ON RESUMPTION ON 1 AUGUST 2018 (at 10:10)

CHAIRPERSON: Morning everybody we're continuing with this matter of the Commission versus Bank of America, Merrill Lynch International and 22 others. We are continuing with the submissions of the Competition Commission, Mr Mpofu?

MR MPOFU: Thank you very much Chair. If I may just as I said I would, just give me one second Chair thank you very much. Alright if I may just expand on some of the broad things that I mentioned yesterday and summarise a little bit I won't repeat some of the points that I did develop yesterday.

What we said is that the starting point must obviously be the Constitution not because we say so but because that's what the Act says that in everything we do here we must interpret the Act in line with the Constitution as we normally should do so. So the structure really of the regulatory framework is the Constitution and the purposes of the Act which I read out yesterday and then it converges into the Act itself and then of course the rules which are subservient to the Act so that is the framework that we are interpreting and I suppose the common law is part of that matrix to the extent that it applies and I'll deal with that in more detail later.

The constitutional principles that we flagged are principally accountability in the context that I mentioned yesterday of this being an anti-corruption piece of legislation and the recognition that corruption is not a victimless crime. In other words when we talk about the effects we are talking about the effects on actual people and society in general,

particularly when you are talking about the currency of a country it should be self-evident that any manipulation or alleged manipulation of the currency of a country will have those far-reaching effects and some of them might be even everlasting depending on the impact but it is something that has an impact on everyone rich or poor or otherwise.

That is something that we must keep at the back of our minds particularly in these days when there is as we all know a move towards criminalisation. Although it has not yet been promulgated but it is a reaction to social pressure if you like of some of the kind of corruption that we are talking about in this matter maybe not being sufficiently addressed or even penalised by the existing penal provisions. But for policy reasons as well an anti-corruption piece of legislation has to be interpreted in favour of the public for obvious reasons. It is for that reason for example that the Prevention of Corruption Act has by a long way been, the requirements have been relaxed. I say this because I know, I was involved in the amendment of that Act to make it much easier to detect and prosecute corruption broadly speaking.

Now the next point around accountability is that we are here dealing with an alleged conspiracy and I think that has to be taken into account. We are not dealing with each of these respondents having acted in their individual right so to speak but we are dealing with collusion in the classical sense with a conspiracy or if you like to borrow from the criminal example I've just mentioned we are dealing with common purpose. So to some extent it doesn't matter really if as part of that conspiracy or common purpose of *quasi* criminal activity if one was the driver or the

shooter or the guy who carries the bags and so on, what you are really dealing with is a collective kind of liability.

Of course, as the matter develops you are going to have to specify that A did this, B did that and so on and so on but you must always bear in mind that this is not an individual transgression but a collective one by definition. We also have to take into account the fact that that collusive conspiracy happened over the cyber space as I mentioned yesterday and that is a factor that must be taken into account when for example we are asked questions such as under Rule 18(4) of the Rules which says well if you are going to allege an agreement when they really mean a contract you must say where did it take place, was it concluded in Pretoria or Durban and so on. Sure that might well be in civil proceedings or where there's a concrete construct that was entered into but when you are dealing with something that A was by definition hidden, conspiratorial and happening over the cyber space then asking those kinds of questions is not going to assist anybody.

Then I just want to pose a particular counterfactual scenario and this refers mainly to the *peregrini* respondents. Surely what they are arguing is not that for example if some of these banks had decided to attack the rand to use a loose term but in so doing they decided to register in Lesotho and Swaziland and Botswana and Zimbabwe and so on and kind of surround us in that way but at the same time their aim was to attack our currency then it means the Tribunal would have been helpless in those situations because of course you are now constrained to the borders of South Africa. I'm just using that example just to illustrate, it's an extreme

example but to illustrate the absurdity of what is being alleged or rather put up as an objection so all those that fall under the broad rubric of accountability which is required in section 1 of our Constitution as a basic value underlying the Constitution.

The other relevant value is the supremacy of the Constitution and that relates to these questions of interpretation, e.g. vis-à-vis the common law argument that has been put up. In relation to that I'd like to just make a quick reference to the discussion in LAWSA Vol. 25 Part 1 paragraph 328 of this presumption that was invoked here about the common law prevailing over the statute or the statute only amending the common law to the extent that it is necessary. Firstly that presumption, there's been a lot of controversy around it and this is what is said in LAWSA:

> "At a glance this objective of the presumption seems to be in competition and therefore in conflict with the Constitution. The latter trumps the common law and requires the development of the common law and the interpretation of existing statute law to promote the spirit, purport and objects of the Bill of Rights. Is there then still room for a presumption that seeks to stabilise the existing common law and statute law, the die on this issue has not been and will probably not soon be cast".

But the writers then say later I've just jumped a few paragraphs:

> "Where a statute dealing with a particular of law is based on the common law with certain modifications but does not profess to be a codification of the common law, the common

> law in such area has remained safe to the extent to which it might have been changed by the statute or is inconsistent with it.
>
> In spite of what has just been said the common law is "no impenetrable obstacle" as it was put in the case of Kruger v Santam and in consequence a number of instances have been added and define which the common law prescripts must give way to the force of enacted provisions".

That just illustrates the obvious point that section 39(2) and (3) of the Constitution requires interpretation that is consistent with the constitutional provisions and the Bill of Rights. To the extent that there is argument that says that the common law jurisdictional requirements must remain purely because of that presumption, well (a) that presumption is rebuttable and secondly in any event generally speaking that presumption is *prima facie* in conflict with the Constitution.

Then we also deal with the inquisitorial nature of the proceedings. There was a suggestion here that the inquisitorial nature of the proceedings actually is aggravation and it requires even more particularity. Well firstly that's not borne out by the text of the Rule 15(2) which I will come to just now, but secondly the inquisitorial nature of the proceedings surely means that given that the Tribunal is able to interrogate and to participate in a more vigorous way than in adversarial proceedings then surely some of the pertinent information would arise from that. In other words in addition to the fact that there is discovery and a request for further particulars and the trial itself, there is the extra mechanism if you

like of the inquisitorial powers of the Tribunal. Those are the constitutional issues that we think should be kept at the back of the mind in dealing with the areas that I'm going to now go into.

Now I want to start by dealing what I'll call broadly the general, I'm not going to deal with everything in our heads, assuming that the heads stand and have been read but I'm just going to tease out some of the issues, particularly those that have been dealt with by our learned friends.

The starting point under the general principles in respect of pleadings is what we said yesterday namely we highlighted all the adjectives that accompany the requirements of Rule 15, both from the text of the rule and also some of the case law. It talks of "concise statement" and I dealt with that yesterday, "material facts" and from the Foodcorp case sufficient granularity. Here what I want to do is really to demonstrate that the equivalent that was contended for with Rule 18(4) is not well founded. I showed yesterday for example that in Rule 18(4) the material facts are prescribed whereas on a proper reading of 15(2) the word "or" is used instead of "and". I will show that that doesn't seem to be a grammatical mistake.

If you look for example at Rule 16, the complementary rule, remember Rule 15 deals with referral, Rule 16 deals with the answer and you'll notice that the same language is used in respect of the answering affidavit it says at Rule 16(4):

> "Any other answer (other than one which only raises a point of law) must be in affidavit form setting out in numbered paragraphs:

(a) A concise statement of the grounds on which the complaint referral is opposed;

(b) The material facts or points of law on which the respondent relies".

So you'll find the same wording and that means that that different formulation must have been deliberate as opposed to what is in the normal rules, the Rules of Court. Then it says:

"An admission or denial of each ground and of each material fact relevant to each ground set out in the complaint referral".

So again you get the qualification "material fact". Interestingly in Rule 6 for example of the rules it simply says an affidavit must set out the facts it doesn't qualify them as material facts. So it's clear that here the intention, and this is in line with the requirement for expeditious proceedings so it's not really surprising but it's clear that what is really needed here is a summarised version and a very shortened one indeed sufficient for the other side to understand what it is that they are facing.

What we say is that really the gist of what we have been hearing here is the absurdity that conduct which manifested itself in the devaluation of the rand over a number of years might have no impact or little impact on the South African economy and the welfare of South Africans, cost of living, education, health and all the obvious things on which such activity would have. This is linked to the idea of what we called an anti-corruption approach to this because imagine if somebody said that, I mean the amount of money we are dealing with here when we are dealing with the whole currency and this number of banks would make

anything that is happening in the Zondo Commission look like a Sunday picnic. To even suggest that there's a possibility that it might be trivial is just absurd.

Of course when we say, we allege at least that this has an ongoing impact and effect if not an everlasting one on some of the citizens then that's what we allege. That may or may not be correct, it may or may not be proved when it comes to the trial but that's not something that can be resolved at the exception stage. What is required is for the other side to present evidence to refute that allegation and say no this was trivial actually it probably had no impact at all on anybody. But at this stage as the general principles on exceptions will show later when I get to that, the allegations must be assumed to be true. The allegations will have to be assumed to be true and it's irrelevant whether we will prevail or succeed in proving the allegation.

Mr Bhana's draft order for example presupposes that it's impossible for the banks to understand what ongoing hardship means and that we need to furnish more particularity on this. His first paragraph is:

> "The Commission must within 30 business days of this order furnish to the 6th respondent material facts on which it relies for its contention that the alleged prohibited practice by the 6th respondent is ongoing".

I mean what is that.

CHAIRPERSON: I don't think he's saying the hardship is ongoing I think it's a question of whether the practice is ongoing for purposes of section 67(1).

MR MPOFU: Yes, yes but the point I'm making is we say that, well the practice if you look at it from a pleading point of view then at worst what we are saying is that at the time of pleading it was ongoing. Let's say the effect or the impact is not ongoing today but any reading of the pleadings would be that as at the date of the signing of the pleadings it was ongoing.

Now the point I'm simply making is that at a pleading level Chair making an allegation like that is the same as saying if it was an MVA case you crossed when the robot was red you can't even say what do you mean you must explain what does red mean and so on or furnish more particulars. It is an allegation that is ongoing, it might be right it might be wrong it stands to be denied or accepted or refuted or whatever or evidence should be brought that it is not so. Similar with this paragraph 2 which says we must, well all the paragraph that it subsisted during the three year period immediately preceding 1 April 2015 and all of them are repetitions.

The point I'm simply making is that what is being required of us is really to get into the second level of factual allegations rather than the first level which is where our duty really ends at this stage. At a later stage maybe when further particulars are requested or when there is a pre-trial conference or even at the proceedings themselves some of this other information might come out. But it can't be that anybody does not understand what we mean by "ongoing" at the level of pleadings at this stage. Of course to the extent Mr Ngcukaitobi will deal with that, to the extent that that ties up with the prescription point well the *onus* is on them to raise prescription at any particular point but they would obviously have

to plead over if that is what they want to raise.

Now when it comes to the issue of exceptions the general principles related to exceptions we have put out in great detail in our heads the applicable general principles, I will again tease out a few that I would like to address. I have already made the example of the absurdity of being asked to say for example where did the conduct occur. From the same people who say – and I'm quoting hopefully *verbatim* I hope I'm not misquoting it's Mr Farlam I think who said that "this is not a case where the alleged conduct occurred in dark smoke-filled rooms…" it might be Mr Cockrell "…it was in broad daylight in the chat room".

Well if we know that it was in broad daylight in the chat room then why do we have to plead where it happened because it's clear everyone knows where the agreement was either concluded or executed. Unless of course what we are being asked to do is to deal with each of these breaches or alleged transgressions not as we have generously chosen to do as part of an overarching agreement but as discrete transgressions in their own right. For example in the case of Mr Trengove then we would for example, they would be liable for three separate administrative penalties in respect of the alleged transgressions that he say they are happy to deal with.

The next point in relation to exceptions is that, and maybe it also deals with pleadings generally and again I use the example of Mr Trengove and I think Mr Luderitz also alluded to this. It can't be that it's our duty to conduct the search for the respondents, just as we have a duty to investigate and set out a case, they also have an equal duty to deal with

their defence and do their own investigations in their own space as it were. So for example Mr Trengove says well if you confine it to these three then I'm fine I'll go home but as far as you're saying I was part of the conspiracy, the seven year conspiracy you must tell me exactly on which page of these reams of paper I must go.

The exact situation happens if these were review proceedings for example we would have asked them for the record and we would be the ones who are sitting with the reams of paper and we couldn't then say well it's excipiable because we now have to look through the record and find the material that assists our defence as it were. Certainly they have a duty as litigants now to put up their defence so to speak.

The following are the general principles that I wish to highlight in respect of exceptions. They would have to show that on all possible readings there is no cause of action that has been disclosed under section 4(1)(b) and Mr Ngcukaitobi will deal with that in detail to show that that proposition is just unsustainable because even under the most benevolent interpretation which is in favour of the applicants, particularly on the issues that deal with interpretation.

I have already said the Tribunal must take all the allegations we make at face value, the web of conspiracy, the number of years, the manipulation, knowing that it's unlawful and all that has to be taken as proven as it were at this stage of the proceedings. It is indeed so as I think Mr Subel said that generally no extraneous documents should be dealt with at this stage but the irony is that the respondents want us to have reference to the Excon document but they also want us to exclude the

guilty pleas in the United States.

Well let's start with the Excon document. I don't quite understand what is being said there, I have read Mr Subel's heads and also the *aide memoire* he came up with yesterday. I equate that submission to this, what they are saying is look you are charged with breaking the speed limit and you just bring the speed limit sign to say but I was not allowed to exceed 120 so therefore that means I didn't exceed 120. I don't get that because the fact that the Excon Regulations might have been transgressed cannot avail or it can't, or it can't have availed them at the main trial let alone at exception stage. So even if extraneous documentation was allowed that would not be an answer to anything that we have raised.

But what takes the cake is the fact that in the same breath we are told that the fact that these banks have pleaded guilty to the same transgressions in the US must not be related to. In other words it's irrelevant that in proceedings that really are meant to demonstrate how much they don't understand what it is that they are asked, that is alleged that they have done they have no idea but they only have no idea here in South Africa but in another place they had an idea, so much of an idea that they pleaded guilty. That is basically an insult both to the intelligence of this Tribunal and to South Africa because it shows a mentality that says it's a banana republic here you can take your chances but when you are meeting with the real deal in the US you must own up. We can't allow that.

