Between a rock and a hard place? A closer look at the Competition Appeal Court

Heathrow Romeo Kariga[*1]

1. Introduction

The law relating to the initiation, investigation and prosecution of cases by the Competition Commission ("Commission") has changed dramatically in the past year. The recent Supreme Court of Appeal ("SCA") and Competition Appeal Court ("CAC") decisions have impacted on the Competition Tribunal ("Tribunal") and the Commission in more ways than might have been intended by the judges. However, it was not the case in the past decade that the CAC always adopted such a strong legalistic approach to competition law and policy. In most cases the CAC interpreted the Competition Act 89 of 1998, as amended ("the Act") in a purposive manner. However, since the SCA decision in the *Woodlands*[2] case, the CAC has adopted a strict interpretation of the Act, dramatically changing some of the jurisprudence it built over the past decade. The question that shall be considered is whether or not the CAC has been advancing the cause of competition law and policy over the past decade and whether it has done so in its recent decisions. This paper analyses whether the CAC is between a rock and a hard place, that is, whether on the one hand it is caught between the Commission and the Tribunal, institutions that, according to some quarters, apply the Act in a practical/flexible manner, and on the other hand the SCA, which applies the strict letter of the law. Experiences of foreign jurisdictions with regard to appeal courts and their application of competition law and policy are very insightful. Undoubtedly there are vast differences between how the Commission and the Tribunal have been applying the Act compared to the interpretation of the CAC and the SCA in the recent decisions.

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*LLB (UFH), LLM (UJ), CIS, Senior Legal Counsel, Competition Commission of South Africa. The views in this paper are those of the writer and are made in his personal capacity and do not reflect the views of the Competition Commission.

[2] *Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd v The Competition Commission* (105/2010) [2010] ZASCA 104 (13 September 2010).

2. Nature and composition of the competition authorities

The structure of the competition authorities in South Africa has been hailed as a desirable one that gives effect to competition principles while taking cognizance of the age old legal principles that guarantee justice and fairness.[3] The investigative and prosecutorial powers are vested in one institution while the adjudicative powers are vested in another. The Commission is the first point of contact with the public. It is empowered to investigate and evaluate contraventions of Chapter 2[4], grant or refuse applications for exemptions in terms of Chapter 2[5], authorize, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3[6], negotiate and conclude consent orders in terms section 63[7], refer matters to the Tribunal and appear before the Tribunal as required by the Act[8], thus effectively acting as a prosecutor before the Tribunal[9]. The Commission also conducts advocacy programs in order to promote public awareness of competition law and compliance with the Act.[10]

The Tribunal on the other hand is an administrative body empowered to make decisions in respect of all anticompetitive conduct and large mergers referred to it by the Commission. The main functions of the Tribunal are to adjudicate on any conduct

[3] M Brassey et al *Competition Law* 2002 at 291 where there is a contrast to the European system, which has been widely criticized because the European Commission, which is responsible for all aspects of competition law complaints, is involved in the initial stages of the investigation to the final decision making process. Thus the European Commission "is involved in all stages of investigation as police, prosecutor, judge and jury" (cf B Rodger and A MacCulloch *Competition Law and Policy in the EC and UK* (1999) at 33).

[4] Section 21(1)(c)

[5] 21(1)(d)

[6] Section 21(1)(e)

[7] 21(1)(f)

[8] Section 21(1)(g)

[9] See M Brassey *supra* note 3 at p287

[10] Section 21(1)(a) and (b)

prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in the Act;[11] to adjudicate on any matter that may, in terms of the Act, be considered by it, and to make any order provided for in the Act;[12]to hear appeals from, or to review any decision of, the Commission that may, in terms of the Act, be referred to it;[13] and to make any ruling or order necessary or incidental to the performance of its functions.[14] The Tribunal is also empowered to hear applications for interim relief pending final determination of a complaint;[15] to confirm consent orders concluded by the Commission and a respondent without hearing evidence.[16] Decisions of the Tribunal can be appealed or reviewed by the CAC, a special division of the High Court.[17]

The CAC constitutes of at least three judges, all of whom should be judges of the High Court.[18] Before the Competition Amendment Act of 2000, the Act provided that the CAC must constitute of at least three judges of the High Court and two lay members with "suitable qualifications and experience in economics, law, commerce, industry or public affairs". The provision authorizing the appointment of lay persons to the CAC was changed because of the uncertainty regarding whether the lay members should be appointed by the Judicial Services Commission or by the President on the recommendation of the Minister of Justice, and because of a concern that the procedure would violate the Constitution in so far as it did not make provision for a commensurate

[11] Section 27(1)(a)

[12] Section 27(1)(b)

[13] Section 27(1)(c)

[14] Section 27(1)(d)

[15] Section 49(C)

[16] Section 49(D)

[17] Section 36(1)

[18] Section 36(2)

degree of protection of judicial independence for lay members as is accorded to High Court judges.[19] Currently there is no lay person appointed as a Judge at the CAC.

