THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CAC CASE NO: 175/CAC/Jul19

In the matter between

THE COMPETITION COMMISSION	Appellant in the cross appeal and respondent in the appeal

And

BANK OF AMERICA MERRILL LYNCH INTERNATIONAL LIMITED	First Respondent
BNP PARIBAS	Second Respondent
JP MORGAN CHASE & CO	Third Respondent
JP MORGAN CHASE BANK N.A.	Fourth Respondent
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	Fifth Respondent
STANDARD NEW YORK SECURITIES INC	Sixth Respondent
INVESTEC LIMITED	Seventh Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Eight Respondent
NOMURA INTERNATIONAL PLC	Ninth Respondent
STANDARD CHARTERED BANK	Tenth Respondent
CREDIT SUISSE GROUP	Eleventh Respondent
COMMERZBANK AG	Twelfth Respondent
MACQUARIE BANK LIMITED	Thirteenth Respondent
HSBC BANK PLC	Fourteenth Respondent
CITIBANK N.A	Fifteenth Respondent
ABSA BANK LIMITED	Sixteenth Respondent
BARCLAYS CAPITAL INC	Seventeenth Respondent
BARCLAYS BANK PLC	Eighteenth Respondent
HSBC BANK USA, NATIONAL ASSOCIATION INC	Nineteenth Respondent
MERRILL LYNCH PEIRCE FENNER AND SMITH INC	Twentieth Respondent

BANK OF AMERICA, NA Twenty first Respondent
INVESTEC BANK LIMITED Twenty second Respondent
CREDIT SUISSE SECURITIES (USA) LLC Twenty third Respondent

JUDGMENT: 28 February 2020

DAVIS JP

[1] 'Since institutional diversity inhibits the global integration of markets by raising transaction costs across jurisdictional boundaries a world that is sufficiently responsive to democratic preferences will also be one that falls short of globalisation'. (Dani Rodrik)

[2] The rapid globalisation of markets has challenged the ability of the nation state to pursue policies borne of indigenous democratic choice. Competition law is one such site of this problem in that anti-competitive conduct can detrimentally effect the national economy in circumstances where the conduct takes place on foreign soil or on the internet. In turn this raises a problem for the competition authorities of a nation state to enforce the relevant national law.

[3] This appeal concerns the vital question as to the scope of the jurisdiction of the respondent ('the Competition Commission') in enforcing the vision of the Competition Act 89 of 1998 ('the Act') as formulated and passed by the democratically elected Parliament of this country. A significant part of that vision is to be found in the preamble to the Act:

> 'The people of South Africa recognise:
> That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.'

In similar fashion s 2, the purpose clause, provides that the Act aims:

‘(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.’

[4] The Act was intended to have a broad reach in that s3 (1) provides ‘this Act applies to all economic activity within or having an effect within the Republic except …’. I shall deal presently with the relevant jurisprudence relating to this section.

[5] Central to the differences between the parties in the present dispute are two considerations, being the presumption against ex-territoriality and the common law requirement that, before a South African court can adjudicate upon a dispute in which a party happens to be a *peregrinus*, both personal and subject matter jurisdiction must be present.

[6] As I have observed, these differences take place within the context of the global economy of the twenty first century. Thus, a pressing problem confronting competition authorities globally concerns the effect of new technologies which have resulted in transnational, and even global consequences. Multinational corporations are often more powerful than nation states and can strategically comport their economic behaviour to avoid national regulation. As Professor Eleanor Fox, a distinguished USA anti-trust scholar has noted, ‘in this altered world market place the presumption against extra territoriality for economic law in defense of markets is no longer appropriate.

We need to deal with the reason behind the presumption to prevent clashes caused by one sovereign's unreasonable intrusion on another sovereign's legitimate interest, and to tailor the law of restraint to the reason for it. Since general retreat and withdrawal from antitrust enforcement against non-nationals and foreign based acts would deeply undermine the global and national competition systems, it is fitting to stress modes for accommodation more than rules for retreat.'[1]

[7] In summary, the question as to whether the Act in general and s 3 (1) in particular rises to the challenge of the global economy lies at the heart of the present case and thus holds major consequences for competition law enforcement in this country.