Then number 4 is that one of the general requirements is that we should not be, or rather the Tribunal should not be over technical in its

approach and I want to expand on that that's obvious but that's the authority and also that the exception must go to the root of the cause of action so to speak. Here I also want to touch on what I call the "policy considerations", I pause to mention that Chair one of the policy considerations that must play in the mind of the Tribunal in making a decision or exercising its discretion where it's call for is the mere fact that what we are dealing with here are allegedly *per se* prohibitions. So the Legislature has taken a policy decision that these are types of transgressions that should be so prohibited that they are legislated in terms of *per se* prohibitions or in loose language one would call strict liability. That is how much the desire to prohibit these practices is.

The sixth principle which I want to dwell on a little bit is the fact that, it's what I mentioned yesterday namely that the Tribunal in any event has a discretion to refer all these matters to the hearing, more particularly if the objections are interwoven with some of the anticipated evidence that might answer the questions which in our respectful submission is the case here. We know that in exercising that discretion which must be done judiciously at least if not judicially, the interests of justice test is the overarching test. But here it's a kind of a double discretion because it must also be read in conjunction with Rule 55 which gives the presiding officer leeway in the application of the Uniform Rules at least.

We have found the following broad principle in relation to this, the question raised by the exception must be interconnected with the facts as I've said or interwoven and authority for that is Avalon Group (Pty) Ltd v Old Mutual Properties. We will give a list of these references maybe at

tea time. Also that same case says that if the issues raise a novel point of law at an early stage of jurisprudence on the issue and our position is that this particular issue on section 3(1) for example has not been dealt with previously, at least here so to that extent it's a novel point of law that has been raised. Fairness, which is obvious and then the discretion must also be exercised with the Tribunal's function and purpose and objects of the Act in mind and we've dealt with that.

As far as the High Court is concerned one of the leading or first cases to deal with this was Hudson v Hudson 1927 AD 259 at 269 and more recently there's the case of Minerals & Quarries (Pty) Ltd v Henckert 1967(4) SA 58 SWA. We also just for the sake of completion make reference to the SCA case of Klokow v Sullivan 2006(1) SA 259 SCA at 24. So the overall point we make on the discretion is that that discretion will have to be exercised , the most important point it must be exercised in the light of the general principles that we have laid out earlier, the purposes of the statute and so on.

While I'm mentioning that I also would like to highlight, and this is a cross-cutting submission which deals with this point and also the point I made yesterday about (indistinct). In the preamble to the Act the following is said "the people of South Africa recognise…" it starts by saying "apartheid and other discriminatory laws and practices…" and so on chasing it from the past but the last one which I want to highlight is that:

> "…an efficient, competitive economic environment balancing the interests of workers, owners and consumers

and focused on development will benefit all South Africans. In order to provide all South Africans an equal opportunity to participate fairly in the national economy;

to achieve efficient economy in South Africa;

provide for markets in which consumers have access to and can freely select the quality and variety of goods;

create a greater capability of environment…;

restrain particular trade practices;

regulate transfer of economic ownership;

give effect to the international law obligations of the Republic".

I'm putting an emphasis on that last one to make the broad point and I will talk about this after tea, the broad point that the work we are doing here is part of a broader international network of prevention of certain activities.

Then the last point that we would like to talk about in relation to exceptions in general is what I call the "Makhanya point". In Makhanya we have quoted the part that deals with a two-stage enquiry of what type of exception are you dealing with. But that case is also important for making the following proposition quite clearly which is that at exception stage we are not concerned with the possibility of success or failure of the allegations and they must be taken at face value. Again Mr Ngcukaitobi will expand on this but if I can just highlight on example of this, or two.

The one is the point raised by Mr Subel around horizontality just as an extreme example. On what basis can that issue be decided on exception

at this stage surely it can't be, all that is needed is that we allege, which we have, that the relationship was horizontal, we allege what market we say these entities were competitors in. Again we might be right, we might be wrong but this Tribunal cannot be expected now to determine that well it might also have been vertical the relationship. All those well-made points but which must be made during the process itself not now. How is the Tribunal at this stage going to be able to go behind our allegation that there was this market and they were competitors. Of course we might not be able to sustain it later but that's not the test at this stage. So there are all sorts of issues like that which are clear defences which may or may not be good in the end and Makhanya makes that point very clearly because there is always this confusion about whether we are testing the possibility of winning or losing at exception stage which we clearly are not.

Just for the sake of completion and I made this point again yesterday that one of the indications of, if you look at the general principles not of exceptions in the High Court now but as they pertain to this Tribunal which have correctly been defined as *sui generis*, one of the telling points is that the precursor or predecessor of Rule 15(2) which was Rule 17(2) and again here the point I'm making is that it's an obvious rule of construction that when a change is made to a statutory instrument or rule then it must be assumed that that was done deliberately. Rule 17 used to require that the Commission should give a detailed statement of the particulars of the complaint and it was changed to now requiring a concise statement of the grounds of the complaint so one has to assume that that change was done with open eyes.

I have made the point about expeditious resolution, another contrasting point to trials which might take years and years to even come to court. At page 585 of our heads we develop this point about, with this quotation from the Potash(?) case it says:

> "In one respect Rule 17 (the previous rule) is similar to High Court Rule 18 in that it requires that only material facts be set but differs in that more analogous to application proceedings it requires an affidavit".

The fact that this is more than an accidental choice of language is borne out by reference to the Tribunal's interim relief rule where we said the word "material" does not appear and the language follows that of Rule 6 of the High Court:

> "While interim relief applications mirror the requirements of a High Court application, Rule 15 does not" Reading that rule as a whole suggests that what is required is that the prohibited practice be described with precision but that its factual matrix can be averred with less specificity. Thus I need to know in detail what I'm being charged with but I'm not entitled to know in the referral all the facts which may be led at the hearing. Granted at times this distinction may blur…"

And so on but the gist of what is being said here makes clear the distinction that I alluded to earlier. The next paragraph in the case of Paramount Mills makes exactly the same point that:

> "A party against whom a complaint has been lodged is

> clearly entitled to sufficient information to determine the nature of the prohibited practice. However, the enquiry as to the requisite level of understanding should not be sourced in the principles which apply to the nature of adversarial proceedings employed in a civil case".

Again this also puts paid to the idea that you actually need more because it's inquisitorial, this makes it clear that you need less specificity. The submission really is that maybe what we are being asked for might have been validly asked for under the old rule which needed a detailed statement but under the current rule it is not.

We invite the Tribunal to be alive to the danger that is identified on the next page 587 in the case of United South African Pharmacies & Others and that danger relates to the distinction between using rules that are meant for the vindication of private rights and transplanting them literally into a situation where we are talking about the vindication of public rights with all the preamble issues we have raised this morning. In that case we would like to emphasise what is said there:

> "It must be borne in mind that the principles of exception which parties exhort us to emulate in our proceedings are derived from adversarial proceedings whose objective is to provide a forum for the vindication of private rights. Ours, in contrast, are to provide a forum to vindicate the public interest. Given this difference in objectives we should be alive to the danger inherent in grafting the principles of exceptions developed by adversarial courts uncritically on

> our proceedings.
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> Secondly, the Tribunal may step into the ring at its discretion exercising its inquisitorial powers…an impoverishment of facts or legal averment hence pleadings play a less central role in our procedures. The effect of both these observations is that our approach to pleadings will be less strict than would be a High Court".

Well that danger is a double-barrelled one in respect of the submissions that I'm making. Firstly it warns us against transplanting private interest processes to this kind of situation but secondly it also poo-poo's the idea that the inquisitorial role of the Tribunal is a requirement for more, but less.

To put it broadly, what is really needed is for the other side to know and understand what it is that they are "charged with" and to deal with it under the knowledge that the issues will be fully ventilated as we said yesterday by all sorts of kinds of witnesses and experts and so on from all sides. I'm told it's 11 o'clock maybe it's the right time to take a break.

CHAIRPERSON: Normally we go closer to 11:30 but I'm in your hands if you want to.

MR MPOFU: No, no in that case I can continue. I just want to make a few broad references to what it is that we have alleged, again Mr Ngcukaitobi will deal with this in more detail but just to show that there is sufficient specificity in what we have said. We have said that they manipulated the value of the rand; we have said that it affected customers who used the rand; we have said that it involved the use of means of

interstate commerce or of the facilities of the South African National Securities Exchange in connection with the alleged transactions, practices and causes(?) of business alleged in the complaint referral which had an effect in South Africa. We have then gone on to explain how that could have an effect within the Republic and so on.

The point I simply wish to make is that anybody who then says in the face of those types of allegations, particularly as contained in the December referral, that they don't know what it is that they are alleged to have done would really be faking that ignorance. Maybe while I'm at it I should use Mr Farlam's heads because they are the first ones it's not that I'm targeting you Mr Farlam but it's just typical of the approach that has been taken here. He says in his paragraph 36:

> "The Commission's position appears to be that the Tribunal has jurisdiction over any firm which is domiciled anywhere in the world regardless of the absence of any connection to South Africa or the lack of consent to such jurisdiction by a foreign *peregrinus"*.

And so on. If that firm was involved in economic activity anywhere in the world and that activity had an effect within South Africa, well that's correct that's exactly what we say. He then says at 37 "we submit that this is mistaken…", well that's what they say, that's the dispute and then he goes on to the principle of effectiveness. But where there is basically an off-ramp is when this whole, that analysis is then mixed up with the common law requirement of effectiveness. As we illustrated yesterday that off-ramp is most illustrated at his paragraph 39 where he said "the

enquiry into jurisdiction of a foreign *peregrinus* is under the common law a dual one" well that might well be so.

> "First a court considers whether there's a recognised ground of jurisdiction, if that is established the court then considers whether the doctrine of (indistinct) is satisfied which generally requires attachment".

This is where we part ways, he says "the Competition Act does not alter this" and the basis for that is what he calls the most fundamental of all the presumptions which is the one I've just shown is against the Constitution.

Our stance on this is twofold; it is that the starting point must be the Act and we don't take a strong position as to whether effectiveness is still part of the requirements or not in the sense explained here because we say in any event as I said yesterday the remedy that is sought here is indeed effective. Even if one were to say that there's a dual requirement at the very least they must concede that the Act really puts the accent on the subject matter jurisdiction. Again that must be something that the Legislature must be assumed to have done with its eyes wide open for all the good reasons that we have spelt out in the remarks about the Constitution, the ambit and the nature of proceedings and so on.

While we are on this point I think one of the sections that has not been discussed is section 27 in respect of this question of jurisdiction. We would submit that section 3(1) must be read with section 27 and section 58. Section 27 is quite instructive because it says:

> "The Competition Tribunal may
>
> (a) Adjudicate on any conduct prohibited in terms of Chapter

2 (which applies here) to determine whether prohibited conduct has occurred and if so to impose any remedy provided for in this Act".

That emphasises the point I was making yesterday of the connection between sections 3, 27 and 58. So for argument's sake this Tribunal could give any appropriate remedy which might say such and such a bank must not be allowed to operate here again in any form or that it must be reported to its regulator wherever it comes from or that it must be blacklisted in some form or another. I'm just using those examples to show the elasticity of the concept of "any appropriate relief" and all those with differing levels of effectiveness would be effective remedies in their own right quite apart from the fact that the declaratory itself as I said yesterday has its own stand alone effectiveness.

Now the problem again that the respondents invite upon themselves is that all these interpretations of all those sections might be wrong and they might be able to put better interpretations at a later stage but that is not something that gets decided on exception. On exception your duty as the Tribunal is going to have to be to assume that unless if our interpretation is so way out that it cannot even be entertained but the general principles dictate that you must make a ruling on the basis that, on the best interpretation of the regulatory regime because you are enjoined to assume at this stage that what we allege is indeed so and what interpretation you put is indeed the interpretation. So in a way the approach that they are taking of wanting to contest these things at this stage is suicidal because they are shackled into accepting our

interpretation at this stage which they would not be shackled to accept at the subsequent stage. For that reason alone the outcome should then obviously be in favour of the Commission.

Now of course as I pointed out yesterday the attitude of the more positive or common law fundamentalist approach is that the Competition Act has no territorial application at all which is a startling proposition given the fact that in the Ansac & Botash case that question was addressed squarely So I don't think it's even worth dealing with that as a starting point, the starting point must obviously be that the Act is extraterritorial and it may or may not apply to certain respondents, that's something that can be debated.

Then of course insofar as we linked to the conspiracy issue or theory that I presented earlier would be what we have presented as an equality argument. Again this is another kind of counterfactual submission because what it would mean is really that you have all these parties to a conspiracy but you are only able to deal with those, let's say Investec and Standard Bank or at least the local banks would be the only ones that you could nail as it were and anyone else simply because even though they were party to the conspiracy and even though it had an effect within the Republic must just be let go as it were and that I'm afraid is not sustainable. Of course, when you say that you must look at the issues broadly the affected respondents, the ones that have the guilty pleas could for example at a later stage say look they plead some kind of double jeopardy that they've already been punished in another jurisdiction and so on.

That might well be something that is available to them but you can't have it both ways, if you accept that theory then you must accept the relevance of those documents. So really what they do is to just paint themselves into all sorts of difficulties but it's clear that the intention is simply to try and dodge having to face the music as it were and the consequences of their actions or alleged actions. If we may Chair take the break now so that I can just wrap up on this point.

CHAIRPERSON: Okay sure let's take a break for 15 minutes please.

MR MPOFU: Thank you.

TRIBUNAL ADJOURNS (at 11:15)

ON RESUMPTION (at 11:36)

COMMISSIONER: Thanks Mr Mpofu.

MR SUBEL: Chair might I ask for an indulgence before my learned friend continues? I just want to raise something that's of some concern certainly to the parties we represent and perhaps to the other parties as well. We're aware that the press are present and they will no doubt be reporting on today's events. And there have been statements made by my learned friend Mr Mpofu very broadly about the respondents being party to corruption, breaching Exchange Control regulations and admitting guilt and in the context of my submissions in fact, certainly if you look at extraneous documents you should take into account the admissions of guilt.

Now he didn't identify which of the respondents or banks he's talking about and it's of serious concern to the parties we represent that these very-very-very serious allegations are being made - we submit

irresponsibly so - without identifying and without it being grounded in any fact and we need to get clarity before the press leave here and this is reported on. We need this to be clarified. So we call upon through you Chair, our learned friend to be (a) circumspect in what he says but (b) also to clarify who he is talking about and on what facts he's relying. So it should be understood that this comes out of the mouth of counsel. There are absolutely no facts to support any of that.

