the CAC an opportunity to pronounce on these issues. This is especially so as the Commission has failed to first seek leave to appeal to this Honourable Court from the CAC, in terms of section 63(2)(a) of the Act.

39. In similar vein the SCA has not had the opportunity to pronounce on such constitutional issues: In essence, this Honourable Court shall be sitting as a court of first instance on these constitutional issues. These issues might have weighty legal import and especially wide-ranging commercial implications, for the respondent, future respondents, complainants and the Commission. It is therefore respectfully submitted that these issues should first be thoroughly canvassed in the courts more directly concerned with such matters¹⁷.
40. In addition, there are factual and/or non-constitutional issues as well, i.e. a "mixed" appeal. It is trite law that such matters should be disposed of on

¹⁷ Lane and Fey NO v Dabelstein 2001 (2) 1187 (CC) paras [4] and [5]

as narrow a constitutional issue as possible.

41. The Commission alleges conflicting and/or confusing judgments. It is with respect in the interest of justice that the SCA first be afforded an opportunity to pronounce on such judgments and/or give clarity. This is especially so as the issue concerns the interpretation of a statute, upon which other courts have already pronounced.
42. The Commission now places reliance on the remarks of the Tribunal in the SAB-matters. Subject to submissions made hereinafter as to these remarks, it will be in the interest of justice that the SCA and CAC at which the Tribunal's criticisms are levelled, be afforded an opportunity to respond.
43. The submissions above in respect of condonation are with respect also relevant in respect of the interest of justice: The Commission has failed to explain the delay, and/or furnish proper reasons for not following the normal appeal route. The weak prospects of success likewise stand in the way of a direct appeal.
44. It is therefore respectfully submitted that the application for leave to appeal directly to this Honourable Court should be dismissed, with costs.

ALTERNATIVELY, AD MERITS

AD OMNIA'S PIECEMEAL REVIEW

45. The Commission in their heads for the first time raised this issue, namely that Omnia is not entitled to pursue litigation on a piecemeal basis¹⁸.
46. This submission is based on Omnia's review application in 2005, with Omnia in their present application again challenging the validity of the referral.
47. It is respectfully submitted that this issue does not concern a constitutional but a factual issue. It with respect does not qualify as a "constitutional issue" in terms of the legislation and should on this basis alone be dismissed.
48. In addition, this specific issue had not been argued, nor ruled upon in the 2005-application, to the best of my recollection (these papers do not form part of the bundle).

¹⁸ Commission's heads pp14-16 paras 25-22

49. A further difficulty with these submissions by the Commission is the fact that once there is no proper referral and the latter therefore *ultra vires* and incompetent, no failure to (timeously) raise this issue, can render the referral *intra vires*. Otherwise put, once a valid initiation of a complaint is a jurisdictional prerequisite for a lawful and valid referral, no failure to raise the lack of this prerequisite timeously, can remedy this fatal defect.
50. It should in passing be remarked that regardless of the merits of this issue, it of course would not dispose of the order in favour of Yara.
51. It is therefore respectfully submitted that this ground of appeal should be dismissed.

COMMISSION A CREATURE OF STATUTE

52. Many of the further submissions and grounds of appeal advocate a “broader” interpretation of the Act, alluding to practical difficulties and perceived limitations by the alleged “technical” and/or “formalistic” approach of the CAC and SCA.

53. In this regard it is material that the Commission is a creature of statute and is therefore limited to the powers bestowed on it by the Act: In the Senwes-matter the SCA in similar vein referred to the Tribunal¹⁹:

“

[51] While all this may be true, the starting point of an enquiry into the scope of the Tribunal's authority, is that we are dealing with a creature of the Act. It has no inherent powers. In accordance with the constitutional principle of legality, it has to act within the powers conferred upon it by the Act²⁰.

54. The latter limitation is with respect relevant when determining the extent to which the Commission may investigate and add further prohibited practices and/or parties, not covered by the initiated complaint.

