REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO:689/2013

In the matter between:

ASTRAL OPERATIONS LTD Excipient

and

NAMBITHA DISTRIBUTORS (PTY) LTD Respondent

CASE NO: 13794/2011

In the matter between:

ASTRAL OPERATIONS LTD Plaintiff

and

MICHAEL HENRY O'FARRELL NO First Defendant
DAVID VIVIAN HOTZ NO Second Defendant
BRIAN GEORGE GARDINER NO Third Defendant
MICHAEL HENRY O'FARRELL Fourth Defendant

JUDGMENT

GORVEN J

[1] The overriding purposeof the Competition Act 89 of 1998 (the Act) is to promote and maintain competition.[1] It has two main focus areas. The first serves to exclude those practices which are inimical to competition and which are referred to in the Act as prohibited practices. The second concerns mergers.[2] A prohibited practice is defined to mean a practice prohibited in terms of Chapter 2. For this purpose, the Act establishes three specialist bodies; the Competition Commission (the Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the CAC).These specialist bodies are the only ones entitled to deal with determining whether conduct complained of amounts to a prohibited practice under the Act. The functions of the Tribunal are set out in s 27 of the Act. Those relating to prohibited practices[3] provide that the Tribunal may:

'(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in *this Act*…

and

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of *this Act*.'

[2] The present two matters are closely related. The first concerns an exception taken by the plaintiff to the counterclaim entered by the

---

[1] Section 2, which reads as follows:

'The purpose of *this Act* is to promote and maintain competition in the Republic in order-

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.'

The italicised words are rendered thus in the Act in this and the further quotes from it.

[2] Since this judgment concerns only prohibited practices, I shall omit all further mention of the application of the Act to mergers.

[3] Sections 27(1)(a) and (d).

defendant company (the company). The second concerns an application by the defendants, who are trustees of theNambithaTrust (the trust), to amend their counterclaim.This is opposed on the basis that the counterclaimwouldbe excipiableif it were amended as is proposed. The parties agree that if the proposed amended counterclaim would be excipiable, the application for amendment should be dismissed with costs. The averments in the counterclaim and proposed amended counterclaim are, for present purposes, identical. It was therefore agreed by the parties that the two matters should have the same outcome. They were argued together and it was also agreed that only one judgment should be prepared.I shall deal with the pleadings in the exception matter and refer to the parties as the plaintiff and the defendant respectively.

[3] In each matter the plaintiff sues for goods sold and deliveredpursuant to a written contract;in the first instance to the company and in the second instance to the trust. Apart from the parties, the terms of the contracts are identical as is the balance of the pleadings for present purposes. The parties agree that clause 11.5 of the contracts precludes the defendant from staying the action instituted by the plaintiff pending the adjudication of any counterclaim of the defendant. They also agreethat clause 19 precludes the defendant from bringing any claim for damages against the plaintiff. I will assume this to be the case for the purpose of the exception without making any finding to this effect.It is not in issue that the goods in question were in fact sold and delivered. The plea raises certain defences unrelated to the exception which need not be dealt with.

[4] The counterclaimalleges that the plaintiff engaged inthree kinds of practices prohibited under the Act (the three issues). It goes on to allege that, in termsof s 58(1)(a)(vi) of the Act, the Tribunal has the power to

declare the whole or any part of an agreement void and that it would be appropriate that it should do so in respect of clauses 11.5 and 19 of the contracts (the impugned clauses). It alleges that the three issues and the binding effect or invalidity of the impugned clausesare 'competition issues' and will require the court hearing the action to refer them to the Tribunal in terms of s 65(2)(b) of the Act.

[5] The prayersto the counterclaim are as follows:

'A. An order referring the competition issues to the Competition Tribunal for determination prior to the determination of any other issues between the parties;

B. An order postponing the determination of the Plaintiff's claim against the Defendant and the counterclaim against the Plaintiff until the Competition Tribunal has completed its determination of the competition issues and all appeal or review processes relating thereto have been finally exhausted;

C. An order directing the Plaintiff to provide the Defendant with a statement and debatement of the account of the Defendant with the Plaintiff for the period from 31 January 2010 to 31 October 2011…;

D. An order adjusting the account of the Defendant with the Plaintiff in accordance with the outcome of the statement and debatement so as to apply the most favourable prices and rebates to the account of the Defendant with the Plaintiff;

E. Costs of suit.'

It is, in essence, the relief sought in prayers A and B which gives rise to the exception. It is accepted that unless the case is made out for the Tribunal to declare the impugned clauses to be void, no cause of action is disclosed in the counterclaim and the exception should be upheld.