COMMISSIONER: Mr Mpofu do you want to respond to that?

MR MPOFU: Yes, yes thank you Chair. Well I mean if my learned friend wants to address the press he can do so. But I don't take kindly to being lectured about irresponsible statements and all that. The position that we – you will remember that there was a discussion that we had which we raised upfront before we started here, which is that the issue of the strike out applications does not belong to this hear, it should be severed away. It was exactly to avoid the issues that Mr Subel is now raising. Because that's effectively a bilateral issue if you like, which does not concern everyone here but only certain of the banks. But in their wisdom they decided to deal with that issue and we are therefore entitled to deal with it as if it is an issue here, as if the matter has not yet been struck out. So that's the basis. I'm sure he was here when I made that request – it was not even an application – at the beginning of the case. That request also applied to the old diatribe about the so-called vexatious actions of the Commission, which again we wanted to be separated out for similar reasons. But I didn't hear any objection from Mr Subel when all those allegations were being made liberally against the Commission when we

had made it clear that the basis upon which we did not deal with that matter, because we were and we still are of the view that it is another bilateral skirmish you know. But that was played out in the media and you know we had to take it on the chin. So he must just toughen up as well.

But be that as it may, the documents that we are referring to are in the bundles. I don't know if Mr Subel has not come across them. And for what it's worth, the banks that we referred to are J P Morgan, Citibank and Barclays. And from page 130 of the bundle Mr Subel you'll find, if you say what are we referring to, we're referring to that onwards. And so to that extent anyone else whose documents we haven't referred to, is not implicated. And to the extent that if I gave an impression – which I doubt that I did – that all respondents are affected by this, then that's what I was referring to.

COMMISSIONER: Mr Subel.

MR SUBEL: Thank you Chair. Well it's of comfort that what our learned friend is saying, is that what he wasn't intending to do was refer to either the 6th respondent, Standard New York Securities Incorporated or the Standard Bank, the 8th respondent. So on that basis we now have clarity that those banks are not those that he's talking about.

COMMISSIONER: Okay thank you. Let's move on.

MR MPOFU: Okay thank you. Maybe those banks would call a press conference.

MR MPOFU CONTINUES ADDRESS:

Alright. Now back to the business of the day. I just want to make a quick point in relation to the broader principles. And this is just a reference

to the fact that one of the considerations that you are going to have to take into account when you're exercising your discretion is the fact that this is a specialist tribunal and even our courts have had something special to say about these kinds of tribunals which depend on specific expertise. And again that's a point that shows the divergence between private law rights and the kind of thing we are dealing with here. There's a case of Papedi – okay, let me just give the surname – it's Mamone, M-a-m-o-n-e, versus Commission on Traditional Leadership Disputes and Claims. It looks like it's unreported. It's case number CCT67/14 (Constitutional Court). Ramapepe J said at paragraph 79:

> "A level of difference is necessary and this is specially the case where matters fall within the special expertise of a particular decision making body, we should as this court council in Batista treat the decisions of administrative bodies with appropriate respect and give due weight to their findings of fact made by those with special expertise and experience."

In that case of course they were dealing with a different type of body, but the point I'm simply making is that there is a level of circumspection which must accompany the desire on the respondent's part to short circuit this kind of inquiry with all its importance, public importance and they must also bear in mind that sitting on that side of the table are people with specialist knowledge and expertise of what we are dealing with here, so that that is a factor to be taken into account and that's why the proceedings are to the extent, to a great extent informal and not as rigid as those in the civil courts. I'm simply making that point Chair as one of the factors to be

taken into account in deciding whether do we get into the real issues or do we just carry on with these technical delays.

And in relation to that question also it's an issue of what message it would send if this matter is allowed to just go on a long wild goose chase as it were of never ending objections and that there's a duty to put this to an end at some stage and to do so expeditiously.

Now I want to just use a quotation that I referred to yesterday, which relates to the point about further particulars which I won't repeat; I made the point yesterday. In fact that some of the particularity might come at that stage after the close of pleadings – or should properly be requested after the close of pleadings. The reason it is stated in Erasmus that the idea of – it says:

> "Requests for further particulars for the purpose of pleadings were abolished with effect from 1st January 1988 and the abuse of the procedure for requesting further particulars for the purposes of pleading was for some time viewed with growing disfavour by the courts."

And so to the extent that this process is now used as a request for further particulars for pleading is the same attitude should be taken. And what Her Ladyship Justice Van den Heever said about this in the case of Wilson v Spitze 1987 (4) SA 118 (Cape) at 132G is reminiscent of what we are witnessing here or what we are likely to witness even if we are – you know we'll have rounds and rounds of these never ending requests. She said:

> "I never cease to be amazed at the number of questions practitioners are capable of thinking up, even to the most

> prosaic and straightforward allegations. In my respectful view this approach is wrong."

And it's that kind of warning that I will implore this tribunal to take into account as to the kinds of interrogatories that are likely to follow, whatever it is that we put I suppose until such time that we actually have to take all the evidence out on paper. And to that extent we welcome Mr Trengove's offer that if his main concern was addressed he would be ready to deal with the matters tomorrow as it were – not literally but as soon as we would be ready to deal with those issues that he is happy with. We invite all the others to do the same.

So in summary this is what we say Chair under this broad category; that the regulatory context, starting with the Constitution, militates for accountability rather than hiding behind technicalities. That secondly the rules of civil proceedings should not be blindly applied here and thirdly that in so far as those rules are applicable with sufficient adaptation they operate in favour of dismissing the exceptions and that the general principles as having been applied by this tribunal in respect of exceptions also operate against granting the exceptions and that fourthly – or fifthly, the restrictive interpretation of the Act on the question of jurisdiction is misplaced and not consonant with the Constitution and the modern rules of statutory interpretation.

And on the big points that we make, which takes us to what my learned colleagues are going to deal with, is that for the reasons that I have mentioned we state categorically that even if the exceptions were good, which they most certainly are not, given all the special features that I've

mentioned both of the Act, of the tribunal itself, of the environment of what it is that we are dealing with, the tribunal should in any event exercise its discretion against referring those matters to the next stage and for those reasons alone exceptions must fail. But for the avoidance of any doubt we want to demonstrate that in any event the exceptions are bad and we'll do so by firstly dealing with the general issue of jurisdiction as it has been raised by different respondents and analysing what they have put up against our version of the basis for jurisdiction and also an analysis of the applicable case law which will be done by my learned friend Ms Hassim. Thank you very much.

COMMISSIONER: I'm not sure in which order you want to go, but who is – Ms Hassim first, okay.

MR MPOFU: Yes, she is next.

MS HASSIM ADDRESSES THE TRIBUNAL:

Thank you Chair. Chair as my learned senior has indicated, I will be dealing with the topic of jurisdiction. I propose to deal with five areas within – in my address and then following. The first is the approach to jurisdiction that the Commission commends to the tribunal as a correct approach to dealing with issue of jurisdiction; the second is that the argument on the common law principles that have been made by the respondents don't avail the respondents; the third is that the principle of effectiveness is not undermined by the tribunal assuming jurisdiction over the respondents in this matter; the fourth is that to the extent that the question of jurisdiction is interwoven with facts, that the exception proceeding is not an appropriate place to make a final decision on the

question; and fifth is an argument that I wish to respond to about whether the word "effect" is qualified in the Act or not, and that's a response to a particular argument that was made in the course of the first two days' hearing. So those are the five areas that I wish to cover.

There are two broad challenges to jurisdiction that have been made by the respondent banks and the first is by those respondents who are foreign companies without branches or presence in South Africa and they challenge – they raise a challenge to jurisdiction on the basis that they have no physical connection to South Africa and that there has been no attachment. That's the first broad category. And in that category the following respondents fall; that's the 1st, the 3rd, 5th, 6th, 9th, 13th, 19th, 20th and 23rd respondents.

The second objection on the basis of jurisdiction is raised by those respondents who have some local presence, either through a branch or a local office, who contend that the Commission has not shown that the conduct complained of occurred in South Africa or had an effect within South Africa, and those are the remaining respondents.

The approach of the Commission to the question of jurisdiction really starts and ends with section 3(1) of the Act and as my learned senior said, the importance of section 3(1) and the importance of the Act has to be seen in the context of the Constitution. Section 3(1) confers jurisdiction on the Competition authorities that appears unusual when viewed against typical jurisdiction principles. That is that it confers extra territorial jurisdiction on the Competition authorities. But because of the nature of global economics, because of the nature of Competition and Competition

Law this is not surprising. This forum has already thoroughly considered the question of the intersection between law and economics and the reach of Competition Law. And this special nature of the ambit of Competition Law is very significant in the way the tribunal is to approach jurisdiction. The forum has considered it, the tribunal has considered it in Ansac. The Ansac case is at page 74 of our bundle of authorities and I refer to the particular paragraph by the Chair of the panel at the time, Mr Lewis, where he says that:

> "The structure of the section with its broad sweep chapeau followed immediately by exclusions, suggests the Legislature's purpose was to assert jurisdiction as widely as possible."

And that is a policy choice that is reflected in the statute that, the policy choice is that the conduct of foreign companies and foreign conduct, conduct that occurs outside of the borders of the country should not be shielded by the Act and that Competition regulation is a complex exercise requiring tailored legislature provisions and powers. Also in Ansac Mr Lewis referred to Professor – the quote by Prof Eleanor Fox which I'm sure this tribunal is now very familiar with, that Competition Law is national, markets are global and there is the rub. It's commonly conceded that fundamental economic factors, the object of anti-trust regulation that is, give anti-trust a powerful extraterritorial jurisdiction.

So the tribunal – those are the comments in section 3(1) which make it clear the tribunal has a special duty in relation to the sphere of Competition Law. It's only the tribunal and the Competition appeal court

that may consider conduct that is alleged to be prohibited under the Act. The high courts may not make a determination as to prohibited conduct. Section 65(2) of the Act makes it clear that where an issue of prohibited conduct under the Act should come before the high court, the court must refer the issue to the tribunal to be considered on its merits.

In similar vein section 62 of the Act provides that the tribunal and the appeal court share exclusive jurisdiction in respect of the interpretation and applications of chapters 2, 3 and 5 of the Act. As an organ of state therefore with this exclusive jurisdiction the tribunal cannot shy away from its responsibility under the Act. Its duty is to advise the objects of the Act. Section 1 and 2 of the Act provides that the tribunal is required to take into account the purpose of the Act when interpreting section 3(1). My learned senior has addressed this already. Those purposes concern not only the economic welfare of South Africans, they are an acknowledgment of the colloquial economic environment in which the Act operates. So the first argument, that's the first and the primary argument of the Commission is that is the Alpha and the Omega of your jurisdiction when it comes to the conduct in question here, Section 3(1).

What some of the respondent banks have argued is that you need to have regard to the common law and the common law constraints on your power to exercise jurisdiction. The position that is taken by the Commission is even if that were to be applicable it is a red herring and it doesn't assist the respondents for the following reasons: Some of the respondent banks attempted to circumvent the meaning of section 3(1) by contending that the Act also requires personal jurisdiction that must be

traditionally established in order for the tribunal to investigate and make determinations on the conduct of foreign *peregrini*. They say that this is so because common law requires a dual inquiry, they are two elements of subject matter jurisdiction that needs to be satisfied and personal jurisdiction in order for a court to extend jurisdiction of a foreign *peregrini*. However, foregrounding attachment as a means to establish personal jurisdiction is turning the principle on its head. What is to be foregrounded if one is to have regard to the common law principles is a principle of effectiveness of court orders. Attachment is a means and only one means of ensuring the effectiveness of court orders.

The argument made by the respondents and elaborated in oral argument by Mr Van der Nest is that the common law principles of jurisdiction are age old. With reference to Practice and Principle in 17th Century Holland hardly assists. This is particularly so in the context of a case such as this, concerning trade in currency where every second counts for millions of Rands and where methods and means are employed which would boggle the mind and certainly would have boggled 17th Century Hollanders. In fact in Ansac the tribunal quoted the judgment of the Nippon Paper Industries case in which the Judge said the following:

> "We live in an age of international commerce where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."

Those are the words of the judge in 1997, before Twitter. BT, that's right.

The banks argue that it's a hallowed principle of our common law that jurisdiction involves this dual inquiry. The second part of the inquiry

being personal jurisdiction established through arrest or attachments. The panel was referred to several cases, particularly the dicta of Honourable Justice Harms in the Tsung case in support of the argument. But apart from the fact that the court in Tsung was considering a narrow issue relating to whether consent to jurisdiction subsequent to attachment can undo the attachment. Apart from the fact that it was cited on that narrow basis it was decided before the common law was developed a year later in Strang.

So now we come to Strang where the long embedded age old principle relating to arrest of individuals as a means of establishing personal jurisdiction had to submit to the Constitution and was therefore found to be unconstitutional in the Strang judgment. And I'd like to go to that judgment and some of the specific passages if I may Chair. And this is a judgment of His Lordship Justice Howie in 2007 and I refer the panel particularly to paragraph 48. The judgment is to be found at page 1685 of the authorities bundle. In paragraph 48 His Lordship says:

> "I do not mean to say that where attachment is possible it is no longer a jurisdictional requirement. It is naturally not open to the court in this case on the issues and arguments involved to override or ignore precedent or principle. We are confined to the issue of arrests, constitutionality and the inevitable consequence if it is indeed unconstitutional and the alternative of attachment is not possible."

In other words if the common law is to be developed by abolishing jurisdictional arrest, that development must necessarily involve providing

practical experience for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment. He goes on to say:

> "One could of course hold that if arrest and attachment were for separate reasons no longer possible, then a resident plaintiff would simply have no basis for establishing jurisdiction in a case such as the present. On the other hand it is important in my view to remember that…"

And I'd like to emphasise the following:

> "… to remember that the practice of arrest and attachment came about in order to aid resident plaintiffs who would otherwise have to sue abroad. There's no reason why the rationale should not still apply. It represents in my view a rational and legitimate governmental purpose."

The judge goes on in paragraph 49 to consider the effect of the abolishment of arrest and whether there are potential substitute practices. And he concludes at paragraph 56 as follows:

> "In my view it would suffice to empower the court to take cognisance of the suit if the defendant was served with a summons while in South Africa and in addition there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of the appropriateness and convenience of its being decided by that court."