The CAC, consisting of three judges, is empowered to review any decision of the Tribunal;[20]to consider an appeal arising from the Tribunal in respect of any of its final decisions other than consent orders made in terms of section 63, and any of its interim or interlocutory decisions that may be taken on appeal in terms of the Act;[21] and to give any judgment or make any order including an order to confirm, amend or set aside a decision or order of the Tribunal, or to remit a matter to the Tribunal for further hearing on any appropriate terms.[22] A single judge of the CAC is empowered to sit alone and consider an appeal against a decision of an interlocutory nature, applications concerning the determination or use of confidential information, applications for leave to appeal in terms of the rules of the CAC, applications to suspend the operation and execution of an order that is the subject of a review or appeal, or applications for procedural directions.[23]

While section 62(1) of the Act says that the CAC has exclusive jurisdiction in considering matters relating to chapters 2 (prohibited practices), 3 (mergers), and 5 (investigation and adjudication procedures) of the Act, the SCA held that appeals can be heard by the SCA when it stated that:

> The apparent attempt to vest exclusive jurisdiction on the CAC in respect of the interpretation and application of chapters 2, 3, and 5 of the Act can and must be read so as to be consistent with the Constitution, and the finality conferred on the CAC by s62(3) is thus subordinate to the appellate powers the Constitution confers on this court. It

[19] Memorandum on the Objects of the Competition Amendment Bill 2000.

[20] Section 37(1)(a), 61(1).

[21] Section 37(1)(b).

[22] Section 37(1)(c).

[23] Section 38(2A)

follows that this court has jurisdiction to consider the substance of the application for leave to appeal.[24]

The effect of the judgment of the SCA is that from the CAC an aggrieved party can approach the SCA for suitable relief, even on matters where the Act says that the CAC has exclusive jurisdiction. To date several aggrieved parties have petitioned the SCA for suitable relief.[25]

If there is a constitutional element raised in a matter, a party can approach the Constitutional Court, which is the final court on all constitutional matters.[26]

Effectively, the CAC is the central institution between the Commission and the Tribunal on the one hand, and the Supreme Court of Appeal and Constitutional Court, on the other. This unique position is important as, on the one hand, the Commission and the Tribunal are specialist bodies applying competition law on a daily basis while, on the other hand, the SCA and the Constitutional Court are generalist courts that deal with all areas of the law on matters that can properly be brought before them. The CAC can therefore be said to be a gatekeeper between these two categories of institutions. The CAC is an independent court that applies competition law and makes independent decisions without being unduly influenced by the Tribunal, the Commission, or the

[24] *American Natural Ash Corporation (ANSAC) & Another v Competition Commission & Others* Case 577/2002 (SCA)

[25] Senwes Limited, Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd successfully petitioned the SCA from the CAC in the recent past whereas Clover Limited and Ladismith Cheese (Pty) Ltd had their applications to petition the SCA turned down.

[26] Only recently has the Constitutional Court been petitioned regarding competition cases. Firstly the Commission petitioned the Constitutional Court in the *Woodlands* case, then the *Senwes* case and more recently the *Yara* case. The *Woodlands* petition was withdrawn, while the *Senwes* case shall be heard on 22 November 2011 and, at the *Yara* case shall be heard on 24 November 2011.

State.[27]In the same vein, the Commission and the Tribunal apply competition law independently and are creatures of statute.

3. The Competition Appeal Court

Since its inception, the CAC has handed down 60 decisions[28] on a variety of matters which include mergers, prohibited practices and decisions on procedural aspects of the Act. The CAC does not have infrastructure of its own. For the filing of pleadings and documents the CAC uses the offices of the Tribunal in Pretoria, albeit it has its own registrar. Nonetheless, these institutions are independent of each other. The CAC hearings are largely conducted at the Cape High Court in Cape Town. The CAC has had the same Judge President since its inception, but the composition of the additional members has often changed due to retirements, resignations from the bench and members seeking appointment to higher courts.[29]In spite of possible staffing and resource challenges, the CAC has performed its functions as a gate-keeper with mixed success.

4. The CAC as a gate keeper

As a gate-keeper, the CAC has a unique and important role of shaping competition law and policy in South Africa when matters are brought before it. However, the success of the CAC in this unique role is mixed in that it has succeeded in certain instances and yet failed in others.

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[27] It is thus not an instrument in the hands of central government to hinder the development of the private sector as feared by critics of competition policies. Cf Jean-Jacques Laffont, *Competition, Information and Development, in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS, 1998 at p252 where he says *"Poorly designed and applied competition laws can even discourage trade and foreign investment"*.

[28] See http://www.comptrib.co.za/cases/appeal/?start=30 accessed on 15 September 2011.

[29] Ten years of enforcement by South African competition authorities, unleashing rivalry, 2010 at p6.

4.1 Has the CAC succeeded in its duty as a gate-keeper?

The CAC has in the past acted as a gate-keeper in competition matters by developing competition law jurisprudence and greatly assisting in shaping the Commission and the Tribunal to be world class institutions. Its criticisms of the Tribunal and the Commission in the earlier decisions enabled them to strengthen their institutional capacity and the quality of the written reasons. Even the Tribunal acknowledged this role of the CAC in its representations to the OECD in 2004 when it stated that:

> "The presence of the Competition Appeal Court naturally contributes to this environment of fairness and due process. It is, we repeat, a fully fledged court populated by serving high court judges… Moreover, the judges have a stake in the competition system. They want it to work well. They set high standards for the Tribunal and Commission below them and, simultaneously, are in sufficient touch with the peculiarities of competition law to develop discerning regard for the expertise of the lay bodies. They have become effective 'ambassadors' for competition law among the judiciary and the higher reaches of the legal profession generally. It is, in short, a system which has established a special nature of competition law, without attempting to deny the traditions and unique contributions of the judiciary and, to this extent, has engendered the required degree of institutional adaptability.[30]

It is submitted that in some cases the CAC performed its gate-keeping role well. This can be seen in cases like *Federal Mogul*[31] (on legality of administrative penalties), *Glaxo Welcome*[32] (on third party complaints), *Sappi*[33] (on the limitations of the investigation),

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[30] *Challenges/Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition, contributions from South Africa, OECD Global Forum on Competition*, 07 Jan 2004 at p5.