[6] Since this is an exception, the plaintiff must persuade me that, on every interpretation which the counterclaim can reasonably bear, no cause of action is disclosed.[4]I am to takeas true the averments pleaded by the

[4]*Lewis v Oneanate (Pty) Ltd& another*1992 (4) SA 811 (A) at 817F.

defendant and to assess whether they disclose a cause of action.[5]Neither party was able to refer me to any authority concerning the interpretation of the sections in question. I found few cases which deal witheither s 58(1)(a)(vi) or s 65(2) of the Act.[6] It is therefore necessary to interpret them without much guidance from previous cases. The approach to interpreting documents was clarified recently in the following *dictum*:[7]

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document… The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

At para 19 the learned judge continued:

'. . . from the outset one considers the context and the language together, with neither predominating over the other.'

---

[5]*Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788.

[6]One such case, *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd & others* 2001 (2) SA 1129 (C), dealt primarily with mergers.The applicant sought an interdict arising from what it alleged was a merger. The alternative relief was for a referral to the Tribunal of the issue as to whether or not a merger had taken place.The court held that, as regards the interdict, its jurisdiction was ousted. It dealt with the question of ouster having specific reference to s 65(3)of the Act which has since been deleted by s 15 of Act 39 of 2000. Another case is*American Natural Soda Corporation & another v Competition Commission & others* 2003 (5) SA 633 (CAC) (*Ansac*). This case will be referred to below.

[7]Per Wallis JA in*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (references omitted).

[7] It is against this roughly sketched backdrop that the sections relied upon by the defendant must be interpreted. The initial one to consider is s 65(2). This section reads as follows:

'(2) If, in any action in a *civil court*, a party raises an issue concerning conduct that is prohibited in terms of *this Act*, that court must not consider that issue on its merits, and-

(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.'

This section ousts the jurisdiction of a court to deal with the merits of an issue which has been raised concerning a prohibited practice. It is established law that there is a presumption against an ouster of the jurisdiction of a court.[8] Any provision seeking to do so must make it clear that this is what is intended.[9] As was said by Solomon CJ:

'It is a well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature.'[10]

Ouster clauses must, accordingly, be narrowly construed.[11] This is because an ouster is 'a result that would deviate from the general rule that judicial authority is vested in the courts'.[12]

---

[8] *Lenz Township Co (Pty) Ltd v Lorentz NO & andere* 1961 (2) SA 450 (A) at 455B-D.
[9] *R v Padsha* 1923 AD 281 at 304.
[10] *De Wet v Deetlefs* 1928 AD 286 at 290.

[8] Under s 65(2), an ouster takes place if a certain kind of issue is raised. The issue raised must be of 'conduct which is prohibited'. This concept is nowhere defined. In the context of the Act, and apart possibly from issues concerning mergers, it can only mean those prohibited practices specified in the Act. For the ouster to apply, therefore, the issue raised must fall into one of the four categories of practices prohibited in Chapter 2. These are restrictive horizontal practices (s 4), restrictive vertical practices (s 5), abuse of dominance (s 8) and price discrimination by a dominant firm (s 9). The merits of these issues therefore cannot be dealt with by a court. The reason for this is clear. The specialist bodies created by the Act are the only ones which may deal with the merits of issues concerning prohibited practices. There is no lack of clarity in the ouster provision.

[9] The rest of s 65(2) does not constitute an ouster. It deals with the further obligations of a court once the ouster has been triggered. In other words, it specifies how a court must deal with the prohibited practice raised. Ifan order has been made by the Tribunal or CAC in relation to a prohibited practice,a court must apply that determination.[13] This is consistent with the purpose of the Act because that issue has been decisively determined by one or both of the only bodies entitled to do so under the Act. Section 64 accords to judgments and orders made under the Act the status of High Court orders. That renders the issue *res judicata*.If no order has been made, on the other hand, the section imposes an obligation on a court to refer the issue in question to the Tribunal ifit is

---

[11] *Women's Legal Trust v President of the Republic of South Africa and Others* 2009 (6) SA 94 (CC) at para 11; *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 33; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 25.