He goes on to say then in the next paragraph, paragraph 55 – these are all

very important paragraphs. The reason I'm taking the time to go through it Chair is because they feature in later judgments to which I will make reference. In paragraph 55 he says:

> "Obviously the jurisdictional principles we are concerned with here have originated because courts have always sought to avoid having to try cases where their judgments will, or at least could, prove hollow because of the absence of any possibility of meaningful execution. It seems to me that, firstly, one has to apply reasonable and practical expedients in moving away, where necessary, from the historical practices that cannot achieve what they were intended to. Secondly, the responsibility for achieving effectiveness absent attachment, is essentially that of the parties and more especially the plaintiff."

And then finally in paragraph 57 he says:

> "As for the principle of effectiveness, despite it having been described as a basic principle of jurisdiction in our law, it is clear that the importance and significance of attachment has been so eroded that the value of attached property has sometimes been trifling. However, as I have said, effectiveness is largely for the plaintiff to assess and to act accordingly."

Now the Strang case was dealing with persons who were foreign *peregrini* and the constitutionality of the use of arrest in order to found jurisdiction. But its principles were applied in later judgments against corporate

foreign defenders. And there was a reference in argument to the Multi-Links case. That is Multi-Links Telecommunications v Africa Prepaid and it's found at page 2869 of the bundle. This was a judgment of His Lordship Justice Fabricius that the panel was asked to pay a little heed to, because either it's extraordinary in its facts or it's just simply wrong. In Multi-Links the court held as follows:

> "I do not agree that the Strang decision is of no application herein. I have referred to a number of decisions that followed and applied the Strang interpretation and those did not relate to the question of a natural person only. The question of convenience and justice in the context of jurisdiction has also been similarly decided by other jurisdictions."

There he refers to the Spiliada case by what was then known as the House of Lords.

COMMISSIONER: Sorry, which is your paragraph that you're reading?

MS HASSIM: That is paragraph 23. My apologies. In essence bringing in the reasoning and the findings in the Strang case into the context of corporate foreign *peregrini.* That judgment, the Multi-Links judgment, has been followed in subsequent cases.

Chair I have handed out two unreported judgments from 2017 to my colleagues but I beg leave to hand up these judgments to the panel.

So the tribunal was urged to ignore Multi-Links but unfortunately there are now two further judgments that apply Multi-Links. The first is Holloway & Another v PADI Amea Limited, a judgment of Her Ladyship Justice Victor. And that is an unreported judgment of 8 March 2017 in

which the applicants were seeking to review a decision made by an international body of the respondent, PADI. And the issue of jurisdiction, the objection to the authority of the court on the grounds of jurisdiction was made by the respondent, PADI, and it's described, the objection is described as follows at paragraph 24 of Justice Victor's judgment at page 13 – summarises the submission that:

> "It is common cause…"

And I'm quoting from paragraph 24, that:

> "It is common cause that it is a foreign company…"

That is PADI is a foreign company.

> "… and that it does have a main place of business in a foreign country and therefore cannot simultaneously reside in this country. In addition the foreign tribunal will not subject itself to the jurisdiction of this court. The respondents contend that because of PADI's Limited present within this division the order sought compelling the production of the record of the international tribunal cannot be effected. If the order cannot be effective since the tribunal would not be obliged to provide the record and there's very little that a South African court could do in this regard."

That was the crux of the objection of the respondent in that matter. And in this case Justice Victor deals with the argument based on Multi-Links that was made on behalf of the applicant and adopts the same reasoning that was applied in Multi-Links and concludes in paragraph 27 of her judgment:

> "I am satisfied that, based on the adoption of the Spiliada case into South African *jurisprudence*…"

Which was via Multi-Links.

> "… and the acceptance that jurisdiction is now a much wider concept than simply the question of founding jurisdiction or arresting someone to found jurisdiction, the applicants succeed in proving jurisdiction."

The second judgment, unreported judgment that we've just handed up is also a judgment from 2017 and it's Standard Chartered Bank v Maphula Solutions. And it's a judgment of Her Ladyship Justice Wiener. And it involved a rescission application. But before being able to deal with the substance of the rescission application Her Ladyship had to consider an objection on the grounds of jurisdiction and she sussed that out at paragraph 8 of the judgment, it's page 5. She says:

> "It's necessary to decide whether or not the court has the necessary jurisdiction to grant the order on 12 December 2016. Why? Because the applications contend that jurisdiction is lacking as the second and third applicants are foreign *peregrini.* They state that it is an essential requirement in order to establish a court's jurisdiction that the assets of the applicants be attached to found or confirm jurisdiction for the purposes of effectiveness."

Her Ladyship then conducts an analysis of the cases, particularly Strang, Multi-Links and then comes to the conclusion after having looked at those two cases that on the facts of the case subject matter is established and she

says:

> "There is sufficient connection to find that the court had jurisdiction to hear the matter and that there is not a more appropriate forum for the matter to be heard."

There's some discomfort with having to move on and I think particularly as lawyers we are quite tied to tradition and practice. But I think the courts are showing us the way in relation to jurisdiction and they're doing so in relation to jurisdiction as it applies in the high court. This is absent section 3(1) of the Acts that we are referring to. The banks would like the tribunal to tick this box of personal jurisdiction so that if the tribunal can't find, can't tick that box, then it has no power to exercise the jurisdiction conferred upon it by the Act. This would result – this result would mean that the tribunal is (a) not securing, not able to secure the objectives of the Act and it denudes section 3(1) of meaning. The fact that this tribunal is a special tribunal, that it has inquisitorial powers and that it had the particular public interest purpose that it's meant to give effect to means that the relaxation of the jurisdictional principles – that principles of jurisdiction rather, that relaxation that we can trace through those judgments in the high court apply with greater force in the tribunal.

So on the point of those cases and to the extent that the argument goes that the tribunal cannot exercise an assumed jurisdiction over this matter because there's no attachment or because the second part of the inquiry on personal jurisdiction is not established, we would ask the tribunal to find rather in favour of the Competition and – the Commission's argument rather, of the Commission, the Commission's

argument on jurisdiction. What we wish to stress is that this doesn't mean that principles of common law are jettisoned. What we need to foreground as I started off in my address, is the principle of effectiveness and that's the third topic that I intend to address and that's to say the following: That the principle of effectiveness would not be undermined by this tribunal assuming jurisdiction. The remedy, the effectiveness, and that principle goes to the remedy that the tribunal may award.

Now in this regard there is a debate to be had on the remedy of administrative penalty and the extent to which that would be effected and would be enforceable we submit that there may be ways in which it would be enforceable, so we don't accept the blanket prohibition that an administrative penalty may never be enforceable against a foreign *peregrine.* There may be means through diplomatic arrangements, through collaboration with regulatory authorities, the relevant authorities in the country of jurisdiction of the *peregrine*, it may be enforced in other ways when a foreign *peregrine* seeks to establish offices in the country, conduct business in the country. There are options that are open to the tribunal. The fact that it may be difficult does not mean that it is impossible. It is not a basis upon which the tribunal should deny that it has jurisdiction.

In any event we submit the tribunal has the power to make other remedies, to award other remedies and those remedies are the remedies that are enumerated in section 58 of the Act and they include the declarator, they include prohibitory interdicts, the type of remedy that is distinguishable from remedies sounding in money, it is distinguishable

from the administrative penalty and it may be enforceable against foreign *peregrini*. The fact that the tribunal may award the other remedies and whether or not other remedies have been requested by the Commission at this stage is of no consequence. It's of no consequence whether the Commission has asked for these particular remedies; it lies within the jurisdiction of the tribunal and in that regard we refer to a recent judgment of the Competition Appeal Court in Hoskin Consolidated Investments in which the court was considering the discretion of the tribunal to grant declaratory relief and in that judgment the Competition Appeal Court found that the tribunal has the power to make declaratory orders and they base, the judgment bases its reasoning on section 62 of the Act that I referred to earlier of the exclusive jurisdiction of the tribunal and the Competition Appeal Court and in particular at paragraph 25 of the judgment, where it is said that in the absence of being able to exercise that jurisdiction – that discretion rather, in the absence of the tribunal exercising it, the court says it would not be possible for a party to obtain relief anywhere else and this would deprive a party of their right to access to court enshrined in section 34 of the Constitution.

So this is just to make a simple point in relation to effectiveness; that it's not impossible – rather that it is possible for the tribunal to award a remedy that does not undermine the effectiveness of the order even if a foreign corporate defendant does not have a presence in the Republic. To the extent that there's debate to be had, it's not at this point in the proceedings that a decision should be made that precludes that debate as to what the appropriate remedy would be that would satisfy the principle

of effectiveness.

Even if – if I may turn to the fourth point – even if there's… even if the tribunal was minded to have greater regard to the common law principles of jurisdiction in the arguments that have been advanced by the banks, it's our position that exception proceedings is not the appropriate place to make a final decision if it involves a consideration of facts if the question of jurisdiction is interwoven with the facts. We make this point particularly in relation to those respondents who have a presence in South Africa and who challenge the tribunal's jurisdiction on the basis that the Commission has not shown that the conduct occurred in South Africa or had an affect within South Africa. The factual averments in relation to jurisdiction of the banks will be dealt with further by my colleague. I would only say that the extent that it may be that the question of jurisdiction is interlinked, this is not a perfect stage to decide the issue during the stage of exception proceedings because the tribunal is not and ought not to be yet in possession of all of the relevant facts.

In support of that argument I commend that this tribunal's decision in Avalon Group v Old Mutual Properties – and my apologies Chair, because I don't think that this is in the parties' bundle but is a judgment of the tribunal which you will be familiar with. It's a judgment in which Old Mutual had brought exceptions against the Avalon Group. And the citation is Avalon Group v Old Mutual Properties 01/CR/Jan01 and it was consolidated matter so; 25/CRMay01, a decision of the Competition Tribunal and it's – we rely on it for the following three principles, three bases upon which the tribunal may defer the consideration of certain

issues to trial and these are the three grounds; the first is where questions raised by the exception are interconnected with facts to be developed in evidence; the second is if the issues are a novel point of law at an early stage of development of the *jurisprudence*; and the third is where fairness requires that the issue is determined with due regard to the full factual matrix. Those three grounds can be – those principles are distilled from pages 11 to 12 of the decision in Avalon.

Finally, I said I'd address the topic of the question of effect, the meaning of effect and whether it's qualified. We deal with this in some detail in our heads of argument at paragraph 77 to 88 of the heads of argument and I don't wish to repeat those submissions here. I only wish to say the following: That to the extent that there has been the argument that the word "effect" in section 3(1) means direct, foreseeable and substantial effect, that is not evident in any way from the plain language of the statute. There's no qualifier in the language of the Act and this is so even though the legislature at the time was aware of the development of the effects doctrine in foreign law. That's the first point.

The second is that Ansac did not establish the legal test for the meaning of "effect", didn't establish that legal test – direct, substantial and foreseeable. It merely said that the effect may not be trivial. Whether or not the section should now be interpreted to include a qualifier or to define the test, the threshold of effect is not a debate that is appropriately had in these proceedings. And I say that on the basis of the decision in Telkom SA v Competition Commission, particularly at paragraph 22 in which it was held that:

> "Exceptions are generally not the appropriate procedure to settle questions of interpretation."

So to the extent that there is any track to be had with the argument that there's a qualifier to the word "effect", these are not the proceedings in which we should be making a final decision on that, particularly to the extent that it will impact on how the tribunal views the appropriate jurisdiction, its appropriate jurisdiction in relation to the respondent, the foreign *peregrini.*

In conclusion therefore what the Commission is submitting to the panel Chair, is simply that the extraterritorial jurisdiction of the tribunal is unambiguous in section 3(1) and the common law principles of jurisdiction as developed in the judgments that I referred to, do not detract from the tribunal's jurisdiction. Rather to interpret the provision in a manner that gives full effect to the application and purpose of the Act. This is especially so in a case such as this involving as it does international collusive conduct, allegations of international collusive conduct and conspiracy taking place over online platforms and real time virtual communication space. Those are my submissions Chair.

COMMISSIONER: Can I just ask on the remedy – I don't know whether this is to you or to somebody else in the team; you can defer it if its not but whatever the argument on the basis of what the common law is and whether it should be developed and how it should be applied, the argument made by some of the respondents is that when it comes to the prayer in relation to the penalty there is simply no facts put up that these firms or some of them have any turnover in the Republic, therefore just applying

the Act as it is it would be impossible to impose a penalty on people who have nought rand in their last financial year. Is it not then incumbent on the Commission to… well either they must dispute that and I don't know whether it is, but if it's not in dispute then should the Commission not at this stage indicate what remedy it would seek against those respondents because the penalty is not appropriate, so they are able to respond to the case, decide whether they want to put their energy even into opposing it. Mr Mpofu made various suggestions during his address. Should that not be made upfront so that these respondents can as it were deal with that in their answer? Because part of filing your answer is to deal with whether the relief is an appropriate thing or not, and should that, should the Commission not as it were now take a view on this particular issue, so even before we get into this very interesting debate between you and Mr Van der Nest look forward to your joint article on which way the common law should develop, but you know there's a very practical basic issue before and which makes even a finding on this academic if there's no money here to find the amount where there's no money to attach.

MR MPOFU: Thank you Chair. We will consider that question over the lunch break. Thank you.

MS HASSIM: Sorry Chair, if I may just add, separate from what the Commission may do in response to your query, that it doesn't detract from the principle that even if the administrative penalty were not to suffice that there are other remedies and that the declarator and some form of a declarator may still be applicable and effective and enforceable.

MS CARRIM: I just want to explore your argument around the common

law principles of effectiveness and the second leg of the jurisdictional requirement as argued by Mr Van der Nest. In this case you have a combination of respondents; you have *incola*, *peregrini* with a presence, *peregrini* without a presence. What would be the situation for example if there was an offshore cartel, Mr Pearse's international oil price cartel, consisting of all *peregrini* but colluding on the price of oil, crude oil to South Africa? The Commission says "ooh there's a problem here, we've got information from maybe our colleagues in Iran or somewhere else and we think there's a problem here", certainly the Commission's powers to investigate as per subject matter jurisdiction are not curtailed. Of course its powers to investigate are curtailed by the fact that all of these potential respondents are *peregrini* and offshore. And assuming that somehow you find information and you think there's a complaint to initiate, you serve papers on them, you bring a referral to us and nobody pitches at the hearing because they all say "well we don't recognise your jurisdiction, were won't even come here as a matter of courtesy, we don't recognise the tribunal's jurisdiction because we think you have to do more if you want us to participate in these proceedings." The reason why I'm raising this is because I think the argument must be that this must be a case by case development if you are going to argue for a development of the common law. But there is an issue there as to "well if you do exercise your jurisdiction" because we are, what you say we are in terms of the purpose of the Act. what is the status of our order? Even if you were to find that they were all guilty what is the status of the legality of the proceedings if there's nobody here to oppose is the question. Because ultimately we are

also operating within principles of legality. And then the question would be will you have to do something more to bring them here? Notwithstanding the fact that we think we can exercise our jurisdiction.