[31] *Federal Mogul-Aftermarket Southern Africa (Pty) Ltd v The Competition Commission* 33/CAC/Sep03.

[32] *Glaxo Welcome and 7 Others v National Association of Pharmaceutical Wholesalers and others* 15/CAC/Feb02.

[33] *Sappi Fine Paper (Pty) Ltd v The Competition Commission and Papercor CC* 23/CAC/Sep02

Distillers Corporation[34] (on the scope and definition of a merger), and in the *SAA*[35] decision (on SAA's incentive scheme), among others. Though in some instances, the CAC may have applied the wrong economic principles to some cases before it like *Mittal*[36] and *Nationwide Poles,*[37] it presumably did so with the aim of giving effect to the purposes of the Act. It is arguable that in such instances the CAC performed its gate-keeping functions by interpreting the Act purposively. Though one may differ with the CAC on the conclusions it reached it would be difficult to accuse it of overstepping its mandate or negating the purposes of the Act.

More recently the CAC attempted to apply the Act purposively in the *CAC Senwes* case and the *CAC Woodlands*[38] case; both decisions have been overturned by the SCA. In the *CAC Senwes* case, for instance, the CAC held that the Tribunal should not be confined to the pleadings before it as would a civil court during a trial:

> "[39] These sections indicate that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings in the same way as would a civil court during a trial. The Tribunal is entitled to conduct hearings 'as expeditiously as possible' and in 'accordance with the principles of natural justice'. Thus, it is empowered, if it so decides, to conduct its hearings in an informal manner or choose an inquisitorial model.
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> [40] The Act does not view the Tribunal as functioning in the same way as would an ordinary court, inflexibly constrained by an adversarial model of adjudication. While a party, against whom a complaint has been lodged, is clearly entitled to sufficient information to determine the nature of the prohibited practice, in terms of which the complaint has been lodged, the enquiry as to the requisite level of understanding should

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[34] *Distillers Corporation South Africa Limited and Stellenbosch Farmers Winery Group Limited v Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd* 08/CAC/May01

[35] *South African Airways (Pty) Ltd vs Comair Ltd and Nationwide Airlines (Pty) Ltd* 92/CAC/Mar10

[36] *Mittal Steel South Africa Limited,Macsteel International BV,Macsteel Holdings (Pty) Limited vs Harmony Gold Mining Company Limited,Durban Roodepoort Deep Limited* 70/CAC/Apr07

[37] *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/Apr05.

[38] *Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd v The Competition Commission* 88/CAC/Mar09

> not be sourced in principles which apply to the nature of adversarial proceedings employed in a civil case.
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> [41] In this case, the facts revealed that the appellant knew, prior to the commencement of the hearing, of the nature of the evidence which would be led as a result of the production of various witness statements. Furthermore, although the respondent did not employ the phrase 'margin squeeze', it set out sufficient facts to indicate to a reasonable reader of the referral affidavit, possessed of a reasonable knowledge of competition law, that the nature of the alleged practice was predicated upon conduct which was alleged to have been pursued by the applicant."[39]

The CAC correctly construed the nature of the Tribunal as an administrative Tribunal given powers to conclude hearings 'expeditiously' and empowered to conduct its hearings 'informally or in an inquisitorial manner' in accordance with the rules of natural justice[40]. The decision of the CAC in the *Senwes* case has since been overturned by the SCA which has held that *'the referral, with or without extension, constitutes the boundaries beyond which the Tribunal may not legitimately travel'*.[41] This decision has been appealed by the Commission to the Constitutional Court and at the time of writing this paper, had not been heard.

In the *CAC Woodlands* decision, the same purposive interpretation of the Act is prevalent. The CAC confirms that the *Glaxo Welcome* case intended to give effect to the intention of the legislature. It stated that:

> "[35] The *dictum* of this court in *Glaxo Welcome* which was cited by Mr. Bhana develops a substantive as opposed to a formalistic approach to the definition of a complaint. The question arises as to whether the complaint had to be against a specified entity as opposed, for an example, to an industry. The spirit of the *Glaxo Welcome dictum* seeks to promote the objectives of the Act, which, in this context, means the investigation of

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[39] *CAC Senwes decision* paras 39-41.

[40] Section 52 of the Act.

[41] *Senwes* SCA decision par 52.

practices that may well undermine the central objective of the Act: the promotion of a competitive economy.

The CAC went on to explain that, as held in *Glaxo Welcome*, section 49B does not require an investigation against specific firms, but against a 'prohibited practice'. This decision was overturned the SCA. Undoubtedly the SCA's decision constituted a turning point in the jurisprudence of the CAC. Arguably, the SCA's decisions emphasizing a formalistic interpretation of the Act may perhaps be the reason why the CAC has shifted from the purposive interpretation of the Act to a more black-letter or formalistic interpretation as shall be discussed below.

4.2 Has the CAC failed in its functions as a gatekeeper?

It is submitted that the CAC has failed to perform its gate-keeping functions in three specific areas, namely, professionalism, deference and the change from purposive to formalistic interpretation of the Act.