55. It is with respect common cause that the Commission do not have general powers to consider and investigate anti-competitive conduct:

“[19] The complaint must be initiated against ‘an alleged prohibited practice’. In this regard the CAC has held in Sappi² that ‘the Commission is not empowered to investigate conduct which it generally considers to constitute ‘anti-competitive behaviour’ and that a complaint can relate only to ‘an alleged contravention of the Act as specifically contemplated by a applicable provision

¹⁹ Senwes Ltd v Competition Commission [2011] (1) CPLR (1) (SCA) para [51]

²⁰ Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council 1999 (1) SA 374(CC) paras [56-[59]; Similane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) 64 SCA para [12]

thereof by that complainant'. Otherwise, the CAC said in that case, the commission would act beyond its jurisdiction. No one submitted that this approach is in any respect incorrect."²¹

56. In this regard the following summary in the Netstar-decision is with respect relevant and applicable:

"[41] There are certain basic principles from the terms of the Competition Act that bear repeating. First the Commission has no powers of investigation into anti-competitive conduct. Second the Act does not in general terms prohibit anti-competitive conduct. Third anti-competitive conduct under the Act consists of horizontal and vertical restrictive practices and the abuse of dominance. Fourth these are not terms of generality but terms that are defined and circumscribed by the Act itself in ss 4,5 and 8 respectively. Unless conduct falls within the definitions it is not prohibited even if its effects are perceived as anti-competitive."²²

57. Applied *in casu*, it is respectfully submitted that it is the submission/ initiation of a complaint against an alleged prohibited practice, that empowers the Commission to investigate and then refer this complaint to the Tribunal. This is a consequence of the wording of the Act, as set out more fully hereinafter.

58. The crisp issue is therefore the proper interpretation of the Act, regardless whether such correct interpretation might impact on the functions of the Commission.

²¹ Woodlands para [19]; See also SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another [2007] (2) CPLR 272 (CAC) para [39]; Yara-decision para [31]; Netstar-decision para [27]

²² At para [41]

PROPER INTERPRETATION OF “COMPLAINT”

59. It is respectfully submitted that the CAC a quo had correctly interpreted and applied the concept of “complaint”, to subsequently form the subject matter of a valid referral to the Tribunal. This finding was correctly based on the interpretation of the Act itself, read with the case law.
60. As alluded to above, such valid complaint is a jurisdictional prerequisite for a valid referral²³.
61. Such complaint may be initiated either by a complainant, or by the Commission. The term “complaint” is used for both instances and should therefore bear the same meaning²⁴.
62. Section 49B of the Act namely for both instances stipulates that the Commissioner/complainant may submit/initiate “a complaint against an alleged prohibited practice” (my emphasis). Such complaint therefore needs to include particulars of the alleged prohibited practice, as per the case law referred to hereinafter.

²³ Glaxo Welcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others 15 (CAC) Feb02 paras [28] and [29].

²⁴ Glaxo para [18]; Woodlands para [18]; Yara CAC para [24]

63. The alleged prohibited practice per the complaint is material, as this triggers the peremptory investigation of the complaint, per section 49B(3):

“[18] The particular wording of sections 50 and 51 is noteworthy. The sections consistently refer to ‘a complaint’ followed by what the Commission may do with ‘the complaint’. What is intended is that the Commission consider and investigate the particular conduct complained of by the complainant. The Commission may then determine that such conduct amounts to a prohibited practice in terms of a section or sections of the Act.”

and

“[19] When a complaint is referred to the Tribunal in terms of the Act, section 51(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 referred to by the complainant and which amount to the facta probanda necessary to establish a prohibited practice.”²⁵

64. Of similar significance namely is the wording used when provision is made for the referral to the Tribunal in sections 50(1) and 50(2)(a): The Commission may refer the complaint initiated by itself, and in the case of another complainant, refer the complaint.
65. The Act furthermore clearly distinguishes between the submission of a complaint in terms of section 49B(2)(b) and the submission of information

²⁵ Glaxo paras [18] and [19]; See also Yara CAC paras [23] and [34]

concerning an alleged prohibited practice in terms of section 49B(2)(a)²⁶. The distinction is obvious but the crisp issue is how to apply this distinction on the facts.