[12] *Minister of Police & others v Premier of the Western Cape& others* 2013 [ZACC] 33 at para 20; Section 165(1) of the Constitution.

[13] Sections 65(2)(a) and 65(6)(a) deal with this eventuality.

satisfied thateach of two further criteria has been met. First, the issue must not have been raised in a frivolous or vexatious manner[14] and secondly,it must be necessary to resolve the issue raisedin order to determine the final outcome of the action.[15] If either of these criteria is not met, the issue does not require determination at all. In this regard,the *dictum* in *Ansac* to the effect that the section 'requires a civil court, when a party raises an issue concerning conduct prohibited by the Act, to decline from considering it and to refer it to the relevant competition authority'[16] is, with respect, too broadly stated.It is, of course, correct that a court must decline to consider the issue but it is not correct to say that all issues which raise prohibited conduct must be referred. With this in mind, I turn to consider the counterclaim.

[10] As mentioned in paragraph 4 hereof, the counterclaim raises the three issues. They arerestrictive horizontal practices (s 4), an abuse of dominance (s 8) and prohibited price discrimination by a dominant firm (s 9). The counterclaim seeks to add to these, as 'competition issues' to be dealt with by the Tribunal, 'the binding effect or invalidity of clauses 11.5 and 19 of the contract'. Put at its lowest, the pleading is ungainly because the Act nowhere speaks of 'competition issues'. The Act is geared at the specialist bodiesdetermining whether certain conduct constitutes a prohibited practice. It is clear from s 65(2) that it is only prohibited practices under the Act which a court may not consider on their merits. There is no ouster beyond that. It follows ineluctably that, since it is only in respect of prohibited practices that a court's jurisdiction is ousted, the impugned clauses are not struck by the ouster in s 65(2). Even if, contrary to what I have found, 'conduct that is prohibited in terms of *this Act*' is not

[14] Section 65(2)(b)(i).
[15] Section 65(2)(b)(ii).
[16] *Ansac*, fn 3, per Malan AJA at 642F-G.

limited to prohibited practices as defined, it is clear that the provisions of the impugned clauses are nowhere prohibited in the Act. They cannot, therefore, be included as conduct hit by the ouster. It follows that, in the present action, the trial court would not be precluded from dealing with the merits of the 'binding effect or invalidity of clauses 11.5 and 19 of the contract'.

[11] It is equally clear that s 65(2)(b) does not provide a basis for a court to refer the impugned clauses to the Tribunal. This section requires a court to refer 'that issue' to the Tribunal. This refers back to an issue concerning a prohibited practice. Thus, only issues concerning prohibited practices can be referred to the Tribunal under this section. I have shown that the impugned clauses do not fit within any of the categories specified as prohibited practices in Chapter 2 of the Act. Therefore, not only will the jurisdiction of the trial court not be ousted from considering the merits of the impugned clauses, but the issues raised concerning those clauses cannot be referredto the Tribunal under this section. The only issues which are susceptible of referral are the three issues. Because the counterclaim seeks to have the trial court refer the impugned clauses to the Tribunal as well as the three issues, the counterclaim does not disclose a cause of action for that aspect of the prayer. The exception must therefore be upheld, even if only on this limited basis.

[12] It is nevertheless necessary to deal with other aspects of the counterclaim. I have found that the court is precluded from dealing with the merits of the three issues. I turn to consider whether the three issues qualify to be referred to the Tribunal by the trial court. It must be established, therefore, whether the provisions of s 65(2)(b) will oblige the trial court to refer the three issues to the Tribunal. If they do not, the

counterclaim does not disclose a cause of action. The trial court will have to be satisfied that both of the two criteria referred to in s 65(2)(b) are met before it is obliged to refer the three issues to the Tribunal. The criterion referred to in s 65(2)(b)(i) is met by pleading that the three issues have not been raised in a frivolous or vexatious manner. This is a question of fact and, because this is an exception, the averment, taken as it must be at face value, suffices. It remains, then, to consider whether the criterion referred to in s 65(2)(b)(ii) is met. This requires the trial court to be satisfied that an issue raised concerning a prohibited practice requires resolution in order to determine the final outcome of the action.