The factual matrix

[8] On 1 April 2015 the Competition Commission initiated a complaint against various banks[2] for colluding to fix prices and divide markets in respect of the rand – dollar exchange rate, which acts it alleged, were in contravention of s 4 (1) (b) (i) and (ii) of the Act. On 15 February 2017 the Competition Commission referred its complaint to the Competition Tribunal ('Tribunal') in terms of s 50 of the Act. By 3 March 2015, most of the respondent banks had either filed an exception to the referral or sought further particulars from the Competition Commission. On 10 March 2017 the Tribunal at a pre-hearing set out a timetable which made provision for the Competition Commission to file a supplementary affidavit by no later than 31 March 2017. Thereafter, the respondent banks were provided with the opportunity to re-examine their exception applications. On 31 March 2017 the Competition Commission filed its first supplementary affidavit addressing the issue of jurisdiction but did little to address a range of exceptions which had been raised by the respondent banks. On 7 April 2017 the Competition Commission filed a second

[1] Eleanor Fox "*Extraterritorial jurisdiction, antitrust and the European Union Intel case*" 2019 (43) Fordham International Law Journal 981 at 993

[2] For the purposes of this judgment the respondents (all of whom other than the sixth respondent appealed the decision of the Competition Tribunal of 12 June 2019) are appellants in the appeal and respondents in the cross appeal will be referred to as the respondent banks.

supplementary affidavit which sought to rectify an omission contained in the March affidavit.

[9] On 23 June 2017 the Tribunal at a second pre-hearing ordered that the Commission could provide further particulars with regard to issues raised in respect of the misjoinder and would provide to certain respondent banks and, in particular, Investec Limited and Standard Chartered Bank, further particulars which they had requested.

[10] Thereafter, the Competition Commission changed its approach. It did not provide further information to Investec and Standard Chartered Bank nor did it provide further supplementary pleadings with regard to the misjoinder point. Instead, it requested that the Tribunal set down the exceptions raised by Investec and Standard Bank to be heard on a separate and expedited basis. Prior thereto, the Competition Commission also filed applications for default judgment against six of the respondent banks[3] as none of these parties had filed an answer to the referral nor had they filed formal exception applications.

[11] However, on 24 August 2017, the Competition Commission abandoned its application for default judgment but persisted with a separate application which was dismissed on 5 September 2017, in which the Tribunal also ordered that all the exceptions were to be heard in a combined hearing in January 2018.

[12] Two weeks before the respondent banks were due to file their heads of argument, the Competition Commission filed a further supplementary affidavit. The covering email read: 'Kindly take notice that the Competition Commission's further supplementary affidavit is served and filed of record evenly herewith. Due to its size the attachment will be sent in nine batches, this is batch 1 and 2.'

[13] In keeping with this unsatisfactory approach to the litigation, the next morning the Competition Commission's representative sent an email to all the parties stating 'the Commission withdraws the correspondence below and all

[3] Second , third, fourth, fifth, ninth and tenth respondents

attachments forwarded.' This was sadly not the end of its vacillation. On 10 December 2017 the Competition Commission submitted a letter in which it indicated that it had decided to file a supplementary affidavit and 'provide additional particularity to the initial referral and dispose of a number of the vague and embarrassing exceptions raised by the respondents. It does so without any concession that such further particularity is required or necessary'.

[14] On 20 December 2017 the Competition Commission submitted a further supplementary affidavit which not only added to the claims contained in the February referral but also sought to join five new parties being HSBC Bank USA (19th respondent), Merrill Lynch Pierce Fenner and Smith Inc. (20th respondent), Bank of America (21st respondent), Investec Bank Limited (22nd respondent) and Credit Suisse Securities (USA) LLC (23rd respondent). Pursuant thereto, the Tribunal issued a direction postponing the hearing which was finally heard from 30 July 2018 to 03 August 2018. Judgment was delivered on 12 June 2019.