66. It is respectfully submitted that the CAC a quo correctly considered the intention of Nutri-Flo²⁷.

67. A complaint is namely a juristic act, requiring such intention to complain:

“[21] I am in agreement with the Tribunal 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 on the process”. To this end the legislature has defined a ‘complainant’ to mean a person who has submitted a complaint in terms of Section 49B(2)(b). We therefore do not need to search for a dictionary definition of the word complainant save to say that the definition of a ‘complaint’ must be given a contextual meaning and not just an ordinary grammatical interpretation whereby every expression of dissatisfaction by a member of the public would be considered a complaint.”²⁸

68. The Commission submits that a complainant may be a lay person, not necessarily knowing all the facts and/or terminology and/or applicable sections (“pigeonholes”) of the Act. It is respectfully submitted that this is not required of a complainant:

²⁶ Clover Industries Ltd and Others v The Competition Commission 78/CAC Jul08 (CAC) para [13]

²⁷ Paras [21] to [25]

²⁸ Clover para [12]

"[15] Section 49B focuses on a 'prohibited practice' and does not require to identify prohibited conduct with reference to various sections of the Act. A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act. What is required is a statement or description of prohibited conduct. In this regard Form CC1, prescribed in terms of sections 21(4) and 49B of the Act, is instructive. The form requires a complainant to 'provide a concise statement of the conduct' that is the subject of a complaint. A complainant need only identify the conduct of which it complained."²⁹

69. However, in as much as it is this complaint that might subsequently be referred and already has important consequences, the complainant needs to identify the misconduct sufficiently:

"[16] ... While the complaint need no be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Act, otherwise it will not be possible to say what the complaint is about and what should be investigated."³⁰

70. As alluded to above the importance of identifying the prohibited practice, is that it defines the ambit of the subsequent investigation in terms of section 49B(3) and of a summons in terms of section 49A.

²⁹ Glaxo para [15]; See also Loungefoam para 53; Netstar para 27; Senwes para [27] to [43]

³⁰ Glaxo para [16]

71. It is therefore respectfully submitted that the CAC a quo correctly interpreted “complaint” in the Act.

CONSEQUENCES OF COMPLAINT

72. The Commission submits that the initiation of a complaint has no impact on the rights of a respondent³¹. It is respectfully submitted not to be the case.

73. The complaint as initiated defines the rights and obligations of a respondent in terms of the subsequent investigation. For example, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation³². As alluded to above, it is the alleged prohibited practice forming the subject matter of the complaint, that must (and may) be investigated. This ambit may have a material impact on the obligations and rights of a respondent in respect of the interrogation and/or the delivery of documents.

74. The Woodlands-decision likewise sets limits and prerequisites for such investigation. In the case of a complaint by a complainant, the limitation is

³¹ Commission's heads p27 para 52; p38 para 76

³² Section 49A(1)

obviously the ambit of the alleged prohibited practice, as contained in the complaint.

75. There are in addition further consequences that may be unfair, should an investigation be conducted purportedly as a result of a complaint, but with such conduct and/or respondent in reality not forming part of such complaint³³. Such consequences may not follow as of right, but nevertheless support the submission that a complaint should identify the parties and alleged prohibited practice.
76. A respondent has a further real interest in the particulars of a complaint: In terms of section 67(1) of the Act, a complaint may not be initiated more than three years after the practice has ceased. On the Commission's interpretation, it may in the course of its investigation and/or referral add parties and other prohibited practices, without initiating a new complaint. It is presumed that a potential respondent need not be informed of such addition at the time and may potentially happen without any specific documentary record and/or fixed and certain date: Otherwise put, a section 8 complaint may be initiated on 1 February 2005. In the course of its investigation, covering several years, the Commission may discover

³³ See for example Loungefoam para [49]

information concerning section 4-misconduct. On the Commission's argument, no new complaint is initiated and both the sections 8 and 4 misconduct are referred to the Tribunal on 1 February 2009. It is then entirely uncertain when the section 4 "complaint" had been initiated, if ever, for purposes of section 67(1)³⁴.

77. It is therefore respectfully submitted that new parties and/or new prohibited practices cannot merely be added informally, without a proper initiation of a complaint, properly recorded and ascertainable.

REFERRAL OF COMPLAINT

78. It is respectfully submitted that it is the complaint, interpreted and applied as set out above, that may be referred to the Tribunal. This follows from a proper interpretation of section 50 of the Act, being "the complaint", as alluded to above.
79. Given the interpretation of "the complaint" described above (a complaint of specific alleged misconduct, with the intention to submit a complaint), it with respect follows that it is only this complaint that may be referred. Any new parties and/or other forms of misconduct require that a new complaint be initiated.