[13] Ignoring for a moment the impugned clauses, prayers A and B of the counterclaim simply pray for a referral of the three issues to the Tribunal. I was informed during argument that the defendant wants the Tribunal to determine that the three issues are practices prohibited by the Act in the categories pleaded. Such a determination is necessary to found a claim or claims for damages on the part of the defendant.[17]The impugned clauses stand in the way of the defendant pursuing any such claims. Unless and until they are declared to be void, the defendant can pursue no claims for the assessment of damages based on such a determination by the Tribunal. None of this is pleaded in the counterclaim. All that is pleaded is that the Tribunal has the power to declare them to be void and that it would be appropriate for it to do so. As is clear from what I have said above, any referral would be limited to the three issues. For the counterclaim to disclose a cause of action, therefore, it must at the very least be competent for the Tribunal to declare the impugned clauses to be void as a consequence of a referral of the three issues alone and without any referral

[17]Sections 65(6) and (9).

of the impugned clauses. This brings into sharp focus the powers of the Tribunal.

[14] For the purposes of this aspect, I shall deal only with the Tribunal and not the CAC. This is because the CAC can make any order which the Tribunal is empowered to make in any appeal from, or review of, a decision of the Tribunal. The Tribunal is a creature of statute whose powers derive solely from the Act. The relevant power relied on is found in s 58(1)(a)(vi) which empowers the Tribunal to 'make an appropriate order in relation to a *prohibited practice*, including…declaring the whole or any part of an *agreement* to be void…'. For such an order to be competent, the declaration that the impugned clauses are void must qualify as an order made 'in relation to' the three issues.If this were not so, the Tribunal would be making an order on matters unrelated to prohibited practices. It is not empowered to do so. The power of the Tribunal to make orders is not an unfettered one. Such an order would therefore be *ultra vires* the Act.

[15] Making an order declaring an agreement or part of it to be void is clearly not to be done lightly. The Act does not in and of itself render void any provisions of agreements. Section 65(1) provides as follows:

'Nothing in *this Act* renders void a provision of an *agreement* that, in terms of *this Act*, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.'

It can be seen, therefore, that even provisions in agreements which are prohibited must be declared to be void. They cannot simply be ignored. They are not, in law, void unless and until they are declared to be so. This arises from the sanctity of contracts and the recognition that a declaration

by the Tribunal intrudes on that sanctity. The Act sanctions the intrusion as being necessary to achieve its purposes. It does so as a matter of public policy. The power to make such a declaration is therefore one to be exercised sparingly and is limited to clauses or agreements which are inimical to the purposes of the Act. Section 65(1) envisages two bases on whichto declare provisions to be void. The first is where a provision in an agreement is one which is prohibited by the Act. This presents no difficulty in interpretation. The second concerns provisions in agreements which ‘may be declared void’. Since the impugned clauses do not fit into the first category, not being prohibited by the Act, they must be held to fall into the second category before the Tribunal would be empowered to make such a declaration.

[16] The clear language of s 58(1)(a)(vi), read in the context of the legislation as a whole, is that the Tribunal deals only with prohibited practices. The relationship between the agreement (orprovision) and a prohibited practice must therefore be a clear one. The Tribunal is required to be circumspect in making such a declaration. The nub of the matter is to determine the nature and extent of the relationshipwhich must exist between the provision of the agreement and the prohibited practice. An extreme example may illustrate the point. A dominant firm may source goods at a market related rate by way of an agreement, which in no way offends the Act,to purchase those goods. The dominant firm thenmarkets and sells those goods at a loss with the intention and likely outcome that a competitor cannot sell its goods and goes out of business. The actions of the dominant firm amount to prohibited price discrimination which is likely to have the effect of substantially preventing or lessening competition. This clearly contravenes s 9(1)(a) of the Act. If the dominant firm had not obtained the goods by way of the agreement to purchase

them, it could not have engaged in the prohibited practice because it would have had no goods to sell at all. The agreement therefore enables and is related to the prohibited practice.