Firstly, the relationship between the CAC and the Tribunal has been marked with a degree of acrimony, at times spilling into the public domain.[42] Instead of addressing the issues at hand, and concentrating on developing or clarifying the jurisprudence and institution building, the focus of the CAC appears to have been clouded by an inclination to prove the Tribunal wrong. This has come through in the text and tone of some of the CAC's decisions. For instance in the *Medicross-PrimeCure*[43] case the CAC stated that *'there is an unfortunate absence of a rigorous exercise to determine the scope and nature of the market. The Tribunal did not perform any of the traditional exercises used*

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[42] See speech by Dave Lewis, the former Chairperson of the Competition Tribunal delivered at the First Annual Competition Commission, Competition Tribunal, Nelson Mandela Institute Conference on Competition Law, Economics and Policy in South Africa on 21 May 2007 accessed at http://www.comptrib.co.za/assets/Uploads/Speeches/lewis10.pdf on 15 September 2011. See also the speech of Dennis M Davis, Judge President of the Competition Appeal Court, *Reflecting on the effectiveness of Competition authority: Prioritisation, Market Enquiries and impact*, presented at the Third Annual Competition Confernce in 2009 accessed at http://www.comptrib.co.za/assets/Uploads/Speeches/Judge-Davis1.pdf on 15 September 2011.

[43] *Medicross Healthcare Group (Pty) Ltd vs Prime Cure Holdings (Pty) Ltd* 55/Sep05.

for determining the dimensions of product market'.[44] The Tribunal, on the other hand, contends that it considered a great deal of evidence to come to its conclusions after having spent many days hearing extensive evidence and only for it to be overturned after a hearing which lasted only a few hours.[45] More recently, in the *Netstar*[46] case, the CAC accused the Tribunal of first coming to a conclusion without evidence and then trying to twist the evidence to suit its conclusion.[47] A reading of the Tribunal's decision, however, shows that in fact the Tribunal engaged with the relevant evidence and the criticism seems unwarranted.

It is submitted that while the CAC may not agree with what the lower competition institutions do or their conclusions on cases, its disagreement can be couched better, without compromising the quality of its decisions, by focusing on providing guidance as to the interpretation and application of the law. To its credit, the CAC attempted to do that in the *Loungefoam*[48] decision when it laid down the procedure it thinks ought to be followed when further particulars have to be added in complaint proceedings before the Tribunal.[49]

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[44] *Medicross-Primecure* CAC decision par 39

[45] Lewis Speech *Supra* note 42. In that speech Lewis went on to say *"I have no idea why they arrived at that decision. There was no question of law involved and hence no possible error of legal interpretation. There were no conceptual issues in economics that were involved. There were no factual or policy issues in which the Court possessed a superior expertise – it does not have any particular expertise, and nor is it expected to have, in healthcare markets. There was simply our interpretation of the evidence that was placed before us in the many volumes of documents that were filed and by the witnesses that submitted many hours of oral testimony. And it was on the basis of the court's rejection of our interpretation of this evidence that we were overturned. However, the court did not point to evidence that we had ignored, or to any logical inconsistency or irrationality in our assessment of the facts before us. I glean from the decision that the Court felt that the Tribunal had erred in identifying the competitors of Primecure, that we had defined the range of competitors, and, hence, the relevant market, too narrowly. Yet it is not clear from the decision how we erred. Did we fail to consider relevant evidence or did we rely upon irrelevant evidence – this is not revealed. And if we did, is the proper approach not to remit the decision back to us for further consideration"* at page 3.

[46] *Netstar (Pty) Ltd, Matrix Vehicle Tracking (Pty) Ltd and Tracker Network (Pty) Ltd vs The Competition Commission and Tracetec (Pty) Ltd* 97/CAC/May10

[47] *Netstar* par 60-61, 39 and 44.

[48] *Loungefoam (Pty) Ltd & Others vs The Competition Commission* 102/CAC/Jun10

[49] See *Loungefoam* par 13.

Secondly, the CAC also failed in its functions in relation to deference.[50] The CAC has in the past accepted the principles of deference and yet has applied them on very few occasions.[51]

The lack of deference was voiced by Dave Lewis the previous chairperson of the Tribunal when he stated that in the *Medicrosss-PrimeCure* merger the appropriate procedure would have been for the CAC to remit the matter to the Tribunal to consider evidence it said the Tribunal had not considered. Lewis argues that there were no complex economic principles to consider, or questions of law that would prompt the CAC to overturn the Tribunal's decision.[52]

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[50]Deference has been defined as "*...a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies and policy-laden or polycentric issues; to accord the interpretation of fact and law due respect; to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped, not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'*" (Cora Hoexter *"The Future of Judicial Review in South African Administrative Law"* (2000) 17 SALJ 484 at 501-502. This was quoted with approval by the SCA in the case of *Logbro Properties CC v Beddersen NO and others*4 2003 (2) SA 460 (SCA) at paragraphs 20–21. The Constitutional Court elaborated further and said that *"Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function, it simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary."* (cf *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616) and further *"Judicia deference is particularly appropriate when the subject matter of an administrative action is very technical or of a kind in which a court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds. That I cannot say. Accordingly, I am of the view that the attack based on capriciousness must also fail."* at par 53.

[51] In *TWK Agriculture Limited vs Competition Commission, NCT Forestry Co-Operative Limited, Shincel (Pty) Ltd, Shield Overall Manufacturers (Pty) Ltd* 67/CAC/Jan07 the CAC the CAC said at par 32: *"In a case where the Tribunal's decision is based upon a technical explication of economic evidence, respect in the jurisprudential sense, must be shown to that bodies' expertise but even here, the decision on appeal is that of the court , based on its evaluation of the evidence and applicable law. By contrast, as indicated, a court has a far narrower remit in the case of a review where it must be particularly cognizant of the role, function and expertise of the administrativebody"* Further the principle of deference was applied in *African Media Entertainment Limited v Dave Lewis No. and Others* 68/CAC/Mar07

[52] D Lewis Speech *supra* notes 42 and 45.