³⁴ See also Loungefoam para [50]

80. It is with respect apparent that, unlike a referral, there is no provision in the Act or Rules for the amendment of a complaint.
81. In this regard it is submitted that section 50(3) does not assist the Commission: It is significant that a clear distinction is made between the complaint and particulars of the complaint. The complaint with respect can only be the complaint as initiated. Particulars are exactly that, i.e. particulars of the complaint and can never be a complaint in itself.
82. The Commission, for example, may in the course of the investigation of a section 8-complaint concerning a cartel based on meetings A and B, establish that meeting A did not constitute a prohibited practice, whilst B did so. In addition, the Commission may establish similar meetings C, constituting misconduct. In terms of section 50(3) the Commission may therefore refer the cartel conduct to the Tribunal:
- 82.1 With some of the particulars of the cartel complaint, to wit meeting B:
Section 50(3)(ii).
- 82.2 Add particulars to the cartel complaint, to wit meeting C: Section 50(3)(iii).

82.3 Issue a notice of non-referral in respect of some particulars of the complaint, to wit meeting A: Section 50(3)(b).

83. The complainant may then refer cartel conduct based on meeting A to the Tribunal³⁵.

84. It is therefore respectfully submitted that the CAC a quo correctly found that the Nutri-Flo complaint did not include a section 4-complaint and that no such conduct could be referred.

AMBIT OF NUTRI-FLO COMPLAINT

85. It is respectfully submitted that Nutri-Flo did not submit a section 4-complaint, nor did it intend to do so.

86. The Complaint Form CC1³⁶ in question expressly called for a description of the party involved in the complaint, as well as a description of the complaint. In both instances only Sasol and the price increases were reflected.

³⁵ Glaxo para 22

³⁶ Record Vol 1 p1

87. Nutri-Flo in addition attached a supporting affidavit comprising 241 paragraphs. Only three paragraphs in passing made reference to an alleged cartel, with members Sasol, Yara and Omnia³⁷. However, no particulars were furnished in this regard, as required.
88. In the said affidavit Nutri-Flo made it abundantly clear in respect of the “Prohibited Practice” that the complaint was limited to Sasol and sections 8 and 9 misconduct³⁸. No mention was made of Omnia, Yara or the section 4-misconduct.
89. Any doubt as to the intention of Nutri-Flo had effectively been removed by their subsequent affidavit in the 2005-review application. The deponent expressly distanced Nutri-Flo from the section 4-referral³⁹.
90. It is therefore respectfully submitted that the CAC a quo correctly held that the said cartel-paragraphs merely constituted information, with no intention to submit a complaint:

³⁷ Record Vol 2 pp23-24

³⁸ Record Vol 1 p59 – Vol 2 p105

³⁹ Record Vol 15B p1621 para 98

"[35] Expressed differently information cannot be converted into a complaint when it is plain that the information is not part of the complaint of the submitting party. For example, information relevant to a s8 case against X may point to a s4 contravention by X, Y and Z. However, if the information is supplied by the complainant solely in support of the s8 case and, in circumstances where the private party did not signal an intention also to be a complainant in respect of a s4 case, the submission of the information does not constitute the initiation of a s4 complaint. In this case, it is not the absence of an express mention of s4(1) that is the relevant point but a clear absence of any intention on Nutri-Flo's part to be a complainant in respect of the price-fixing complaint."⁴⁰

91. In the foregoing there had not been a valid section 4-complaint initiated, with any investigation and/or referral of such conduct therefore incompetent.
92. Once that is so, it is respectfully submitted that the Commission may not add parties or other misconduct by a mere amendment, without initiating a new complaint.

"AMENDMENT" OF COMPLAINT

93. As alluded to above, the Act does not provide for the amendment of a complaint. It however does provide for the addition of particulars to the

⁴⁰ Para [35]

existing complaint, but not for the addition of new complaints, when a complainant submits a complaint.

94. It is namely the complaint as initiated, that must be investigated. It is again the complaint that is referred. Given the consequences of an initiated complaint, it is respectfully submitted that new parties and/or new grounds of complaint cannot be added by mere amendment: The Commission does not have general powers of investigation and especially not in respect of a complaint. In as much as provision is made for the amendment of a referral, the absence of any such provision in respect of a complaint, is indicative that a new complaint is required in respect of different misconduct.
95. The Commission with respect need not be hampered and/or be uncertain as to this aspect: A complaint clearly has to be based on specified prohibited practices. The Commission as experts should with ease be able to determine the intention of such complainant or, where the Commission initiates the complaint, be able to describe the alleged conduct. As soon as other parties and/or conduct (not comprising mere particulars) are established, a new complaint should be initiated.