[17] Is the Tribunal empowered to declare the agreement void by virtue of the provisions of s 58(1)(a)(vi)? In *Mike's Chicken (Pty) Ltd & others v Astral Foods Limited & another,*[18]the CAC held as follows:

'The only power that the Tribunal has to "void" contracts is derived from section 58(1)(*a*)(vi) of the Act, which permits the Tribunal to make an appropriate order in relation to a *prohibited practice,* including "declaring the whole or any part of an agreement to be void". The Tribunal can thus only "void" a contract if it relates to a practice prohibited in terms of Chapter 2 of the Act (which concerns restrictive practices and the abuse of a dominant position). A contract that does not offend the Act (and more particularly Chapter 2 thereof) is beyond the scope of the Tribunal to terminate.'

The last sentence may perhaps be too broadly stated if it is understood to mean that a contract must itself amount to a prohibited practice or have terms which do so. If, on the other hand, all that it means is that the contract or its terms must not have any relationship to a prohibited practice, it does not really assist in dealing with the nature and extent of that relationship. A helpful approach to this issue is articulated in the following *dictum* of the Tribunal with whose reasoning I respectfully agree:[19]

'It is significant that the power mentioned in section 58(1)(*a*)(vi) to declare an agreement or part thereof void is not a power in the abstract but is constrained by being a power "in relation to a prohibited practice". This means that it is not open to the Tribunal to declare an agreement or part thereof to be void unless the agreement or

[18][2004] 1 CPLR 40 (CAC) para 15.
[19]*Gogga Tracking Solutions (Pty) Ltd v Vodacom Service Provider (Pty) Ltd* [2010] 1 CPLR 115 (CT)para 45.

relevant provision(s) thereof is an integral element of the prohibited practice. Often there will be little more than the conclusion of an agreement and its implementation to constitute the prohibited practice, and it then in most cases will be struck down by an order under one of the sections mentioned above (ie sections 4, 5, 8and 9). But it is conceivable that an agreement or part thereof may have a secondary or ancillary role in the broader scheme of a prohibited practice. An example of the latter would be an agreement between parties who engage in a prohibited practice to conceal or destroy evidence of the practice, or an agreement which seeks to extinguish a firm's rights of access to the forain which competition disputes are resolved.'

[18] The crisp issue is whether the fact that the impugned clauses stand in the way of a potential damages claim provides a close enough relationship to the three issues so that it can be said that a declaration declaring them to be void relates to the three issues. The impugned clauses are themselves not an integral part of a prohibited practice. It will be necessary, therefore, to conclude that they serve secondary or ancillary roles in the conduct underlying the three issues or in some other way relate to them. Whilst the examples referred to the Tribunal in that *dictum* do not form a *numerus clausus* of all such secondary roles, it has not been alleged by the defendant what the connection is. To my mind, the impugned clauses play no role at all in promoting or facilitating any of the three issues. They do not operate to conceal evidence. They do not function to impede the right of the defendant to initiate a complaint with the Commission concerning the three issues. To say that the voiding of the impugned clauses relates to the three issues because the latter cannot found a claim in damages if they remain intactstretches the notion of a relationship too far. I thus conceive that the Tribunal has no power to declare the impugned clauses to be void. Any such order would be *ultra vires* the powers of the Tribunal and would contravene the principle of legality. That being so, the trial court could not be satisfied that the three

issues require resolution in order to determine the outcome of the action. The trial court would, therefore, not be obliged by virtue of s 65(2)(b) to refer the three issues to the Tribunal. This is a further basis on which the counterclaim is excipiable.