After the Lewis' speech the CAC approved a consent agreement between the Commission and *Netcare* after holding that the Tribunal had not properly applied the principles of natural justice by including in its decision evidence that was not canvassed with the parties at the hearing. It is submitted that the proper approach would have been to remit the matter for reconsideration so as to enable the parties to respond to the evidence mentioned by the Tribunal. This, more so as there was no urgency in a case which pertained to a consent agreement in respect of prior implementation of a merger which the Tribunal had approved.

After Lewis' speech and having approved the consent order in the *Netcare* case, the CAC remitted the *Mittal* case to the Tribunal with 'fairly crafted constraints'.[53] This was a good example of an instance where deference was exercised in that the Tribunal was required to consider issues identified by the CAC as not having been properly considered.

However, a sharp deviation from the principle of deference can be seen in the recent case of *Southern Pipelines.*[54] In its decision, the CAC clearly stated that there was no evidence placed before the Tribunal to make an informed decision on an appropriate administrative penalty,[55] but yet it went on, despite this deficiency in evidence, to determine what it considers to be a suitable penalty. The proper approach would have been to remit the matter back to the Tribunal for consideration of evidence in relation to the factors listed in section 59.

The third area in respect of which the CAC has failed to fulfill its mandate relates to its change in approach from a purposive to a formalistic interpretation of the Act. This can be gleaned from the recent CAC decisions as discussed below.

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[53] DM Davis Speech supra note 42 at p8.

[54] *Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs The Competition Commission* 105 and 106/CAC/Dec2010

[55] *Southern Pipelines* par 56

5. From a purposive to a formalistic interpretation, the change in the jurisprudence of the CAC

The SCA decision in the *Woodlands* case was a turning point in the jurisprudence of the CAC built over a decade. While one can argue that the *Woodlands* decision is bad in law,[56] the CAC in response adopted a strict and unduly formalistic interpretation of the Act. However, in doing so, the CAC may have gone beyond the bounds of what it seeks to protect and promote, i.e., the spirit and the purpose of competition law as envisaged in the Act. The recent decisions of the CAC post the SCA *Woodlands* decision clearly show how the CAC has moved from a purposive interpretation to a more formalistic interpretation. The points regarding this change shall be discussed under three categories namely criminal analogy, third party complaints and the Commission's initiations, and the contents of third party complaints.

5.1. The criminal analogy

In *Woodlands*, the SCA stated that the administrative penalties imposed by the Tribunal can be likened to criminal penalties and as a result the powers of the Commission have to be interpreted restrictively in a way that least affects the rights of the respondents as enshrined in the Constitution.[57] Through these lenses the SCA said that the Commission's initiation must survive the test of legality and intelligibility just like a summons. This analogy to criminal law has been expanded upon by the CAC in the *Loungefoam*[58] matter and *Southern Pipelines*[59] matter as justification for a narrow construction of the Commission's powers. It is through this analogy that the CAC is now

[56] See the Tribunal's decision in the *SAB* matter which explain in detail the difficulties caused by *Woodlands*

[57] *Woodlands* decision par 10

[58] *Loungefoam* paragraphs 44-45 where the CAC compared the investigation undertaken by the Commission to a criminal investigation

[59] *Southern Pipelines* decision at par 9 where the CAC stated that ''*Nonetheless, the approach adopted by the Supreme Court of Appeal compels, at the very least, the conclusion that a penalty which is of a criminal nature should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular*.'' The court further stated that as an additional consideration, that notwithstanding section 59(2) of the Act, a penalty should ''*not destroy the business of the offending party*''.

requiring greater particularity on the part of the Commission and the Tribunal than is envisaged in the Act and has moved from the purposive interpretation of the Act to the more formalistic interpretation. The Tribunal, in the criminal analogy, will presumably not be regarded as *sui generis*, at least in some instances,[60] as intended by the legislature and accepted by the CAC in the *CAC Senwes* decision quoted above, but may be required to adhere to strict legal principles which are applicable in criminal law matters. This position has been challenged by the Commission and the Tribunal.[61] However, it forms the basis upon which the CAC has decided cases post *Woodlands*.

5.2. Third party complaints and the Commission's initiations

In the case of *Sappi*,[62] the CAC interpreted section 50(3) [63] of the Act and stated that the Commission is entitled to refer some or all of the particulars of a complaint from a third

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[60] In the *Southern Pipelines* matter the CAC accepted that the Tribunal's proceedings are sui generis and that it is entitled to utilize its inquisitorial powers to request further evidence in appropriate circumstances.

[61] Commission's Constitutional Court application in the *Yara* at paragraphs 46-50 where the Commission argues that 'the Act does not deal with criminal proceedings' but 'envisages an inquisitorial process that may culminate in the imposition of an administrative penalty'; an inquisitorial process is far better suited to uncover prohibited practices; if the powers of the Commission and the Tribunal were limited to those afforded to the police and the court in criminal cases, it would be far more difficult, costly and time consuming to uncover and adjudicate; the Constitutional Court has already held that administrative processes that lead to inquisitorial proceedings are fundamentally different to criminal proceedings.

The Tribunal has challenged the analogy to criminal actions in the case of *Paramount Mills (Pty) Ltd v The Competition Commission* 15/CR/Mar10 where it says that: *"It is important to bear in mind that an initiation statement or a complaint initiated by a third party is not a pleading, nor is it a charge that is put to a respondent. It merely leads to an investigation into a complaint which may or may not lead to a referral"* (at par 24). The same sentiments were also echoed in the recent *SAB* decision (*South African Breweries Limited & Others v The Competition Commission* 134/Dec07) .