The decision of the Tribunal

[15] For the purposes of this appeal, the major issue decided upon by the Tribunal concerned its jurisdiction to hear the Competition Commission's complaint in that a number of the respondent banks alleged that they were *peregrini*; that is, firms that were neither domiciled nor carried on business in South Africa. A distinction was made between "pure" *peregrini;* that is those respondent banks which were neither domiciled nor carried on business in the Republic and "local" *peregrini* being banks with some presence in the country. It is helpful to examine the Tribunal's decision by way of a separate analysis of its treatment of local and pure peregrini.

The local peregrini

[16] Certain of the banks, which appeared before the Tribunal, were termed local peregrini because of a presence in South Africa. Four banks had a local

branch in South Africa and were registered as authorised dealers in terms of the Banks Act 94 of 1990. These were: BNP Paribas (2nd respondent), JP Morgan Chase Bank (4th respondent), Standard Chartered Bank (10th respondent) and HSBC Bank PLC (14th respondent). In the case of Credit Suisse Group (11th respondent) Commerzbank, (12th respondent) and the Bank of America, (the 21st respondent) the Competition Commission contended that they had representative offices in South Africa.

[17] The dispute before the Tribunal turned on the argument presented by these banks that the mere existence of a local office was insufficient to meet the requirement that the bank carried on business in South Africa. This argument was based on the provisions of the Banks Act which provides in terms of s 34 (1) that 'an institution which had been established in a country other than the Republic' which lawfully conducts in such other country a business similar to the business of a bank (hereinafter in a section referred to as a foreign institution) may not establish a representative office in the Republic without having previously obtained the written consent of the Registrar'. Section 34 (4) of the Banks Act provides that a representative office may not conduct the business of a bank in South Africa.

[18] For this reason, it was argued that, if these banks did not conduct the business of a bank in South Africa, for the purposes of jurisdiction they could not be held to conduct business in the country. The Tribunal held that there was nothing in the Banks Act which prevented a representative office from carrying on business in South Africa so long as it was not the business of a bank. In addition, the Banks Act made it clear that a representative office constituted an office where the business of a foreign institution was promoted or assisted. For this reason, the Tribunal held that the Commission had alleged sufficient facts to establish the Tribunal's personal jurisdiction over all seven local peregrini.

[19] Turning to subject matter jurisdiction, the Tribunal held that none of the four affidavits, to which reference had been made, provided evidence as to how the conduct of any of the traders employed by these banks was linked to an 'effect within the Republic', sufficient to justify subject matter jurisdiction in

terms of s 3 (1) of the Act. Accordingly, the Tribunal held that it was necessary for the Competition Commission to depose to additional affidavits to sustain its case against the local peregrini.

The pure peregrini

[20] So much for the local peregrini, the Tribunal's decision against which was not the subject matter of this appeal. This appeal is concerned with the question of jurisdiction of the pure peregrini. The Tribunal noted that it was common cause that there had been no submission by any of the pure peregrini to the jurisdiction of the Tribunal nor had any of the property of the pure peregrini banks been attached. Accordingly, the Tribunal considered whether there was some other basis for personal jurisdiction to be asserted over these peregrini or whether personal jurisdiction was in fact required in terms of the Act.

[21] Although the Tribunal considered whether the concept of "an adequate connection" between the pure peregrini to the jurisdiction of the Tribunal could be employed as a basis for asserting personal jurisdiction, it held that none of the factors which had been set out to found "an adequate connection" in *Multi-Links Telecommunications Ltd v Africa Prepaid Service Nigeria Ltd and others, Telkom SA Soc Ltd and another v Blue Label Telecoms and others* [2013] 4 All SA 346 (GNP) were present on the facts which had been presented by the Competition Commission, sufficient to justify connecting any of the pure peregrini to South African jurisdiction.

[22] The Tribunal also found that s 3 (1) of the Act could not be read to imply a repeal of the common law requirement for personal jurisdiction. For this reason, it accepted the argument that "a traditional declaratory order – one that has civil but penalty consequences is not an order we can competently give without personal jurisdiction over a peregrinus respondent."