[19] The plaintiff relied primarily on a simple point in argument. Section 65(2)(b)(ii) provides that a court mustbe satisfied that the resolution of the issue concerning a prohibited practice ‘is required to determine the final outcome of the action’.The plaintiff submitted that the words ‘the action’must be construed to refer only to the claim brought by the plaintiff. The counterclaim should, it says, be disregarded. This submission rests on the proposition that a counterclaim must be distinguished from a claim in convention. It is a separate action. The reference in the section is in the singular. The resolution of a counterclaim is not necessary for the determination of an action brought against a defendant. Both the common law and the Rules provide for the two to be dealt with together only as a matter of convenience. When they are dealt with together they do not constitute a single action. The claim and the counterclaim remain two separate and distinct actions. Separate judgments must be given on each. The plaintiff submits, and the defendant accepts, that none of the issues raised in the counterclaim in the present matter has any bearing on the claim of the plaintiff for goods sold and delivered. In addition, clause 11.5 is only a bar to the claim and counterclaim being dealt with together. There is nothing to prevent the defendant from lodging a complaint with the Commission. The three issues can be declared to amount to prohibited practices. The defendant can attempt to persuade the Tribunal to declare clause 19 to be void, thus opening the way for a subsequent damages action by the defendant against the plaintiff.

[20] It seems to me that there is considerable force in this line of reasoning. If there is a defence to the action, it stands or falls in determining the action without reference to any counterclaim. The submission is lent more force in the present matter for the following reasons. Clause 11.5 prevents the very relief sought in the counterclaim, viz. the pending of the claim in convention until the three issues are determined by the Tribunal. Clause 11.5 has not yet been set aside and, according to s 65(1), must be given effect to until declared void. The only basis to refuse to give effect to it would be if it is alleged to be a prohibited practice which would bring it within the ambit of s 65(2). This has not been done. The trial court will not be able torefuse to give effect to it on the basis of the counterclaim. To allow prayers A and B of the counterclaim would be to ignore the provisions of clause 11.5 without it having been declared to be void. In the light of this reasoning and the language and purpose of the section under consideration, it seems to me that 'the action' does refer to the claim without including any counterclaim. If that is the case, it cannot be held that the resolution of the three issues is necessary for the final determination of the action.

[21] Even if the Tribunal has the power to declare the impugned clauses to be void, there are difficulties with the counterclaim. It would be necessary to plead that the Tribunal would do so. A basis should be alleged in the counterclaim that the Tribunal will declare the three issues to be practices prohibited under the Act. Such a declaration cannot be assumed to be the result of a referral of the three issues. A declaration is only one of the orders the Tribunal may make in relation to prohibited practices.[20] It may interdict them.[21] It may order the plaintiff to supply or distribute

[20] It is provided for in s 58(1)(a)(v).
[21] Section 58(1)(a)(i).

goods to the defendant on terms reasonably required to end the prohibited practices.[22] It may impose an administrative penalty in terms of s 59.[23]It has not been pleaded that a declaration is likely to result from the desired referral. In addition to the declaration concerning the three issues, it is necessary topleadthat the Tribunal will declare the impugned clauses to be void and the basis why it will do so. This has likewise not been done. It should further be pleaded that, once certification has taken place and once the two clauses have been declared void, the defendant will have a claim for damages and the basis for such a claim. This was not done. Without these aspects being pleaded, the counterclaim simply requires a referral to the Tribunal without foreshadowing any relief arising from the referral. A simple referral does not remotely impinge on the action or require resolution absent at least these aspects. Even on this basis, it is my view that the counterclaim does not make out a case that the issues raised require resolution for the final determination of the action. As a result, no case has been made out that the trial court would refer the three issues to the Tribunal.For all of these reasons, therefore, the counterclaim fails to disclose a cause of action and the exception must be upheld.

[22] In the result, the following order issues:

A. In case 689/2013:

a. The exception is upheld with costs.

b. The defendant is given leave to file an amended counterclaim within 1 month.

[22] Section 58(1)(a)(ii).
[23] Section 58(1)(a)(iii). This may be done with or without the addition of any other order.

B. In case 13794/2011:

The application to amend the counterclaim is dismissed with costs.

DATE OF HEARING:	15August 2013
DATE OF JUDGMENT:	15October 2013
FOR THE EXCIPIENT/ PLAINTIFF:	J C King SC, instructed by Edward Nathan Sonnenbergs Inc.
FOR THE RESPONDENT/ DEFENDANTS:	K J Van Huyssteen, instructed by Fluxmans Inc. locally represented by Atkinson, Turner & De Wet.