96. In respect of disputes that may in such event arise between the Commission and the complaint as to the “ownership” of the complaint: Such disputes are not only unlikely and improbable, but are of the nature that are adjudicated upon regularly.
97. It is furthermore respectfully submitted that the relevant judgments are not in conflict, but has been developing: The fact is however that there is no authority that new grounds of a complaint may be added by a mere amendment.
98. Woodlands did make reference to the “possible amendment and fleshing out”⁴¹ as well as the use of information obtained in the investigation “for amending the complaint or the initiation of another complaint”⁴². It is respectfully submitted that this does not support the submission that new grounds of misconduct may be added by a mere amendment. This is especially so when the entire gist of this judgment is kept in mind, i.e. that an investigation requires proper procedure and reasonable grounds. These remarks are in general in respect of “information” and may include additional particulars of the misconduct forming the subject matter of the complaint. In such event the complaint may be amended. On the other

⁴¹ Para [35]

⁴² Para [36]

hand, the information may disclose new grounds of misconduct and/or new parties. In such event a new complaint is required.

99. The latter was in fact the interpretation in Loungefoam:

“In referring to the possibility of both an amendment and the initiation of another complaint the learned judge contemplated two possibilities. The first is that the information obtained in the course of an investigation may relate to and fortify the existing complaint and justify an amendment of the particulars of that complaint as initiated without altering its fundamental nature.”

...

In view of the careful analysis of the requirements of the Act that preceded these statements they cannot be taken as sanctioning an amendment of a complaint that has been referred to the Tribunal by including new transgressions or new parties to existing transgressions without following the requirements of the Act.”⁴³

100. In Sappi the first complaint was based on the precondition set by the respondent for further supplies, being the payment of some legal costs. This complaint was labelled as section 8(c) misconduct. This complaint was withdrawn, with the second complaint alleging section 8(d)(iii)

⁴³ Para [55]

misconduct, but with the same particulars. The court confirmed that it had been the same complaint, to which new facts⁴⁴ could have been added.

101. In Glaxo it was confirmed that a new complaint or particulars of a complaint not mentioned in the complaint, may not be added⁴⁵. Even though it may be submitted that the reasoning is to prevent the Commission from being “ambushed” by a complainant to make an own referral, the fact is that this interpretation was based on the wording that it is the complaint that may be referred. In respect of a referral of a Commissioner-initiated complaint, similar wording is used, to wit the complaint may be referred.

102. Netstar is with respect not in conflict with Woodlands, limiting the referral to the complaint (regardless whether instituted by the Commission or a complainant):

“The jurisdictional reason lies in the path by which a complaint reaches the Competition Tribunal. The process starts with the Commission initiating a complaint in terms of s49B(1) of the Act or some other person submitting a complaint to the Commission under s49B(2)(b) of the Act. In either case the complaint must be investigated and, if the Commission concludes that a prohibited practice has been established, must be referred to the Tribunal under s50 of the Act. The Tribunal’s jurisdiction is confined to a consideration of the complaint so referred and the terms of

⁴⁴ Para [38]

⁴⁵ Para [22]

that complaint are likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person. 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*.”⁴⁶

103. The CAC a quo confirmed, with reference to Woodlands and the above passages, that new parties or causes of action may not be added by a mere amendment. A new complaint was required⁴⁷.

104. The approach to Loungefoam has been set out above.

105. **SAB**⁴⁸:

105.1 The Tribunal on 7 April 2011 dismissed the referral against South African Breweries (Pty) Ltd, by virtue of the referral by the Commission not being covered by the initial complaint.

105.2 The Tribunal on 16 September 2011 issued reasons for their decision. The Tribunal was namely obliged to apply the principles set out by the CAC and SCA.

⁴⁶ Para [26]

⁴⁷ Para [40]

⁴⁸ South African Breweries v Competition Commission 134/CR/Dec07

105.3 The latter constituted the judgment and its *ratio decidendi*.

105.4 The Tribunal however then added a Part B, under the heading “Reappraisal of the approach to the jurisprudence in respect of initiating documents”.