[62] *Sappi Fine Paper (Pty) Ltd v The Competition Commission and Papercor CC* 23/CAC/Sep02

[63] Section 50(3) of the Act states that: *"When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it-*

(a) may-

(i) refer all particulars of the complaint s submitted by the complainant;

(ii) refer only some of the particulars of the complaint as submitted by the complainant;

(iii) *add particulars to the complaint as submitted by the complainant…"*

party, to add particulars to the complaint, and does not have to initiate a fresh complaint. The CAC stated that:

> "[38] If the first respondent [the Commission] is of the view that there is merit in the complaint and that it ought to refer same to the Tribunal, it may refer the complaint in its entirety or only some of the particulars thereof. The first respondent may, if it deems it necessary, add further particulars to the complaint referral (section 21(g) and section 50 of the Act)" at Par 35 and further "The first respondent is, of course, empowered in terms of section 50(3)(a)(iii) to add further particulars to the complaint submitted by the complainant in the complaint referral to the Tribunal. It does not, nor did it in the instant case, have to initiate a fresh complaint" [64]

However, in the case of *Yara* the CAC effectively raised the bar by finding that the Commission is not entitled to investigate and refer conduct which the complainant did not intend to be a complainant in respect of and further pronounced that the Commission is not empowered by statute to amend a complaint. The CAC stated that:

> "[39] There is no provision in the Act for amendment of a complaint. Rule 18 of the Rules for conduct of proceedings in the Competition Tribunal only provides for the amendment of the referral. I can only conclude that the legislature intended that complaints be initiated or submitted as provided for in section 49B(1) and 49B(2)(b) of the Act. Further, <u>the Legislature, must have intended that the Commission should only refer to the Tribunal such a complaint as initiated by or submitted to it</u>. Consequently only the particulars of the complaint as submitted by Nutri-Flo should have been referred to the Tribunal… The Commission was not entitled to refer to refer to the Tribunal any complaint or particulars of any complaint other than those relating to a complaint submitted to it by Nutri-Flo" (My emphasis). [65]

[64] *Sappi* at par 38.

[65] *Yara South Africa (Pty) Ltd and Omnia Fertiliser Limited v The Competition Commission and Another* at par 39

This finding is in direct conflict with the earlier finding in the case of *Sappi*. It is also in direct conflict with the SCA *Woodlands* judgment which held that the Commission is entitled to investigate a complaint with a view to uncover more contraventions and more parties/respondents, and to amend or expand the complaint accordingly.[66]

In the *Loungefoam* decision, the CAC tried to correct itself from the narrow approach it adopted in *Yara* when it stated that:

> "[53] The Commission can couch initiation statements in fairly broad terms covering a number of market participants, on the basis of circumstantial evidence to be considered in light of the pattern that cartel activity takes, even if the Commissioner lacks information directly implicating a particular firm"[67]

However, the attempted correction may also be in conflict with *Woodlands* which states that the Commission must be in possession of information before initiating against a party. It says that *"A suspicion against some cannot be used as a springboard to investigate all and sundry"*[68]. In opposing the findings of the SCA, it is submitted that the CAC overstepped its authority as a lower court that is bound by decisions of higher courts.

5.3. Contents of third party complaints

The CAC has also changed its views regarding the contents of third party complaint. In the *Glaxo Welcome* matter the CAC said that all that is required is for a party to identify the 'conduct' and facts to show that and not necessarily the parties involved. In interpreting the complaint processes of the Act, the CAC stated that

> [15] Section 49B focuses on a "prohibited practice" and does not require a complainant 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

[66] *Woodlands* par 36.

[67] *Loungefoam* at par 53

[68] *Woodlands* par 36

> of the Act. What is required is a statement or description of prohibited conduct. In this regard form CC 1, prescribed in terms of section 21(4) and 49B of the Act, is instructive. The form requires a complaint 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.
>
> [16] Clearly it is intended that once the complaint is initiated the Commission will investigate a matter and it is the Commission which is enjoined to find that the conduct complained of amounts to prohibited conduct in terms of one or more sections of the Act. While the complaint need not be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognizably linked to particular prohibited conduct or practices. There must a rational or recognizable 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. Note that section 49B provides that, once a complaint is initiated, the Commission must investigate the complaint.

As can be seen in the *Glaxo Welcome* case, the CAC understood that there would be third parties that would lodge complaints with the Commission who do not have a clear understanding of competition law. Indeed the Act was formulated to 'create a transparent, user-friendly mechanism whereby a member of the public (who is not vested in the field of economics or competition law) can obtain the assistance of an expert body in investigating the conduct of market players and, if it gives rise to a prohibited practice, referring the matter to the Tribunal'.[69]While the CAC recognized that, it has been criticized by the Tribunal for enunciating a *'facta probanda'* enquiry to determine facts necessary to establish a prohibited practice, which requires a complainant to understand what precisely the conduct is that gave rise to the anti-competitive effect experienced by the complainant prior to any investigation[70] Generally, the decision in *Glaxo Welcome* reflected a purposive interpretation of the provisions of the Act.

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[69] Commission's Constitutional Court application in *Yara* at par 61.

[70] *SAB* decision at paras 35-38.