[23] For reasons which were never clearly expressed, the Tribunal went on to say "that does not mean we are barred from issuing any other form of

declaratory order"; that is an order made against the pure peregrini to the effect that the named firms in the order would have been found to have participated in conduct which was held to be in contravention of s 4 (1) (b) of the Act. In recognition of the absence of personal jurisdiction over these peregrini, the Tribunal held that this order had to be limited in effect, namely that it would have to exclude the provisions relating to civil damages and penalties (ss 65 and 59 of the Act), from any order it issued.

[24] To return to the local peregrini, the Tribunal considered whether in the case of these local peregrini subject matter jurisdiction had been established. The difficulty confronting the Tribunal was, as indicated earlier, the Competition Commission's case appeared to resemble a movable jurisprudential feast. It began with the argument that there was a single overarching conspiracy involving all of the banks. It then offered a second candidate, namely a multilateral collusive agreement; that is a series of conspiracies which are differentiated firstly on the basis of the type of mechanism agreed upon to rig the exchange rate and then, in this case, a multilateral conspiracy, which did not involve all of the banks. It then offered a third possibility; that is a bilateral conspiracy confined to a specific type of agreement, namely between two banks.

[25] After examining the four affidavits of the Competition Commission, the Tribunal came to the following conclusion:

> 'If the Commission clarifies its referral in the manner suggested in its oral argument, with the addition of the particulars we require in these reasons, this will resolve most of the exceptions that relate both to no cause of action or vague and embarrassing. There will now be a coherent case of what the conspiracy was, how it was entered into, and how it ended; if it indeed has. It will also explain why the relationship between the firms is one of competitors as distinct from one between buyer and seller. In the order we have indicated the minimum features that this supplementary affidavit needs to have.'

[26] For this reason, the order of the Tribunal provided that, while the applications for the dismissal of the complaint referral brought by the pure peregrini were dismissed subject to a declaratory order which would include the proviso that the relief excluded the operation of ss 59 and 65 of the Act, the application for the dismissal of the complaint referral brought by the local peregrini was dismissed, subject to a qualification namely that the Commission was required to filed a new referral affidavit to substitute for and replace all the complaint referral affidavits within forty business days of the order being granted. The relevant part of this order reads thus:

> 'The new referral affidavit must:
>
> 1. In the case of the local *peregrini* respondents set out the facts the Commission relies to allege that it was foreseeable that the impugned conduct would have direct or immediate, and substantial effect in the Republic;
>
> 2. Confine the case to a single overall conspiracy (SOC), provided, subject to 3.4.3 below, that the Commission is not restricted from alleging that his may be founded on an agreement, arrangement or concerted practice;
>
> 3. Indicate whether the same facts are relied on for proof of the concerted practice or allege any different facts if they are not;
>
> 4. Allege whether its case for and AOC relies on proof of an express agreement or arrangement or whether this is an interference based on facts; if the latter, allege in general terms what those facts are;
>
> 5. Provide each respondent with a date, or period, in which they are alleged to have joined the SOC or deemed to have joined the SOC;
>
> 6. Provide the facts that are relied on to prove that the particular respondent joined or had joined the SOC;
>
> 7. If the SOC has ceased

7.1 provide what dates the SOC alleged to have ceased;

7.2 what facts are relied on for establishing that the conduct had then ceased; and

7.3 whether all the respondents remained participants in the SOC on that date; and, if not, when the respective respondent/s exited.

8. If the SOC is still alleged to be ongoing;

8.1 what facts this is based on; and

8.2 whether all the respondents are still part of it; if not, when the respective respondent/s exited;

8.3 in relation to the relationship between the respondent banks and their respective traders;

8.3.1 is it alleged that some traders acted for more than one respondent at the same time? If so, details should be provided;

8.3.2 if a trader ceased to act for a respondent bank, did this end the respondents' participation in the SOC or if not, on what basis is it alleged that the respondent's participation continued?

8.3.3 Is it alleged that all the traders named as participants in paragraph 40 the December affidavit were so-called active participants or were some so called passive participants;'

[27] As noted, this part of the order, insofar as it relates to the local peregrini, was not subject to appeal before this Court. It effectively meant that, were this court to find in favour of the Competition Commission's argument relating to personal jurisdiction in the case of the pure peregrini, a similar order in respect of subject matter jurisdiction that was granted against the local peregrini would have, at the very least, to be considered; hence the attention given to this part of the Tribunal's order.