105.5 In Part B the Tribunal with respect submitted a voluminous mixture of argument, criticism, evidence and facts aimed at conveying that the SCA and CAC had not appreciated the practical effect of their decisions:

“98. We believe that entirely unwittingly, decisions that impact on the legal requirements for a valid referral based on the prior complaint, have threatened to undermine the rights of complainants and the public as represented by the Commission to get access to justice.”⁴⁹

105.6 It is respectfully submitted that Part B should not be taken into account, as being obiter in the extreme and with the respondents being unable to properly counter and/or respond.

⁴⁹ P26 para 98

- 105.7 This is especially so in the absence of the CAC and SCA, at which the remarks are directed, having an opportunity to consider and respond.
106. It is therefore respectfully submitted that there are no conflicting and/or incompatible dicta concerning a complaint and referral: Particulars of the prohibited practice forming the subject matter of the intended complaint, may be added. New grounds of misconduct and/or new parties require a new complaint. These principles are with respect clear and simple and the Commission should be able to comply with ease.
107. The mere fact that the Commission had for some time misinterpreted their powers, with respect cannot justify that the clear interpretation of the Act should not be applied.
108. The above with respect is the result of a proper interpretation of the Act and not of a “technical” or “formalistic” approach.

TECHNICAL/FORMALISTIC APPROACH

109. The Commission submits that the said interpretation is too technical and/or formalistic.
110. This criticism has repeatedly been submitted in argument before the different courts.
111. It is respectfully submitted that it is the Act that stands to be interpreted, with defects to be addressed by the legislature:

"[40] Throughout the argument on behalf of the Commission the refrain was sounded that to uphold the objection by Feltex involves an unduly technical approach to the construction of the Act and renders the task of the Commission and the Tribunal more difficult or even impossible. Implicit in this is a suggestion that this court and the SCA are being unduly technical in contrast to the informality of the approach of the Commission and the Tribunal. That is an unfortunate and incorrect view of matters. The Commission, the Tribunal, this Court and the SCA are all engaged in applying the same statute – the Competition Act. In common parlance we sing from the same song sheet. The language of the statute and the architecture of the complaints system it establishes is set out in the Act and was determined by the legislature. If it suffers from defects the remedy is in the hands of the legislature."⁵⁰

COMPARISON WITH POLICE INVESTIGATIONS

⁵⁰ Loungefoam para [40]

112. Several dicta have alluded to the analogy of the Commission's investigation and police investigation⁵¹.

113. This analogy is with respect correct in as much as it confirms that the Act (and the powers of the Commission) need to be interpreted in a manner that least impinges on the democratic values and rights:

"[10] The Act, unnecessarily, reminds us that it must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in s 2 of the Constitution. Importantly, in the context of this case is that the Constitution is based on the rule of law, affirms the democratic values of dignity and freedom, and guarantees the right to privacy, a fair trial and just administrative action. Also important is the fact that the actions of the commission in relation to chapter 2 complaints, which are administrative, may lead to punitive measures. The so-called 'administrative penalties' (more appropriately referred to as 'fines' in s 59(2)) bear a close resemblance to criminal penalties. This means that its procedural powers must be interpreted in a manner that least impinges on these values and rights."⁵²

114. The two investigative procedures however differ in the sense that the police have general powers to investigate (subject of course to reasonable grounds). The Commission lacks such general powers in respect of complaints.

⁵¹ For example, Loungefoam para [44]

⁵² Woodlands para [10]

115. Reference has been made to the impact on the Commission's inquisitorial procedure. It is of course rather the Tribunal that in its role as adjudicator, may act in an inquisitorial manner. The Commission remains the investigator and, more often than not, the prosecutor⁵³.

CONCLUSION

116. It is respectfully submitted that the judgment of the CAC a quo had been correct and that the appeal should be dismissed, with costs.

CONDONATION: WRITTEN ARGUMENT

117. An application for the condonation for the late filing of this written argument is lodged together herewith. At the time of the drafting of this argument it is expected that the lodging will be two or three days late, for reasons explained in the founding affidavit to the application for condonation. It is respectfully submitted that a good reason is furnished and that the delay is not excessive. It is respectfully in the interest of justice that the first respondent be afforded an opportunity to submit this written argument. It is

⁵³ Simelane para [14]

further respectfully submitted that no prejudice shall be suffered should condonation be granted as the submissions to a substantial extent overlap with the written argument submitted by second respondent.

Johan Pretorius

Chambers

POTCHEFSTROOM

27 October 2011