MS HASSIM: Thank you for the question. I think that what we need to remember is first to separate remedy and effectiveness from the subject matter, from the issue of – from section 3(1). So the starting point again would be 3(1) and the effects. So assuming that we find there are effects, the remedy would really depend on the facts. I'd like to have a bit of time to consider more the second part of the question, which is what to do in order to enforce the remedy. There may be, I mean one, you know one can theorise about ways in which you could collaborate with partner regulatory authorities and other jurisdictions and so on but I'd like to give it a bit more thought before I respond to that question if I may.

MS CARRIM: That's fine. My question really is about if a *peregrini* is saying "you don't enjoy jurisdiction", do they even have to appear in front of us? And they don't, so they come as a matter of courtesy and so we say "that's good because as a matter of courtesy you are here, in this case we can…" but what if t here wasn't that, would you not still have to do something more to bring them in? That's the question I'm asking.

COMMISSIONER: Thanks. Who is next in the batting ... (intervention).

MR MPOFU: It will be my learned friend Mr Ngcukaitobi.

COMMISSIONER: Okay thanks.

MR NGCUKAITOBI: Thank you Mr Chairman. I've structured the argument as follows: I have four categories or four heading which are in a sense my argument and also the response made by the banks. The first

relates to the course of action. What we understand the argument to be is that our pleadings must disclose an action; we accept that, that is the law. But it is the disclosure of an action for purposes of section 4(1)(b) of the Act, so I will deal with that first.

The second category of complaint is that not only should our pleadings disclose a valid action, they should also comply with rule 15. We accept that too and I will explain to the tribunal why we say that we comply with rule 15. The third category is that compliance with section 4(1)(b) and rule 15 is still not enough because you must also comply with section 3. My colleagues have addressed the meaning of section 3. What I will do is to show by reference to the pleadings why the pleadings meet the test of section 3.

And then the fourth category is that we must plead that our claim is not invalid by reference to section 67(1) and (2). There are subtopics under this fourth category. The first one relates to the new parties that have been joined and the question there, the first question there is whether there is a valid initiation at all, and the second argument on the assumption that there is indeed a valid initiation, whether that initiation is not time barred and therefore the Commission prohibited from pursuing it. And there is a third point, which is the cessation of the conduct. The second and the third point overlap but there are unique aspects that need to be teased out.

Firstly we must remember what the test is for an exception because these are exception hearings. It is summarised in a judgment of the Constitutional Court which I was happy to see that Mr Trengove won. It

is at page 3194 and it's called Pretorius v Transport Pension Fund and Transnet Second Defined Benefit Fund. And it's delivered on the 25th April 2018. The relevant passage is paragraph 15. It's helpful to read it out, it's a short paragraph but because I will be making references to it I might as well read it out. At page 3199 paragraph 15:

> "In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true, may not have regard to any other extraneous facts or documents and may appoint the exception to the pleading only when the excipient has satisfied the court that the course of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts."

If I pause there and underscore two elements to this, the first is the fact that you've got to accept the averments made by the plaintiff as true and the second is that you can only uphold an exception if you are satisfied that on every possible interpretation that can be put on the facts, the course of action or conclusions of law cannot be supported.

What that immediately means is that we are ultimately concerned with an exercise in the interpretation of the pleadings. What do the pleadings mean, can you on every possible interpretation of those pleadings conclude that it would neither disclose an action or the pleading is still vague and embarrassing to the extent that the respondent is unable to plead.

I must then go back to my outline which is section 4(1))(b)(1) and (2). The criticism here relates to the question of the agreement. How

should we plead an agreement in a way that complies with the statute? We should obviously start with a definition of an agreement. If one looks at the definition provision in the Act, an agreement is defined when used in relation to a prohibited practice to include a contract, arrangement or understanding whether or not legally enforceable. So immediately we know from that, that the mere fact that you do not meet a contractual standard for the definition is neither here nor there. It may still be an arrangement or understanding.

But we also know not only from the statute, because on Monday there was an argument about the meaning of Netstar. The court will recall that we were told that Netstar distinguishes the type of evidence that would be required for an agreement to the type of evidence that would be required for a concerted practice and that our pleadings are defective because we do not sufficiently explain what the agreement is, nor do we put up any facts in support of the concerted practice.

If the court can go to paragraph 25 of the Netstar judgment we submit that the submission made that the evidence required to prove a concerted practice is distinguishable from that required to prove an agreement is wrong in law. The passage in paragraph 25 of Netstar reads as follows:

> "A concerted practice arises from the conduct of the parties and does not amount to an agreement. A possible example might be the type of cartel arrangement where a market leader signals a price increase by way of public announcement and in accordance with longstanding practice

> in the industry the other participants follow its lead. However care must be taken not to confuse independent conduct with interdependent conduct. It suffices for present purposes to say that the emphasis is on the conduct of the parties. By contrast an agreement arises from the actions of and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest."

I need to emphasise the statement I've just read:

> "An agreement arises from the actions of and discussion among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest."

The paragraph continues:

> "It may be a contract which is legally binding or an arrangement or understanding that is not but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus."

And then here is another important part of the passage:

> "No doubt in many cases the same evidence may be relied upon as pointing towards either an agreement or a concerted practice. However sight should not be lost of the fact that they are different."

So what we get from this paragraph, what we know from this paragraph is that actions and discussions aimed at arriving at an arrangement that is

binding by virtue of a contractual force or moral suasion constitutes an agreement. But we also know that it is permissible to rely on the same evidence as pointing either towards an agreement or a concerted practice.

So the submission that you heard on Monday is plainly wrong. It is perfectly permissible for the Commission to rely on the same evidence to show a concerted practice, alternatively an agreement. Of course we are not dealing with evidence here, we are dealing with pleadings. But I make the point to say that pleadings are a precursor to the evidence to be led at trial. If Netstar holds that the same evidence is permissible to be relied upon in support of either an agreement or a concerted practice then it follows as a matter of logic that from a pleading perspective it is permissible to use the same facts to support either an agreement or a concerted practice.

So that is the broad legal agreement. We rely first on the definition in the Act, we also rely on the passage in Netstar. What we know then of the current pleadings and do these pleadings take us closer to section 4(1)(b). What we know about section 4(1)(b) is that what the Commission must plead is that there is an agreement or concerted practice by firms or a decision by an association of firms who are in a horizontal relationship. And we are in (b). And that agreement or concerted practice must involve one of the following restrictive horizontal practices: Directly or indirectly fixing a purchase or selling price or other trading conditions, dividing markets by allocating customers, suppliers, territories or specific types of goods or services or (3) collusive tendering. And we are not in the realm of collusive tendering, we are in 4(1)(b)(i) and (ii).

In so far as the agreement is concerned what the pleadings show, we can start with the first referral which is at page… the passage from page 20 and this relates to the context of the market. So what we know about the context of the market is firstly that it is about trading in Forex and we know that Forex trading is a global market. From page 20 paragraph 28 the Commission pleads that:

> "Currency trading is by definition an act of buying and selling one country's currency for another country's currency. The participants in currency trading are dealers, customers and brokers."

In paragraph 30 page 21 the Commission also pleads:

> "There are a number of different types of currency trading transactions traded in global currency trading market. These are spot, forward and futures transactions with spot transactions being the predominant way of trading."

And then the last part of this pleading that's relevant for the context of the market is paragraph 36 page 24.

> "This referral concerns currency trading involving USD and ZAR currency pairs. There are a vast number of currency trading transactions including trading on ZAR currency pairs that are taking place on a daily basis. Globally currency trading transactions amount to 5 trillion US Dollars a day involving the USD, ZAR currency pair trading for about USD R51 billion of the global daily trades."

So in other words those currency trading involving the Rand and the

Dollar amount to R51 billion a day – sorry, 51 billion US Dollars a day.

And then what we also know is who are the participants. We know that from the December referral and we note at pages 80 and 81, and there we have listed 18 traders and they represent different banks; Barclays, Absa, J P Morgan, Credit Suisse, Investec, ANZ, Commerce Bank, Standard Bank, Standard Chartered, HSBC, Standard New York, Macquarie Bank, Bank of America, Nomura International, Barclays Capital, City Group and Standard New York. So we know that in this field of currency trading and those that were specifically involved with the currency trading involving USD and the Rand, we know their names. But we also know the means of communication. We know that from page 82 at paragraph 41 how did they communicate. What we know from paragraph 41.1 is in the course of providing currency trading services for the USD/ZAR currency pair the respondent traders would from time to time communicate with the other traders employed by or representing competing banks. The one way of communicating was the Bloomberg Electronic Instant Messaging platform, the Rotors Kobra Electronic Instant Messaging platform, the Blotter Electronic Instant Messaging platform, e-mail on the phone and in person. So we know who and we know the method. But for those that were taking place in the instant messaging platforms and when I deal with this I will show you Mr Chairman that on what we pleaded in December there are at least 85 discrete transactions. 84 of those took place under the instant messaging platform and only one was by telephone and that's why the emphasis at the beginning of the pleading is on those transactions that took place under

the instant messaging platforms.

But what did they allow them to do? So this is the first thing that would happen:

> "41.2.1 The instant messaging platform allowed the respondents' traders to create permanent or *ad hoc* chat rooms with selected participants."

So the first thing we know is that there is a chat room and that chat room has selected participants.

> "41.2.2 In that chat room there is an administrator and what that administrator does is to invite other participants and once you are invited you obviously have the election either to participate or to refuse the invitation.

Those who would accept the invitation and become party to the chat room, this is what they would do at:

> "41.2.3 They would post their own instant messages in the chat room and then they would view other messages posted by other participants in the chat room."

So this is the instrument that is used. One can see that if these are invitations that are done on an *ad hoc* basis you then accept the invitation, you participate in the chat room. Your participation in the chat room enables you to post your own messages and to read other messages that have been posted in the chat room.

But it continues:

"41.2.4 Through the exchange of instant messages the participants in a chat room could engage in bilateral or multilateral communications or conversations with one or more participants in the chat room.

So the chat room is then the virtual global platform involving 18 participants representing 18 banks. In fact more than 18 participants but 18 banks and approximately 30 traders. But that enables you to communicate on a bilateral basis or on a multilateral basis. And then:

"41.2.3 The instant messages posted in the chat room were visible to all participants in the chat room regardless of whether a participant chose to actively engage in the communication or conversation by posting an instant message.

So not only can you post but you also know the exchange of information across the platform.

So what you know then is being exchanged? We first deal with this category of those participants, assuming that you were not posting anything on the chat room and you were a member of the chat room but on that particular occasion you were not posting anything. We know this from page 84 paragraph 41.4.

"As passive participants in these communications either as a passive participant in the chat room or in an instant messaging platform or by receiving information the respondent traders would

41.4.1 Gain knowledge of an permit the communications in paragraph 41.3 above and the conduct in paragraph 41.6 below, accept information from competing traders and obtain knowledge regarding the understandings on trading strategies and the co-ordination of trading activity by competing traders.

41.4.2 What type of information is then accessible on these platforms? The information requested and provided during the communications included information on a respondent's trader's previous trade and intended future trades; speculation as to the flow of the market; whether the trades for certain volumes at certain prices were successful or not."

And then:

"41.5.4 Competitively sensitive information including

1. Whether a trader was holding a long or short position the USD/ZAR currency pair during ordinary trading hours or at a specific time.
2. A trader's position on the FIX.

Then at page 85.

3. The price that the trader had quoted to customers for the USD/ZAR currency pair.
4. The price that the trader intended to quote to a customer for the USD/ZAR currency pair.
5. The trader's trading strategy or activities."

But not only do you know what your colleagues, the other traders, are doing and what their strategies are, you also have access to customer information.

> "41.5.5 Information about customers that was not publicly available, including customer identities and customer positions, the volumes that customers had previously transacted or intended to transact, whether a customer was a buyer or seller or whether the trader suspected the customer to be a buyer or seller, whether a customer was suspected of engaging in certain behaviour such as splitting of large orders among traders."

So if I can put a stop at this point to show where we are with the narrative; so what we know is that there is the Bloomberg Chat Room. It is administered by an administrator; he has rights to invite participants. The participants have the option of agreeing to participate or not. Once they are in they know everything about what the other traders are doing and they also know everything about the other customers.

Now this is the type of an international cartel activity that takes place in virtual platforms that Ms Hassim was talking about earlier. The point we make here is there is enough on these facts to show that this was an arrangement or an understanding between all of these participants. It also shows another aspect Mr Chairman which is that it is not feasible to do what we are being asked by Mr Trengove to isolate Investec from the

rest of the participants because the way in which the platform works is that each and every participant has rights of access to it. Once they have rights of access to it they have access to the information described in 41.5 and in 41.5.5 and that access to that information enables them to co-ordinate their own trading strategies. So in other words we have a group of traders involved in currency manipulation on what is pleaded by the Commission and each and everyone of those traders, whether they post one message or whether they post 20 messages, the fact is their membership to the platform is itself in violation of section 4(1)(b) because they then have access to the competitively sensitive information and which enables them to decide their trading strategies.

So at the first very point is to look at this global platform involving 18 banks, involving approximately 30 traders where each trader can talk on a bilateral and a multilateral level and each trader can based on the information they gain, decide how to trade going forward. This is the first point we make on the agreement. So we're saying that there is in fact no sensible objection to the lack of specificity in relation to how this agreement came into being because it is clear how the agreement came into being and hence the criticism that you have heard. It was initially raised by Mr Trengove but everybody else tagged onto it, which was that how can you have an agreement ranging between 2007 and 2013? But on a proper assessment of these pleadings it is perfectly possible because the way in which the co-ordination works is that you are invited by an administrator and then you have to agree to join or not to join. Once you are inside, this is the information that you have access to.

Now, what we then say ... (intervention).

COMMISSIONER: Sorry, you can finish your proposition but ... (intervention).

MR NGCUKAITOBI: Oh yes sorry, it's actually a convenient time because I was going to move to the next proposition.