Joinder

[28] As noted, the Competition Commission sought to join five banks, none of whom had been respondents in the original February referral. The Tribunal accepted that in order for a joinder order to be granted it had to be satisfied on four issues:

> '(i) whether we have jurisdiction over the respondent; (ii) whether the complaint has been properly initiated against the respondent; (iii) that the complaint has not prescribed; and (iv) whether prima facie a cause of action has been made out.'

[29] It then held that requirements (ii), (iii) and (iv) could not be determined until the Tribunal had received the Competition Commission's response by way of the further particulars that it had ordered. For this reason, it deferred the question of joinder, pending the substitution of the further particulars so ordered.

The appeal and the cross appeal

[30] The first, third, fourth, fifth, thirteenth, nineteenth, twentieth and twenty third respondents lodged an appeal against parts of the Tribunal's order; in particular the issuing of a declaratory order against the pure peregrini banks, albeit that the order was limited in effect. In essence, the pure peregrini respondent banks argued that the Tribunal had already determined that it had no jurisdiction over pure peregrini and therefore did not possess the power to issue the declaratory order that it had granted. Three of the banks, HSBC Bank USA (19th respondent), Merrill Lynch Pierce Fenner and Smith (20th respondent) and Credit Suisse Securities (USA) LLC (23rd respondent) appealed against the Tribunal's decision to defer the determination of the Competition Commission's joinder application, pending the further particularity so ordered. Shortly, thereafter, on 18 July 2019, the Competition Commission noted a cross appeal against the following findings of the Tribunal:

1. that it had no personal jurisdiction over the pure peregrini banks;

2. that to establish jurisdiction over a *peregrinus* the requirements of both personal jurisdiction and subject matter jurisdiction had to be met;

3. the provisions of s 3 (1) of the Act could not be read to broaden the established approach to jurisdiction in competition matters; that is extend those principles imposed by the common law;

4. s 3 (1) required the application of the "qualified effects" test for the purposes of subject matter jurisdiction.

[31] Thereafter, Standard New York Securities Inc. (6th respondent) applied to have its citation in the Competition Commission's notice of opposition to this appeal and cross appeal declared to be an irregular step and thus invalid. It sought to have the cross appeal against it set aside. In essence, it did so on the basis that it had never noted an appeal against the Tribunal's order. It was only when the Competition Commission lodged its cross appeal that it sought to appeal, inter alia, against the order upholding the exceptions brought by the peregrini. Standard New York Securities Inc. argued that, as there was no appeal against the dismissal of the complaint referral brought by it nor was there any appeal by Standard New York Securities Inc. against the declaratory order of the Tribunal, it behoved the Competition Commission to have lodged an appeal against the decision of the Tribunal of 12 June 2019 in favour of Standard New York Securities Inc.. This could not be done by way of a cross appeal and, accordingly, the Competition Commission had initiated an irregular step, such that the cross appeal against it stood to be dismissed.

[32] JP Morgan Chase and Company, JP Morgan Chase Bank NA (3rd and 4th respondents), Australian and New Zealand Banking Group Limited (the 5th respondent), Credit Suisse Securities (23rd respondent), the Bank of America Merrill Lynch International Limited (1st respondent) and Merrill Lynch Pierce Fenner and Smith (20th respondent) all filed both an appeal and a review against the decision of the Tribunal.

[33] In essence, the grounds for the review made similar points to the grounds of appeal, namely that a declaratory order against parties over whom the Tribunal lacks jurisdiction is not competent, in that the Tribunal has no powers in respect of a party over which it lacks jurisdiction. These parties contended that the issue of the limited declaratory order was unfair, prejudicial and unreasonable. Further, the joinder of parties over which the Tribunal lacks jurisdiction was equally a legally incompetent order.

[34] For reasons that will become apparent, the merits of the review were hardly traversed in oral argument in that, central to the review and to the core of the appeal, lay the determination of the same question of the Tribunal's jurisdiction to make any order over the pure peregrini banks.