In the *Yara* decision, the CAC radically shifted the tables by stating that instead of only mentioning the prohibited conduct complained of, with the facts to allege the conduct, as stated in the *Glaxo Welcome* case, the complainant needs to show an intention of lodging a complaint in respect of specific complainants and specific complaints. The CAC stated that the non-appearance of the names of *Yara* and Omnia on the CC1 where it states that

> "[25] The non-appearance of the names of Yara and Omina from the CC1 Form, is in my view, indicative of Nutri-Flo's intention not to submit a complaint against them. The Complaint is set out in the CC1 Form as "concerning Sasol". The respondents are stated therein as "Sasol".

and

> "[35] it is not the absence of an express mention of 4(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 a price fixing complaint."

The intention referred to is not an intention to be a respondent but an intention to lay a specific allegation against a particular respondent.

The CAC applied to third party complaints the test of legality and intelligibility adopted in *Woodlands* in relation to the Commission's initiations.[71] The CAC stated that third party complaints should be subjected to a high degree of clarity and specificity and that there must be a correlation between the complaint 'as submitted' and the Commission's subsequent referral affidavit. The issue of third party complaints was not canvassed by the SCA in the *Woodlands* decision. It is trite that many complainants are lay people who do not fully understand the mechanics of competition law. Indeed the formalistic interpretation by the CAC in the *Yara* decision unduly prejudices third parties who lodge complaints with the Commission, as their complaints would fail to meet the standard set in the *Yara* case. They will thus lose out on the Commission investigating their complaints and on the rights accruing to a complainant. [72] In an earlier decision in the case of *Netstar*, though the complaints or initiation statements were not an issue, the

[71] Commission's Constitutional Court application in the *Yara* par 39

[72] *SAB* decision par 123 and 125.

CAC clearly identified the risks of subjecting a third party complaint to the high standard enunciated in *Woodlands*, when it said that:

> [27] In *Woodlands Dairy* the initiation of a complaint was likened to a summons in that must contain sufficient particularity and clarity to survive the test of legality and intelligibility. This is not to say what is required of a complaint is the level of precision that is demanded in pleadings. Where a complainant is a lay person that would be to demand more that can reasonably be expected. What is required is that the conduct said to contravene the Act must be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is and be able to prepare to meet and rebut it." (My emphasis)

The *Netstar* decision was handed down on 15 February 2011 before the *Yara* decision, which was handed down on 14 March 2011, yet with differing conclusions on the standard required in respect of third party complaints. However, even in the *Netstar* decision the CAC adopted a narrow approach to the interpretation of section 4(1) when it held that if the original ground for a complaint had related to a prohibited 'agreement' in terms of section 4(1), the Tribunal could not determine it on the basis of a concerted practice or vice versa.[73]

The suggestion in *Loungefoam* that every time the lay person has not properly lodged a complaint the Commission must simply initiate, will deprive many complainants of their right to have their complaints investigated and prosecuted by the Commission as well as their right to interim relief, and may result in confusion as to the owner of the referral.[74]

6. Is the CAC between a rock and a hard place?

One may argue that the CAC is caught between a rock and hard place when one considers the impact of *Woodlands* and *Senwes*. *Woodlands* and *Senwes* show that the SCA is keen to apply strict legal principles akin to the ordinary court processes, and the CAC has, perhaps in deference to the SCA, adopted that approach as well. In trying to

[73] *SAB* decision par 47.

[74] *SAB* decision par 123 and 125.

give meaning particularly to the *Woodlands* decision, the CAC continually show that that judgment was ill conceived and may be difficult to follow in practice. For instance, in the *Southern Pipelines* case the CAC argues that when the SCA likened administrative penalties to criminal fines the SCA did not have regard to the decision of the CAC in the *Federal Mogul* case. This may be true. However, and more concerning is how the CAC is now more keen to adopt a more formalistic interpretation of the Act, and at times, narrowly interpreting the SCA decisions. It is arguably a place that the CAC is creating for itself in trying to make sense of decisions from the SCA. Indeed there is room for purposive interpretation of the Act taking into consideration the SCA decisions without being unduly formalistic.

The institutions that can be rightly said to be between a rock and a hard place are the Tribunal and the Commission. These institutions apply competition law on a day to day basis, and have to make sense of the decisions of the CAC and the SCA, some which may unduly limit their powers contrary to what was envisaged by the Act. The Tribunal, for instance, dismissed the *SAB* case. In its press statement, the Tribunal echoed its frustration in that it is bound by decisions of the upper courts, which it believes are wrong and need to be reconsidered.[75] In the subsequent decision, the Tribunal elaborated on where the upper courts have gone wrong with the strict interpretation of the Act.[76]

On its part the Commission has stated that there are 14 challenges out of 34 referrals pending before the Tribunal, all largely based on the recent CAC decisions.[77] In addition there are numerous challenges brought by respondents during the investigation phase relying on the recent decisions. The challenges during the investigation phase seem to go against the grain of the earlier SCA decision in *Seven Eleven* where the SCA recognized that during the investigation phase the respondent is only entitled to the 'gist' of the complaint as the Commission, at the investigation stage, is not expected to 'put its cards on the table' and to tell all the evidence it has.[78] The Tribunal echoed the same

[75] See Tribunal Press Statement dated 7 April 2011 accessed on 15 September 2011 at http://www.comptrib.co.za/publications/press-releases/the-competition-commission-and-sab-07-april-2011/.

[76] *SAB* decision and *Paramount Mills* decision. Most of the points have been discussed in this paper.