COMMISSIONER: Just to… I'd like you to, because I think this aspect of the case is very-very important, what I understand you to be saying is that the chat room has some taint associated with it. This is not the general market in which people trade currencies, this is something else. This is the electronic equivalent of the smoke-filled room that Mr Farlam spoke a bout.

MR NGCUKAITOBI: Yes.

COMMISSIONER: And if that is the Commission's case, in other words there is something sinister to your mere joining this thing to communicating on it and for as long as you're on it we will draw certain inferences. If that is the Commission's case is that sufficiently made out? I see you know in your pleading you refer to an *ad hoc* chat room with selected participants. But does that go enough to take what is an *ad hoc* chat room with selective participants to suggest that this, the joining of the chat room really is the conspiracy, is the joining of the conspiracy and is that sufficiently made clear here or is the chat room like this general Bloomberg thing where this is where you trade? Because these firms also as I understand, or these dealers also buy and sell to one another, so at what stage are they doing what the Commission would regard as a legitimate trading between buyer and seller of these currencies and at what

stage to they turn into conspirators? So the chat room is distinguished from the normal Bloomberg platform because here is where the conspiracy takes place, that's where the actual, the acceptable lawful trades take place on the general Bloomberg thing. Has the Commission sufficiently explained that to make it clear? So you can just think about that over lunch and we can deal with it when you come back. So let's take a break till 2 o'clock. Thank you.

TRIBUNAL ADJOURNS (at 13:06)

ON RESUMPTION: (at 14:03)

CHAIRPERSON: Thanks, Mr Ngcukaitobi.

MR NGCUKAITOBI ADDRESSES TRIBUNAL:

Thank you, Mr Chairman. I should start with the last question that were – perhaps the first question that was asked before the lunch adjournment.

Of course the test for whether or not we have pleaded enough facts is one of embarrassment, is whether the respondents know what the case to meet. Can I just show you what has been pleaded in this regard? Some of the material I have already read through, but it perhaps bears emphasis.

So firstly it's page 81 at paragraph 41, where we deal with the terms of the ongoing arrangement and / or agreement and / or concerted practice.

So we put all of those alternatives, and at page 82 paragraph 41.1 we explain there that in the course of providing currency trading services for the USD / ZAR currency per the respondents' traders would from time to time communicate with other traders employed by or representing competing banks, and then we say on the Bloomberg electronic instant

messaging platform and on the Reuters Kobra electronic instant messaging platform.

So if we can just stop there for a moment and go back to the first referral, specifically at page 23, where Bloomberg and Reuters are both explained.

So at paragraph 33, page 23, Reuters is explained:

> "Reuters Dealing 3000 is an interbank trading platform used by dealers to enter into currency trading with counter parties. Reuters Dealing 3000 typically runs on a standalone Reuters terminal rather than as a computer application. It is displayed on the Reuters screen at each trading station. It also has a messaging functionality that allows traders to communicate and transact with one another."

Then if you look at Bloomberg, it's described at page 24, paragraph 35:

> "It is as a source of information, Bloomberg provides news headlines to the specific currency markets and movements in exchange rates for particular currency (indistinct). As a tool of communication it offers electronic instant messaging platform through which traders may communicate among themselves with customers, sales, personnel, brokers and anyone who has a Bloomberg account. It is this instant messaging system that the respondents' traders used to communicate and coordinate their trading activities. This instant messaging system is called Bloomberg chat rooms."

If you then go back to the December referral. What we say in paragraph,

in page 82, paragraph 41.2:

> "In respect of the communications taking place on the instant messaging platforms…"

That is Bloomberg, Reuters and the (indistinct) electronic instant messaging platform, this is what happened: the respondents were allowed to create permanent or ad hoc chat rooms with selected participants. Then the administrator of a specific chat room would invite the participants to join the chat room, and in that chat room they would be able to do the things that we described at 41.2.31.

So those are the four stages of participation in, were the four passages where we describe how Bloomberg, particularly these chat rooms, came into being and hence our suggesting at the beginning that Bloomberg as a facility is benign, but the opening of the chat rooms with the specific aspects described in paragraph 41.2 and the invitations, even invitation to a conspiracy and the acceptance of that invitation, is an acceptance to join the conspiracy because it is these chat rooms that were utilised by the traders to facilitate, perform and undertake activities that are in violation of section 4(1)(b).

Now this, we submit with respect, is enough. Why? Because it is possible for a trader at Investec or at Standard Bank to say that they have never heard of the platform called Bloomberg. They've never joined a chat room within in the Bloomberg platform. If they have joined a platform within the, a chat room within the Bloomberg platform, it is possible to say that it was for football and not for trading.

So there is no lack of granularity in relation to how the conspiracy

came into being and no lack of granularity in relation to how the conspiracy was executed. The particulars are sufficiently clear, and again we need to emphasise this: that the ultimate object is to avoid embarrassment. There is no embarrassment at all in the way in which these two pleadings – and again – in the way in which these two pleadings have been put together, and again one must remember that at exception stage the function is interpretation and the object is to exclude every possible interpretation and ultimately to conclude, after you've subjected these two interpretations, that they are still embarrassed nevertheless.

So on both of those legs I suggest that it is clear what the nature of the agreement was and it is clear what the nature of the overarching agreement was. The Bloomberg chat room simply provided a forum, in other words it is the smoke filled darkroom, and when you got in you knew full well what you were getting yourself into. When you stayed you knew precisely what you were staying in for because you knew the type of information that was being communicated, and there is of course a secondary level to the case, that when you were inside the platform you then took place in the several activities, and that's why, Mr Chairman, it's important to take a global view of the case to understand that what we have in the pleadings, the December pleadings, is 85 charts and what is characteristic about those charts is that they are all described as having taken place in the Bloomberg chat room.

85 charts, 18 banks and I think 30 traders utilising a platform created in the Bloomberg instant messaging system. Reasonably speaking what did they think they were doing when they logged in? When they

discussed trades? When they told others to withhold their positions? When they told them to put their fixes and their bids? When they told them to put fake bids? What did they think they were doing?

So if one takes that global view of what was actually at stake here, it becomes inevitable to be drawn to the conclusion that what we are dealing is, with is a wide conspiracy involving these banks, abusing the Bloomberg instant message system by opening this particular chat room that they then subsequently utilised for this purposes.

So that construction is a perfectly legitimate construction of the pleadings, and it is a construction that is, objectively speaking, available to you, it's available to the banks. This is why Mr Trengove was right when he says: "Insofar as Investec is concerned we know precisely what case we have to meet." It is very odd to us that Mr Trengove understands the case that Investec must meet, but Standard Bank doesn't. Or the other banks do not understand the case that they have to meet, because it's the same conduct overlapping over a certain period of time.

So this argument that there is lack of clarity in relation to the agreement has no foundation whatsoever. It is clear what arrangement, what understanding we say was violative of section 4(1)(b). Once we show that there was an arrangement or an understanding, we must then move of course to the next level, which is whether this was within competitors. There are very few banks that take the point that this was not an arrangement or an understanding with competitors. The only argument that is raised(?) rather tendentiously is the argument that says in some instances we acted on a vertical level as bank customer, as opposed to a

horizontal level as competitor.

But, Mr Chairman, there is a short answer to that concern. If that is so that is no concern of an exception. If it is correct that in a particular trade you acted as customer or you acted as buyer, that is an issue to be dealt with in the pleadings, and it has no relevance whatsoever to an exception because in an exception you must accept, as Justice Froneman reminded us, that the Commission is right when it says you are competitors, you were in a horizontal relationship, and if that is so, it doesn't matter that Investec says there were certain instances where we were involved with Absa, because the three trades they were talking about are the trades with Absa, where we were involved with Absa as customer, and therefore in a horizontal relationship.

What that simply means is that that is a case that they must plead. What in fact it does demonstrate is that they understand what the case is that they should meet and they understand not only the case, they understand also their defence. That their defence is we were in a vertical relationship and you are wrong when saying we are in a horizontal relationship.

So that's the short answer to the complaints about the failure to show that in certain instances there was verticality as opposed to horizontality.

That goes to the other concern that is being raised by Standard Bank, which is that we are prohibited by virtue of the Exchange Control Regulations. That has nothing to do with whether or not there is lack of clarity in the particulars. You understand the particulars, your defence is

that I could not have possibly committed the acts of misconduct because committing that act of misconduct would then bring me into a conflict with the provisions of the Exchange Control Regulations, but again you understand the case, there is no embarrassment, so you can plead the times of the exchange control regulations, and that, Mr Chairman, cuts across this entire debate, which might be interesting, but it is entirely irrelevant for exception purposes. This entire debate about whether or not it's necessary to prove a regulation or whether or not there's an act that was passed in 1965 that changed the law that was decided in 1954, that we were being taken through by Mr Cockrell, it is ultimately irrelevant because if your defence is that I could not have possibly engaged in the act of misconduct described under section 4(1)(b), because the Act of 1965 prohibits, well, that is a defence to be pleaded. It has not bearing whatsoever to the question of exception.

And hence we cited authority that said:

> "If you are relying on a regulation because the regulation implicates questions of fact that may be proven, that issue must be dealt with at the trial."

It is to that extent that we simply want to pursue the argument. It's not a defence to say that I cannot be guilty of the offence you are alleging because being guilty of that offence would implicate another regulatory regime that I'm subject to, so it simply doesn't make sense at all.

So for purposes of an exception the case is clear enough, the course of action is clear enough, especially the course of action flowing from section 4(1)(b), and the answer to each bank that says that it is bound by

the Exchange Control Regulations, is that it must put up a defence that says it did not breach because of the provisions of the Excon Regulations.

Phase 2(?) then answers, cut across the entire debate. It then becomes unnecessary for the Tribunal to concern itself with whether or not a pleading that does not take into account the breach of regulations is sufficiently clear because the issue is, (indistinct) not be dealt with at the trial because for the current purposes, what we are concerned about is whether we can sustain an action on the allegations we have put and whether or not there is embarrassment on the part of the respondents.

On both of those questions it's quite clear that there is no embarrassment and it's clear that the course of action founded in 4(1)(b) is sustained.

So to recap on this topic, there is an agreement pleaded, there is a concerted conduct pleaded, there is horizontality pleaded and then of course we must go to sub 1 and sub 2 that the horizontality and the agreement must relate to specific acts.

Now if one looks at our pleadings, they are replete with instances of misconduct on the part of the banks. We start off by summarising them at page 83, paragraph 41.3:

> "As active participants in these communications the respondents' traders would:
>
> - Offer and provide assistance to competing traders through coordination of trading activities.
> - Request and accept assistance from competing traders through the coordination of trading activities.

- Offer and provide information to competing traders.
- Request and accept information from competing traders."

And 5:

> "Reach understandings on trading strategies and the coordination of trading activity in order to assist and be assisted by competing traders."

You will recall that there was a comment made in the past two days and it's unclear if this was a seriously intended comment, that we've pleaded an agreement, but we haven't pleaded its implementation, or we haven't pleaded its effects or the way in which it was carried out.

If I can take you to the actual pleadings and I don't intend to take you through to all of the pleadings, but we can start with the first respondent with, which is Bank of America, which is at page 91.

So we start at paragraph 48. We know that on the 18th of March 2011 the Bloomberg chat room was used by Katz, Cummins, Hatton, Cook, McInerney, Mullaney, Sweeney, and we know that they represent BNP, Citibank, HSBC, Bank of America and Standard Chartered, and we know that they discussed, and where Jason Katz asked other traders to tell him if they needed his assistance with the ZAR at the FIX, with the South African rand at the FIX.

We know again at paragraph 49 that in the same chat room on a different date the same participants were now discussing a different topic, the traders consolidated their common FIX positions, Jason Katz notified everyone that he had South African rands to sell at the FIX and Christopher Cummins said he hopes he has the same.

You look at the following page, paragraph 50, page 92. We have Katz, Hutton, Mullaney, Barisic, Cook. They again represent four different banks and Mullaney and Cummins they coordinate by consolidating similar FIX positions such that only one of them will undertake the trade at the FIX.

At paragraph 51 a different date, again using this Bloomberg platform. Different traders. There is now Cook is back, Mullaney, Cummins, McInerney, Sweeney and Jason Katz and Christopher Hatton consolidated their USD / ZAR position, buying positions at the FIX.

And then paragraph 52, page 93, we have the traders representing multiple banks. What they decide at that point is the traders held and / or pulled their trades(?) to reserve liquidity for each other, and the same conduct you see at paragraph 53, 54 and – 53 and 54.

So what we know from this is six traders, four banks, Bloomberg chat rooms and there is actual manipulation of the conditions of trade. If you have to accept this to be true, it's clear that they are guilty of section 4(1)(b) and we see the actual acts that they performed, the pulling of the trades, the consolidation of their fixes and consolidation of their common bank position, and then Jason Katz even ask them if they need assistance with the rand.

You can go to the next one, which is BNP. Starting from paragraph 56. I am not going to take you through that, but it is involved in 61 separate acts and they are all set out right up to paragraph 85. Sorry, not 85, it goes on… to 117, page 1-1-1. But it's 61 acts, they all fall within the five categories and they involve in turn – I counted… BNP, Standard

Chartered, JP Morgan and Absa. Four banks. 61 times, same platform, discussing conditions of trade and actually fixing their positions.

You will also note at paragraph 60, you will recall that Mr… You will recall that there was a concern about the involvement of Standard Chartered and they said well, we are not mentioned at all.

Now I want to show you, Mr Chairman, how they come into the picture. At page 95. Paragraph 60. On the 6th of March 2012, using the Bloomberg chat room, the following traders were active participants: Nicholas Williams and Jason Katz, and the following traders were passive participants: Christopher Cummins and Akshay Aiyer in the following communication:

> "Nicholas Williams and Jason Katz suggest (indistinct). Later Nicholas Williams informs the traders that Standard Chartered asked for his spread at 25 million USD / ZAR, and warns them about customers. Jason Katz suggest that Nicholas Williams should suggest a specific spread to Standard Chartered and Nicholas Williams responds that this is what he relayed."

So you've got to accept that to be true, accept that what Jason Katz suggested here was correct and this is what happened.

Now… Yes, and then at page 101, and this is now again, I think there was another complaint about Standard New York. Paragraph 85. On the 13th of April 2011, using the Bloomberg chat room, the following traders were active participant: Jason Katz and Duncan Howes in the following communication:

> "Jason Katz tells Duncan Howes about his contacts at Citibank, Standard Chartered and Standard New York, pulled their offers in order to allow him to go first and put his offer."