The conduct of the appeal

[35] In keeping with the remarkably adaptable and flexible basis upon which this case was argued from the outset of the litigation, a number of points fell by the wayside during oral argument. As indicated, the review hardly enjoyed any mention, in that it appeared to be conceded, albeit implicitly by the banks, that in the event that the Tribunal had jurisdiction, an order would not be competent for the review proceedings which would then be rendered redundant. The Competition Commission, notwithstanding its initial vigorous opposition to the appeal brought by various respondent banks, abandoned its defence of the order granted by the Tribunal on the basis that, as the Tribunal had found that it had no jurisdiction to deal with the dispute, it followed that it had no power to grant any order. This was a wise concession, albeit one made at the proverbial twelfth hour as counsel for some of the respondent banks were at pains to inform this Court. Apart from the debate about joinder and the irregular step, the core question concerning jurisdiction took up the majority of the debate. It turned on two fundamental issues, namely whether the Act could apply extraterritorially in the light of a presumption against extraterritoriality, and whether there was a requirement for personal jurisdiction to be established prior to the assumption of any powers possessed by the Tribunal. I shall deal with these questions separately.

The presumption against extra territorial application

[36] Section 3 (1) of the Act provides that the Act applies to all economic activity within the Republic and economic activity having an effect within the Republic.

[37] In *American Natural Soda Corporation v Competition Commission* 2003 (5) SA 633 (CAC) this Court carefully examined the parameters of s 3 (1) of the Act. Writing for a unanimous court, Malan AJA (as he then was) exhaustively examined the implications of the section in respect of its potential extraterritorial application. He noted:

> 'In most cases the exercise of the functions of a State by legislation, executive and enforcement action and judicial decrees is limited to the territory of the State. (However)… the extra territorial application of domestic competition laws is one of the ways to combat International cartels'. (para 16)

[38] Malan AJA then went on to say that it is not disputed that the Act possesses extra territorial application and 'it is not disputed that a State may, in certain cases, extend jurisdiction beyond its territorial borders'. (para 17) He then held:

> 'The question is not whether the consequences of the conduct is criminal or, for that matter anti-competitive, but whether the conduct complained of has "direct and foreseeable" substantial consequences within the regulating country. In other words "the effects" in the present case must be such that they fall within the regulatory framework of the Act whether they are uncompetitive or not.' (para 18)

[39] In support of this concept of 'effects' reference was made to the seminal antitrust case of *United States v Aluminium Company of America ('ALCOA')* 148 F2d 419 (2d Cir, 1945) where Judge Learned Hand said:

'We should not impute to Congress an intent to punish all whom its courts catch, for conduct which has no consequences within the United States …

On the other hand, it is settled law as "Limited" itself agrees that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognise.'[4] (my emphasis)

[40] In an opinion of the Advocate General of the European Union of 25 May 1988 which was provided in the case of *Ahlstrom v Commission* [1988] ECR 5193, the Advocate-General noted that there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect nor does the concept of international comity in view of its uncertain scope militate against those criteria either. (para 57)

[41] This approach was also followed in *F Hoffmann-La Roche v Empagram SA* 542 US 155 where the United States Supreme Court held that anti-competitive conspiracies abroad are not within the reach of the Sherman Act unless the effect in the United States of the conduct give rise to the particular plaintiff's Sherman Act claim'. In short, an international cartel selling vitamin products into the United States was liable for suit under the Sherman Act but only insofar as US consumers were concerned.[5]

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[4] The decision of the Competition Appeal Court in American Natural Soda Ash Corporation, supra was taken on appeal to the Supreme Court of Appeal. See *American Natural Soda Ash Corporation v Competition Commission* 2005 (6) SA 158 (SCA). However the approach adopted by the CAC to s 3 (1) of the Act was not disturbed on appeal. See paras 24-29 of the SCA judgment.