[77] Commission's *Yara* Constitutional Court application at par 73

[78] *Menzi Simelane No & Others v Seven Eleven Corporation (Pty) Ltd* SCA Case 480/231 at par 22.

sentiments and stated that the initiation statement was not meant to confer rights on the respondents as it does not require a respondent to answer.[79] In addition the contents may or may not find their way into the complaint referral and the respondent is only required to answer that which is in the referral. There is indeed considerable difficulty in practice in trying to reconcile the principles in the *Seven Eleven* decision and the recent *Woodlands* decision which entitles a respondent to test the validity of a summons against an initiation statement or third party complaint.[80]

7. Lessons from the experiences of the US

While the enforcement of South African competition law has been hit hard by judgments from the appeal courts, this position is not unique to South Africa alone. The US experience shows that the current South African experiences are not unique.

. . Clearly, the US structure is slightly different to the South Africa structure, but has some lessons on their experiences with appellate courts. In the US there have been applause and criticisms over the years as to the Supreme Court's application of competition law.[81] Kovacic states that the US competition law was applied through 'twists and turns'[82] and some of the developments have both toughened and loosened antitrust enforcement.[83] The Sherman Act of 1890 is designed in such broad terms that there is a lot of room for the ordinary courts to shape competition law more than what is applicable to South

[79] *SAB* decision paras 109-110

[80] Whether or not a respondent is entitled to the underlying information to test the validity of the initiation statement was not made clear. But if a respondent wants to determine if the Commission is reasonable in initiating against it, how can that be done unless the respondent has access to the underlying information informing the Commission's actions? This may entail the Commission laying all its cards on the table during the investigation, thus compromising its work.

[81] William E Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, Journal of Economic Perspectives – Volume 14, Number 1 –Winter 2000 pages 43-60.

[82] *Ibid* at p58.

[83] *Ibid* at p57.

Africa. [84] Most of the key positive and negative developments in the US competition law have stemmed from the Supreme Court.

The EU system is slightly different to the US and South Africa in that in the EU, the Competition Commission investigates and makes decisions on competition matters. This has raised many alarm bells as the investigator is the final decision maker, which have led to the Commission being called ‘a distinguished institution weakened by poor procedures’.[85] The European Court has entrenched extensive powers to review decisions of the Commission and can gather its own evidence. Over the past years there have been calls for the European Court of Justice to be involved to a greater extent in reviewing the decisions of the Commission. However, in some cases the Court went beyond the boundaries it had set for itself much and delved in complex details that it had said would be remitted to the Commission.[86]

One thing that is clear is that the US experienced what South Africa is going through in its developmental years and continues to face similar problems with decisions of appellate courts as does South Africa. What has enabled competition authorities to sail on is developing new ways of doing things and bolstering economic theory with new research. At times they were trapped for decades under a wrong competition principle and that possibility still exists today.[87]

While the Commission and the Tribunal are facing challenges from recent upper court decisions, they need to do a lot of soul searching. Kovacic says that hard questions will continue to be asked about the content and the enforcement of competition policy, and the only way competition institutions can survive is to lead rather than follow the process.[88] New ideas and methods may have to be developed to withstand close

[84] *Ibid* at p58

[85] Ian Forrester, *The need for better judicial review of European competition* decision-making, presented at the Centre for European Law, King’s College, London, on 21 January 2010 at p4

[86] *Ibid* p15.

[87] *Ibid* p7.

[88] William E Kovacic, *Achieving Better Practices in the Design of Competition Policy Institutions*, Remarks before the Seoul Competition Forum 2004, Republic of Korea, on 20 April 2004 at page 6.

scrutiny. One way of doing that is to analyse all criticism leveled against the operations of these institutions and see how best to strengthen internal processes and improving on institutional deficiencies. This calls for thinking outside the box, and considering experience of other foreign jurisdictions. Indeed all competition institutions can benefit from such soul searching, including a mature competition authority like the US.[89]

As a starting point, we have to accept that the system of competition law enforcement that we have is in many respects better than what other countries have, as the Commission, Tribunal, and CAC are all independent bodies that apply competition law at different levels. There is currently a lot of discussion as to whether the best model is for specialist courts or for generalist courts. The OECD has observed that neither structure is more beneficial and observed that in countries that have generalist judges presiding over competition cases they have done well like specialists would. This is so because appellate courts largely deal with questions of law and they usually remit the matter to the lower courts where there are complex factual and/or economics questions to be considered.

8. Conclusion

The enforcement of competition law in South Africa is at a critical stage where there is need for improving how things have been done over the past 13 years to be able to withstand the scrutiny of appellate courts. However, all the institutions involved in the implementation of the Act need to comply with its provisions while giving effect to the intention of the Legislature. This calls for working towards a common purpose, in a professional environment where the tenets of justice are respected. While radically changing the way the Commission and the Tribunal have been operating, the appellate courts can learn a lot about the practical realities faced on a day to day basis on the implementation of the Act. The CAC in particular, can improve on its function of being a gate-keeper and greatly assist in the building of competition institutions in its judgments. Much can be achieved by practicing deference save where the CAC sees that the

[89] William E Kovacic, *"Lessons of Competition Policy Reform in Transition Economies for U.S. Antitrust Policy"* 74 St. John's Law Review 361 2000),

interests of justice will not be served by such a move.[90] While the SCA has adopted a restrictive interpretation of the Act, the CAC need not go beyond that which the SCA intended and adopt a more restrictive interpretation of the Act. Much can be achieved by continuing to apply the purposive interpretation of the Act within the boundaries set, rightly or wrongly, by the SCA.

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[90] In *African Media Entertainment Limited v Dave Lewis No. and Others* 68/CAC/Mar07 the CAC stated in paragraph 61 that *"Nothing in this decision should be construed to undermine or diminish the adherence to the approach to deference as set out in **TWK**, supra. However, there cannot be deference to a decision predicated on so material an error of law. Bad law in this kind of case prevents good economics from being employed."*