Paragraph 86:

> "I understand that the context of Jason Katz at Standard New York included Robert Silverman and Louis Friedman."

So again if you accept those to be true, what happened here is that Jason Katz was reporting that his contact at Standard New York, which is Robert Silverman and Louis Friedman, had pulled their offers, had made an offer to buy, they pulled them in order to allow him to go first and put his offer.

So if you take paragraph 60 and paragraph 85 and 86 as correct, it's clear that Standard Chartered is within scope and Standard New York is also within scope. They have been brought in by the representations made by Jason Katz.

So this (indistinct – rustling of pages) goes on in relation to the first three respondents. The same position is applicable to the other banks at of course different levels and it is true, as Mr Subel was saying, that Standard Bank is implicated in one instance where they are discussing a trade, but that is not a defence to the claim of the Commission, because the claim of the Commission is that your acceptance of the invitation to the Bloomberg chat room where this was discussed, was sufficient to constitute a breach of section 4(1)(b). It is possible that because you've only participated once you might have a defence in relation to penalty, but it's not a defence to your participation in the conspiracy because the case of the Commission,

as we, I've tried to show that there is an overarching agreement and the overarching agreement has specific terms that are pleaded, and if all of that is accepted, the mere fact that you attended once, logged on once or spoke to another trader once, is neither here nor there, for purposes of 4(1)(b).

Now, Mr Chairman, we've been told repeatedly here, and I think Mr Snyckers made the point, that well, you have to choose whether there is an overarching agreement or whether these were discreet instances, but let's stop here for now, with the three banks that I've tried to show. The one bank is involved in six instances, four traders and with four different other banks. The other bank is involved in 61 instances, with six traders and six different other banks. What is the impression, the reasonable construction of that conduct? Does this show you that these are separate discreet instances? Or does it show you that there is an overarching conspiracy? It seems to us that the most probable inference to be drawn from these facts is of an overarching conspiracy. Of an overarching agreement.

The idea that these are discreet instances just boggles the mind. The idea that one day Standard Bank, the traders of Standard Bank got into the chat room, had a discussion about a trade, then logged out and had no idea what was otherwise going on, just boggles the mind on what we know, on the facts.

So we'd urge the Tribunal to find that this suggestion that has been made, that we have to make an election between an overarching conspiracy and discreet agreements, actually is unfounded and that the

case of the Commission is sufficiently clear, and if we again go back to the issue of Standard Bank, it is not as if it is difficult for Standard Bank to answer to the case because they can say: "We were never party to any ongoing conspiracy or overarching agreement. The only instance we were involved is logging in on that particular chart," and which, in which event they must explain what that chart was about and they must explain why they were discussed the terms of the trade, and they must then say: "After that we logged out, we never got back again."

But this has nothing to do with lack of clarity or lack of particularity.

CHAIRPERSON: Ja, but let's use that examples. I think it's quite an important one. If – up until now, I don't know that it was clear to Standard Bank if they need to say explain the trade or if they need to explain the fact that they even logged onto this chat room. In other words had they entered the realm of the legality by tapping in, their log-in, or whatever you do to get into these chat rooms in itself, or was the act of that particular communication what was unlawful?

Now as I understand you're saying now well, just by tapping into that you entered into this overall conspiracy and therefore you are liable for everything that went on in this chat room. You joined this, whenever you joined the smoke filled room, once you joined you're in trouble for everything that went on in that room before and after?

MR NGCUKAITOBI: No, but, Mr Chairman, on what basis could they not understand that? Because that is precisely what's pleaded in paragraph 41. I mean any sensible person reading this pleadings will respond to

paragraph 41. They will say: "I see this platform, but I have nothing to do with it, and that I have a different defence for my participation later in that single trade." It is just unclear to us on what basis Standard Bank can say they don't understand the allegations in paragraph 41. On what basis they can say that: "We actually always thought we were implicated in one instance." Whereas every paragraph here talks about what the respondent banks did, and the respondents' traders. And they now that they are a respondent bank, a respondent trader, and if they have a defence to their participation in the chat room, they must put up the defence.

So if one is really concerned with embarrassment, there's nothing embarrassing in having to answer to the overarching agreement and then having to answer to the specific complaint against Standard Bank, and as I've tried to show by reference to the, just the first two respondents where you've got five traders, five different banks, similar platform. What difference does it make that you have one trader, one bank and, but the same platform? I mean what is the most reasonable construction of these facts? The most reasonable construction of the facts is that they must have known that they were entering the realm of a conspiracy. And if they say they were never aware of the conspiracy, with respect, Mr Chairman, they can answer that.

And it's not clear to us that they can legitimately say that up until today they've never been able to interpret paragraph 41, because paragraph 41 is self-evident because it refers to the respondent banks. And then we even make it clear later that the manifestations of what we are dealing with here are the following, where we cite the examples.

So they are entitled to say: "We were never aware of the overarching conspiracy, we just got in on that specific day and we got out," but then they must explain how they got in and what information they had access to, and what did they do with that information, and what did they think they were doing when they participated in the Bloomberg chat room.

So, Mr Chairman, that is not to say that they will not have a defence, it is to confine this debate to what we are dealing with now, which is this is an exception hearing, where you are compelled to accept what the Commission says is true, and then you must ask if we say this is what the respondents banks did, well, what is their defence to that?

So I respectfully submit, Mr Chairman, that they could never have been embarrassed by having to plead to paragraph 41, and that paragraph 41 is clear enough.

So, Mr Chairman, I don't want to spend time on these specific instances, but they go on to paragraph, page 123. I should probably spend a minute or two on Commerzbank. You remember that they complained that they were mentioned only once. They are mentioned at page 110, specifically at paragraph 117, and you will see there that we say that:

> "On the 28th of July 2010, using the Bloomberg chat room, the following traders were active participants: Nigel Dousie…"

And that's the Commerzbank representative:

> "And Jason Katz in the following communication: Nigel Dousie shared information with Jason Katz about a potential

customer in the market."

If I can just stop here. Remember yesterday that Ms Carrim asked an important question, that if you look at the nature of cartel, you can't have a cartel with yourself.

So you must always look at the counter party. If you look at Commerzbank and Nigel Dousie, they are involved in a conversation with Jason Katz, and just by looking at all of the pleadings we see that Jason Katz was at the core of this cartel. What Commerzbank would have to do firstly is to explain if this communication ever happened. Then they have to explain what they understood about Jason Katz. Then they have to explain why they were discussing about a potential customer in the market. And they'd do that with the added advantage that they know that Jason Katz is implicated the most in this cartel activity.

So again there is no embarrassment in the fact the Commerzbank has to respond, and the fact that they say: "We are implicated once," does not absolve them from having to explain why they are implicated once.

So, Mr Chairman, again we go back to the original starting point, is that the facts are sufficiently clear to enable them to put themselves one side or the other in the debate.

Then… Yes. Then, Mr Chairman, we have the complaint – if I can move on from the explanation that we have met the requirements of section 4(1)(b), we've shown an agreement, we've shown that these were competitors, we've shown that the conduct they engaged in was conduct in breach of 4(1)(b)(i) and 4(1)(b)(ii).

Then we have Investec making a separate complaint that: "All we

want to know is whether or not the complaints against us are confined to the three complaints that you have raised," but if I am right in my interpretation of the pleadings, that Investec must answer paragraph 41 in relation to itself, then there is no valid complaint because it is possible to answer whether or not you know anything about what is said in paragraph 41, and then to answer in your specific instance whether or not your participation was in furtherance of the terms that are pleaded in paragraph 41, or whether or not your participation was benign.

So I submit, with respect, that that answer must apply to Standard Bank, to Commerzbank, in the same way as it should apply to Investec. It is not necessary for the Commission to be told at this stage that it should confine its case against Investec to the three instances, because one looks at this, one is forced, if one adopts that approach, to say that the three instances constituted independent, discreet agreements or arrangements, which have nothing to do with the overarching agreement and participation by the different banks in the Bloomberg chat room. This is not the case that the Commission is bringing because the Commission is bringing Mr Snyckers' (indistinct) and calls it an ambitious case, but that description is unhelpful because it's either the case is factually pleaded or not. It doesn't help for an advocate to stand here and say that it's ambitious. It's up to the Tribunal to decide if it's ambitious, it's not up to him.

So ultimately the point is if we have shown that there is an overarching agreement and we have shown that you have participated in one of the terms of that overarching agreement, which is the logging in

and the acceptance of the invitation, then you must explain that particular instance that you were involved in, and I know that Mr Trengove says it's three and it's not six and that we've made mistakes in the pleadings. I've gone back to those pleadings. We haven't made a mistake in those pleadings. The truth is that that conduct happened twice in that particular day, but that's not relevant as a question of principle for the purposes of this hearing, because whether it's three or six, there is no distinction. The fact of the matter is what he wants to know is: "Are you limiting your case to those six or three, or have you got wider cases?"

My argument is that on a proper interpretation of the pleadings the case is against all of the respondent banks as pleaded from paragraph 41 and as pleaded in the specific manifestations, and that language is clear, this is the overall agreement and these are the specific manifestations.

So if I can then sum up on this topic. What do we know? Forex is globally traded, it's a multiplicity of banks. They – Bloomberg is generally available as a platform, but in this particular instance chat rooms were opened, they participated in those chat rooms and that is the single factor that is common across the pleadings. Every paragraph that talks about the breaches of 4(1)(b) harks back to the usage of the Bloomberg chat room. We've explained how the, you would get to participate through the invitations, and we've explained specifically what conduct they committed.

So for purposes of section 4(1)(b) we raise a cognisable case. Whether or not this is a good or a bad case is not something to be decided here. We have shown that there is horizontality. You don't have to decide

whether in particular instance such as the Absa / Investec instance there was verticality. That is an issue to be dealt with in trial.

Now that covers topic 1 and topic 2. In other words we've complied with the primary norm which is contained in the legislation, we've also complied with the secondary norm which is contained in the rule 15.

We then need to move on to the next requirement: do the pleadings show an effect as provided for in section 3? Ms Hofmeyr has dealt with what is the meaning of effect within the Republic, and the important starting point is to understand that that is distinguishable from activity taking place within, or having an effect. We make two submissions about the issue of the effect. The one submission is that if it is true that these were not just agreements, there was actual manipulation of the currency of the rand, that is enough to constitute effect within the economy. If you take that together with the fact that what is pleaded in the first referral is that globally speaking there is 51 billion US dollars of trade that's taking place using the rand. Out of that – obviously the pleadings do not say how much these trades contributed or didn't contribute, but if I am correct in my original submission, that the mere fact that there is a manipulation of the currency is sufficient to show that there was an effect within the Republic, and I take it from Ansac, effects do not have to be positive or negative, they merely have to be effects.

So I submit at a primary level that the mere manipulation of the currency is enough to establish effect and we don't need to do any more than we have done, but beyond that, if you look at the facts of this case (indistinct) that they illustrated that there are 85 charts, all of them about

the setting of the trading conditions or alternatively the fixing of the price or alternatively encouraging people to pull back so that you can put your bids. Sometimes encouraging people to put their fake bids.

Those are separate acts of manipulation and it cannot sensibly be argued that those acts of manipulation have no effect on the economy because these are acts of manipulation of the local currency.

So it seems to us that whether one looks at the principle argument that I made, which is the mere fact that you were using the South African currency was sufficient, or alternatively even if you isolate these 85 acts that we have pleaded, it clearly shows that there was an effect within the, an effect on the South African economy.

So there can be no sensible argument made that there was no effect. You will recall that one of the points that are made I think by two of the respondent banks, is that because I was involved in one instance you must show that particular instance, in other words a discussion about the trading condition, that that instance had an effect on the currency, and you must show that the currency went up or down as a consequence of that. This submission is absurd. It is absurd because one is dealing with, look at this in an overall context. One is dealing with an ongoing overarching agreement over time, and so it is absurd to suggest that we must now show that a conversation between Katz and Williams on the 20th of March 2011 somehow affected the rand. It is the overall effect of the activities that are pleaded that we say illustrate that the conduct had an effect because we don't accuse the banks of single conducts, we accuse the banks of having participated in an overarching agreement, and that we say clearly had an

effect within the Republic.

Aligned(?) to that question of effect is obviously the issue of effectiveness, but that we say is a question of remedy and I have planned to deal with it, but I think it's been sufficiently covered by Ms Hassim and there questions that the Court has asked and those will be dealt with in due course.

That leads me to the last point which is the validity of the claim. Oh no sorry, there is in fact one more point before I deal with that, which is the argument raised by JP Morgan.

Now firstly JP Morgan you will see is implicated in paragraphs 119, 120, 121, 122, 123 up to 125.

So they are implicated in seven instances and the time that they are implicated in, stretches between 2007 and 2013. What they have asked the Tribunal to do is to strike out the material that appears at page 130. If I can ask the Tribunal to go to that material. This is a plea agreement concluded by JP Morgan in the United States of America, and this is what Mr Mpofu are saying, they plead guilty in America and they come here and they raise defences. This is a plea agreement with JP Morgan and the United States of America. If you look at page 132 about what they pleaded guilty to, the factual basis for the offence as charged:

> "(a) For the purpose of this plea agreement, the relevant period is that period from at least as early as December 2007 and continuing until at least January 2013.
>
> (b) The Forex spot market is a global market in which participants buy and sell currencies. The Forex spot

> market currencies are traded against one another in pairs. The euro / US dollar currency pair is the most traded currency pair by volume, with a worldwide trading volume that can exceed 5 billion US dollars per day, in a market involving the exchange of currencies, valued at approximately 2 trillion dollars a day during the relevant period."

And then they explain the process that is followed, but what would strike you about (a), (b), (c), (d) and (e) and (f), is – up to (g), (h), it's precisely the same conduct, only involving a different currency pair. The only difference is not the US dollar / euro, it is the US dollar / ZAR. But it gets better because if you look at page 134, paragraph (h):

> "In furtherance of the conspiracy the defendant and its co-conspirators engaged in communications including many daily conversations, some of which were in a code, in an exclusive electronic chat room, which, with chat rooms participants and well as others in the Forex spot market referred to as the cartel or the mafia.
>
> Participation in the electronic chat room was limited to specific euro / USD traders, each of whom was employed at certain times by a co-conspirator dealer in the Forex spot market. The defendant participated in this electronic chat room through one of its euro / USD traders from July 2010 to January 2013.
>
> What they do, the defendant and its co-conspirators

carried out the conspiracy to eliminate competition in the purchase of, and sale of euro / USD currency pairs by various means and methods, including in certain instances co-ordinating the trading of the euro / USD currency pair in connection with European Central Bank and World Markets Reuters benchmark currency fixes."