[5] The jurisprudence which followed Empagram reveals the importance of the facts of the particular dispute to the determination of jurisdiction. In a subsequent decision *Motorola Mobility LLC v AU Optronics Corp* (7th Cir. 26/11/201) the extent of the connection to the local jurisdiction was emphasised. See also *Minchem v Agrium Inc* (7th Cir 27/6/2012) where the following was said

> 'If the prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce. And that effect would be foreseeable (because the defendants knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that Motorola would resell in the United States), could be substantial, and might well be direct rather than "remote," the word we used in *Minn*–

[42] For the sake of completeness reference can also be made to the opinion of Advocate General Wahl delivered on 20 October 2016 in respect of *Intel Corporation Inc v European Commission* (Case 413/14P) where the Advocate General states:

> 'I could also remark that public international law allows states to exercise jurisdiction extra territorially in certain instances…
>
> A survey of the case-law of the Court reveals that the application of EU law presupposes an adequate link to the EU territory. That way, the basic principle of territoriality under public international law is observed. Still, it is not unusual for a State or an international organisation also to

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Chem, Inc. v. Agrium, Inc., supra, 683 F.3d at 856–57, to denote effects that the statutory requirement of directness excludes.

The price fixers had, it is true, been selling the panels not in the United States but abroad, to foreign companies (the Motorola subsidiaries) that incorporated them into cell-phones that the foreign companies then exported to the United States for resale by the parent company, Motorola. The effect of fixing the price of a component on the price of the final product was therefore less direct than the conduct in Minn–Chem, where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers." Id. at 860 (emphasis added). But at the same time the facts of this case are not equivalent to what we said in Minn–Chem would definitely block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." Id. In this case components were sold by their manufacturers to the foreign subsidiaries, which incorporated them into the finished product and sold the finished product to Motorola for resale in the United States. This doesn't seem like "many layers," resulting in just "a few ripples" in the United States cellphone market, though, as we'll see, the ripple effect probably was modest. We'll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied, as in *Minn–Chem* and *Lotes Co. v. Hon Hai Precision Industry Co*., 753 F.3d 395, 409–13 (2d Cir.2014).

What trips up Motorola's suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action. 15 U.S.C. § 6a(2). The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce.

We have both direct purchasers—Motorola's foreign subsidiaries—from the price fixers, and two tiers of indirect purchasers: Motorola, insofar as the foreign subsidiaries passed on some or all of the increased cost of components to Motorola, and Motorola's cellphone customers, insofar as Motorola raised the resale price of its cellphones in an attempt.'

take into account, in the exercise of its sovereignty, circumstances that occur or have occurred outside its territorial jurisdiction.

It follows from the existing case-law of the Court that EU competition law operates with a requirement that there be an adequate link to the EU territory, be it in the form of the presence of a subsidiary, or to the implementation of anticompetitive conduct within that territory.'

[43] I shall return presently to the debate concerning the nature of the test. Suffice it to say at this stage of the judgment that the overwhelming authority both domestic and internationally is in favour of recognising the possible extra territorial application of competition legislation in domestic law; of course depending on the facts so alleged. Accordingly, there is no merit in the argument that the presumption against extraterritoriality always trumps wording such as that contained in s 3 (1) the text of which is set out in this judgment, such that the presumption overrides any possible application of extra-territorial jurisdiction of the competition authorities.

[44] There was some argument by certain counsel for the respondent banks that s 26 of the Act which provides that the Tribunal has jurisdiction throughout the Republic precluded it from assuming jurisdiction in a matter where the conduct took place outside of the Republic. Not only would such an interpretation be at war with the approach adopted by this Court in ANSAC (supra) to s 3 (1) of the Act, but it is clear that the purpose of s 26 was to ensure that the Tribunal was a body, the jurisdiction of which was not confined to its particular location but that it applied throughout the country. The two sections namely the idea of the Tribunal as a national adjudicative body and the interpretation of s 3 (1) as developed are thus not incompatible.