And then it goes on:

"Refraining from certain trading behaviour by withholding bids and offers when one conspirator held an open risk position, so that the price of the currency traded would not move in a direction adverse to the conspirator with an open risk position."

This is precisely what they did with the rand and dollar, and this is exactly at the same time. They call it the cartel or the mafia.

If you then look at paragraph 14. Sorry, paragraph 13, which is at page 145.

"Other relevant conduct"

Paragraph 13:

" In addition to each participation in a conspiracy to fix, stabilise, maintain, increase or decrease the price of, and rig bids and offers, for the euro / USD currency per exchange in the Forex spot market, the defendant through its currency traders and sale staff, also engaged in other currency trading and sales practices in conducting Forex spot market transactions with

customers via telephone, email and electronic chart.

2. Intentionally working customers, limit orders, one or more levels or (indistinct) away from the price confirmed with the customer, including sales mark-ups through the use of live hand signals or undisclosed prior internal arrangements or communications to prices given to customers.

3. Accept and limit orders from customers and then informing those customers that the orders could not be filled."

And then:

"4. Disclosing non-public information regarding the identity and trading activity of the defendant's customers to other banks or other market participants."

It goes on. If you look at paragraph 13, they went to America, they pleaded guilty to what they did in America. They also pleaded guilty to engaging in other currency trading and sales practices, involving Forex spot market transactions. They even explained what they did in other currencies.

The same appears in paragraph 14:

"The defendant and its related entities, as defined below, shall cooperate fully and truthfully with the United States in the investigation and prosecution of this matter involving:

(a) The purchase and sale of the euro / USD currency pair, or any other currency pair in the Forex sport market."

So not only did they plead guilty to what they did with relation to the euro

/ USD, they also pleaded guilty to other currencies. They even undertook that they would help the Americans to investigate other currency pairs. We have pleaded here it must be accepted that they were involved in the USD / ZAR currency pair. They are happy to assist the Americans to investigate to the USD / ZAR currency pair, and they have come here, and this is why Mr Mpofu's point was actually not a joke, and they have come here to say: "Sorry, for so many reasons you should not do anything about this."

And so the pleadings here are quite clear. They pleaded guilty in America, they've undertaken that they will help the Americans to investigate them on other currency pairs. They have now asked that you should strike out all of this.

Now this, we submit, is actually the pinnacle of vexatiousness. So this application to strike out this material is utterly vexatious. They say that it's because it's irrelevant. It is directly on point because it shows you the elements, the usage of this instant messaging platforms. It also shows you the trading strategies that are directly the same, but it also shows you that they were happy to plead guilty in America and they had undertaken to assist the Americans in other currency pairs.

So this is not just a question of similar fact evidence, it's overlapping, directly relevant evidence to what you are dealing with because when we cross-examine them, we are going to put to them why they pleaded guilty in America to include other currency trading pairs. What were those currency trading pairs? Did they include the USD / rand? What assistance have they given to the Americans to investigate the USD,

the rand?

So this evidence is directly relevant to the function that you are performing. It's not only the time, it's the same platform, it is the same participants. The only difference here is the currency. Every other element of the offence that they pleaded to, if you just compare with our referral you will see it word for word.

So we submit that the application by JP Morgan is a vexatious application, it should be dismissed. The pleadings that they pleaded guilty in America are clearly admissible and they are clearly relevant to what you have to deal with.

Then, Mr Chairman, I must address the last of my points, which is the issues around the joinder and the validity of the referral. I wonder, I've been talking for a while, whether I can get five minutes?

CHAIRPERSON: Let's take a five minute adjournment. Thanks.

TRIBUNAL ADJOURNS (at 14:58)

ON RESUMPTION: (on 15:06)

MR NGCUKAITOBI ADDRESS TRIBUNAL: (continues)

Thank you, Mr Chairman. I still have two more things, if not topics. There is still the declarator of Ms Hofmeyr. My leader will deal with it. I suggested during the adjournment that we must negotiate it with Mr Trengove on the basis that we'll give them a discount. [General laughter]

But it will be dealt with in due course, but I want to then answer Mr Cockrell and Mr Farlam on the joinder issue.

So as we understand what the arguments boil down to, so firstly it's the location of when the initiation was done, and what has been suggested

is that the best possible case for the Commission is that the initiation happened in April 2015, and that should be the date at which everybody accepts, and I think that was the argument run by Mr Cockrell, is that he will run his arguments on the assumption that April 2013, 2015 rather, is the date.

So let's work on that basis as well. The argument that he makes on behalf of HBUS is that Mr Hatton who is the link between the misconduct and HBUS ceased being employed by HBUS after October 2010, and that in our pleadings we have not joint issue with that. He's right on both of those. However the problem is that in order to assess the validity period if one works on April 2013, 2015, the issue is not the termination of employment, but it is the cessation of conduct and the question of the cessation of conduct is broader than the termination of employment, and the cessation of conduct implicates questions of fact because the test whether one looks at Power Construction or looks at the later case Pickfords, the test remains when was the last date that the benefits flowing from the conduct stopped emanating to the entity? That is a question of fact on which, at this point in time, we have no idea. It may turn on questions of onus, like we've said in Pioneer, that because it ultimately becomes a prescription question it must be dealt with along the lines of Pioneer, in other words the respondents must allege and prove the date at which they last received benefits flowing from the conduct.

Or it may turn on a case such as Pickfords, that the Tribunal might say on a proper assessment of your case I am looking at these individually, in which event the Commission must provide the evidence about the

cessation of the conduct. But that is not where we are right now and so the starting point is to draw a distinction between the termination of employment, including, for that matter, even if Mr Hatton packed his bags and left in August 2010, even if, as they say, he in fact took up employment with Credit Suisse, that still does not help the Tribunal to answer the question in section 67, which is what was the last date when you received, you last received benefits from the conduct?

And so we say that there are two answers to that. The first is that that is a factual enquiry and that it's inappropriate to resolve to an exception. The second point we make is that that enquiry might require a determination of onus, and it's not appropriate now to decide whether we or they bear the onus, and that is an issue to be dealt with later, and hence we agree actually with the submission that was made – I can't remember who cited Makhanya, because Makhanya says that questions of prescription and jurisdiction, some may be appropriate to be raised on exception, others may not. Others may hinge on facts, others may not. This is one of those that hinges on facts because what you are asked to decide now, with only the benefit of the Commission's pleadings, is when was the date at which the benefit ceased? But we are in the dark about that question, and that's why we would respectfully urge the Tribunal to resist the temptation to make definitive findings on whether the conduct is prescribed or not.

And so even on their factual hypothesis, which is let's work on April 2015, it does not help because all they ultimately prove is that Hatton packed his bags and left in August 2010, but they don't come close

to having to prove what the law requires, which is when did the conduct cease? And there we must answer the difficult question in Power Construction.

So that we say is the better way of resolving that issue at this stage of the hearing, bearing in mind that these are exception provisions. Exception hearings.

Now you have another argument which is not about cessation for purposes of prescription, and of course Mr Bhana incidentally is right when he says that section 67 is not a prescription provision, it is a provision intended to regulate the power of the Commission to refer. Mr Chairman, I've run that argument before you without success. [General laughter]

CHAIRPERSON: There's always a second time around (indistinct – laughter).

MR NGCUKAITOBI: But I just wanted to say that Mr Bhana has caught up to it, which shows that I wasn't entirely wrong. [Laughs]

So there's another argument raised… (intervention)

MR BHANA: Or the Commission is entirely wrong. [General laughter]

UNIDENTIFIED MALE SPEAKER: (Indistinct – mic off)

MR NGCUKAITOBI: No-no, I think it was me who wasn't, who was not quite correct. Until I go on appeal. [General laughter]

So there's another point that is raised which is not just the question of the prescription, which is the validity of the initiation and the argument made around this is that: "You had never initiated against us," and this is Mr Farlam's argument: "And because you didn't initiate against us, well,

end of the story." We have cited in our heads or argument, especially from paragraphs 3.28 to 3.30 the authorities, Yara being the main authority that discusses at length the question about a decision to initiate, and the most important being that there is no formality that is required to initiate, and that all that is required by section 49(b)(i) is that there must a decision by the Commission to open a case. It can be informal, tacit and as I explained that all the Commission has to do is to decide to initiate a new complaint, to investigate that complaint and if appropriate refer that complaint to the Tribunal.

Now – but I shouldn't take an opportunistic line and talk about the tacit referral. I should deal with the case on the basis that they pose it, which is April 2015 is the date at which your refer against us and show us on that basis that there is a valid initiation. The short argument is that section 67(1) and section 67(2) are the different. The initiation referred to in section 67(1), which is the initiation that ultimately leads to "prescription" is an initiation against a prohibited practice. It is common ground that we initiated against a prohibited practice in April 2015.

Section 67(2) deals with the referral against a firm and that draws a clear distinction between the two, and on that basis the argument that is made against us, that: "Sorry, you didn't initiate and therefore you don't have a valid referral," misses that distinction that there was an – and there was always an initiation against the prohibited practice, and what was happening is that along the way we were discovering new firms and discovering new participants to the cartel, and we were always entitled to add those cartels to the, those firms participating in the cartel because of

the interpretation of section 67(1), that the focus of 67(1) is a practice and the focus of (2) is a firm, and the argument that has been raised misses that distinction.

So that is the short answer to both the argument by Mr Farlam and the argument by Mr Cockrell.

So the April 20 – this is the point that we made in the replying affidavit. If you bind us to the April 2015 initiation, that initiation is good enough for the firms that subsequently became added for purposes of section 67(1).

CHAIRPERSON: Can I just ask on that point? I mean what you're saying I think has been the Tribunal view on this matter, but for better or for worse it's suggested that we have been overruled on this point in Loungefoam. Do you interpret Loungefoam as overruling us on that particular point?

MR NGCUKAITOBI: No, we don't, with respect – I actually had Loungefoam… We don't, with respect, concede that Loungefoam overrules your, the view that you've held on this. We – I will come back and make further submissions on Loungefoam because I have, my note that, is missing right now, but the point is that Loungefoam did not overrule you, the interpretation that we advance is the interpretation that in any event is consistent with the language of the legislation. I mean the statute is clear on the point. There is no reason to use a referral and qualify it with firm, and use initiation and qualify it with prohibited practice if the two mean one and the same thing.

MS CASSIM: If that is the case, then why did the Commission find it

necessary to have an amendment to its initiation in August 2016?

MR NGCUKAITOBI: No, that is true, that it had an amendment in August 2016, but that cannot create a statutory presumption, it's just the conduct of a commission. I did consider that point about whether or not that could be a concession of some sort. If it did become a concession it would then be a legal concession and it would not be binding on anybody. The correct position would be what is the view of the Tribunal in relation to what is the meaning of 67(1) and 67(2), but the point is well made that you did in fact amend the referral in August 2016, but the amendment cannot be construed in any way to override the statute, and that's the argument I will make.

MS CASSIM: The debate in Loungefoam was slightly different. It wasn't about 67(1). It was a debate about whether you can add particulars to a complaint.

MR NGCUKAITOBI: Yes.

MS CASSIM: And the relationship between initiation and the Commission's investigation, and my understanding is that the Tribunal was overruled because our position was that when you add a party to what has already been prohibited conduct, it has been initiated, it's simply adding particulars as a result of an investigation.

MR NGCUKAITOBI: Yes.

MS CASSIM: The Court found that no, you had to have an initiation. You had to initiate against those individuals, that is Feltex.

So it is a slightly different debate, but I think that it will be useful to hear your views about how you understand Loungefoam.

MR NGCUKAITOBI: Yes, I will come back to that topic. Subject to that, I think I've come to the end of what I can say to you usefully today.

CHAIRPERSON: Is there someone else from your team or do you want to, or should we carry on tomorrow? What's the position of the… (intervention)

MR NGCUKAITOBI: No, I would suggest an adjournment because I do need 10 minutes to cover this debate we're having now.

CHAIRPERSON: Okay. And do you and the other counsel have any view as to whether we need Friday still or…

MR MPOFU: Chair, thank you very much. This morning we did canvas the views of the other side. The arrangement as it stands now is that we have committed to finish by teatime on condition that they will use the rest of the day and it looks we are not going to need Friday, subject to confirmation.

MR TRENGOVE: My learned friend and I had that conversation and as I told him this morning is that we were in favour of the deal, but we'd like to withhold the final decision on it because we'd like to hear his argument in the course of the day to assess whether we'd be able to finish in the allotted time tomorrow. We haven't reconvened to reconsider it. Their arguments have been so compelling that we might need more than a few hours to respond to it, but may I confer with my colleagues and tell you whether we have an arrangement or not?

CHAIRPERSON: Okay. (Indistinct – mic off) would you want to let us know tomorrow or do you want to let us know today?

MR MPOFU: We'd like to know... (intervention)

MR TRENGOVE: I think we owe it to my learned friend… (intervention)

MR MPOFU: … earlier.

MR TRENGOVE: … to do it now.

MR MPOFU: Because it might… (intervention)

CHAIRPERSON: Okay. So should we just stand down for a few minutes and you can tell us?

MR MPOFU: Thank you.

MR TRENGOVE: If we may.

CHAIRPERSON: Okay.

TRIBUNAL ADJOURNS (at 15:22)

ON RESUMPTION:

CHAIRPERSON: Thanks, Mr Trengove, are you the spokesman for the… (intervention)

MR TRENGOVE: Ja. Chair… (intervention)

CHAIRPERSON: … chat room here?

MR TRENGOVE: We're both the conspirators and the angels (indistinct). [General laughter] And our consensus is that we're all keen to, not to have to sit on Friday, but we can't commit not to do so because we're afraid that we might not be able to finish tomorrow.

So the understanding is we're going to, my learned friends have said that they would like to adjourn now, but – and we'll try tomorrow to finish in the day, but we can't promise that we'll succeed in doing so.

CHAIRPERSON: Alright, fair enough.

So we promise you more action tomorrow. For those of you who

are in the crowd, Friday, we'll see. [General laughter]

Okay, thank you. 10 o'clock tomorrow morning then.

TRIBUNAL ADJOURNS (at 15:29)