Personal jurisdiction

[45] The earlier arguments of some parties notwithstanding, a number of counsel for the respondent banks correctly conceded that s 3 (1) of the Act dealt with subject matter jurisdiction. Their argument was that s 3 (1) had not abolished the common law requirement of personal jurisdiction. To that

submission counsel for the Commission developed two alternative responses: one that personal jurisdiction had been expressly excluded by virtue of the wording of s 3(1) and, alternatively, that this Court was enjoined to develop the common law regarding personal jurisdiction in order to ensure that the competition authorities could assume jurisdiction over alleged extraterritorial conduct of the various respondent banks. Under existing common law, the requirement of personal jurisdiction over a peregrinus which had not submitted to the jurisdiction of a court or, in this case, the Tribunal, can only be fulfilled where either the party has a physical presence in the country or, if not, where there has been attachment of property of a peregrinus in order to assert jurisdiction. As long ago as 1911 in *Steytler NO v Fitzgerald* 1911 AD 295 at 346, it was said that 'a court can only be said to have jurisdiction in a matter if it has the power not only to have cognisance of a suit but also to give effect to its judgment.'

[46] Much emphasis was placed by all the parties on the judgment of Howie P in *BID Industrial Holding (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA). The appellant in this case had applied for an order for the arrest of two respondents in order to found or confirm the court's jurisdiction in respect of a proposed action against them for damages in delict. The appellant was a South African company which had its registered office within the area of jurisdiction at the relevant High Court, while the respondents were citizens of Australia, where they were both resident and domiciled. It appeared that the appellant had not attached an asset belonging to the respondents, which had, at one stage, been capable of attachment to found or confirm jurisdiction. Notwithstanding the appellant's repeated request, the respondents had refused to submit to the jurisdiction of the High Court.

[47] The application of the appellant was resisted on two grounds, being that no prima facie case on the merits of the proposed claim had been made out on the papers and that s 19 (1) (c) of the Supreme Court Act 59 of 1959, which empowered an arrest, was unconstitutional. Howie P recognised 'the court had jurisdiction over a matter if it has the power not only of taking cognisance

of a suit but also of giving effect to its judgment.' (para 24) The learned judge of appeal went on to say:

> 'A court has the power to take cognisance of the suit if the relevant cause arises in its area of jurisdiction. The cause arises there if it would have done so at common law. At common law even if a jurisdictional cause (for example, contract or delict within the jurisdiction) was present if the defendant was a foreigner there had to be arrest or attachment.' (para 25)

Howie P then went on to say:

> 'We are confined to the issue of arrest's constitutionality and the inevitable consequences 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 practical expedients for cases where jurisdiction is sought to be established and there can be neither arrest nor attachment. One could, of course, hold that if arrest or 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 the practice of arrest and attachment came about in order to aid resident plaintiffs who would otherwise have to sue abroad. There is no reason why that rational should not still apply. It represents, in my view, a rational and legitimate governmental purpose.' (para 48)

[48] In dealing with the argument regarding the constitutionality of s 19 (1) (a) of the Supreme Court Act Howie P said:

> 'I nevertheless consider that jurisdiction in the present case will fall within the terms of s 19 (1) (a) if the matter could be said to involve a 'cause arising' or be a matter of which the court 'may according to the law take cognisance'. A 'cause arising' is not to be confused with a cause of action, and to determine what a 'cause arising' is, as also to

determine of what matter a court may take cognisance, one is driven back to the common – law jurisdictional principles. If those principles can be developed to accommodate a situation like the present there will be conformity with s 19 (1) (a). Which is not to say that the common law must conform to the legislation. It is rather the converse. The legislation in question has all along been concerned to reflect or implement the common law. All one is therefore looking to ensure is that between the Act and the development sought to be achieved there is harmony.' (para 54)

[49] Of considerable significance to the present dispute is the following passage:

'It seems to me that, firstly, one has to apply reasonable and practical expedients in moving away, where necessary, from historical practices that cannot achieve what they were intended to do. Secondly, the responsibility for achieving effectiveness, absent attachment is essentially that of the parties and more specially the plaintiff. Economic considerations will dictate whether a South African judgment has prospects of success for enforcement abroad and thus influence the plaintiff in deciding whether to attach or sue here or there (leaving aside of course, other costs considerations) … In my view it would suffice to empower the court to take cognisance of the suit if the defendant was served with the 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 it being decided by that court. Appropriateness and convenience are elastic concepts which can be developed case by case. Obviously the strongest connection would be provided by the cause of action arising within that jurisdiction.' (paras 55 and 56. (My emphasis)

[50] The issue of personal jurisdiction was dealt with further in *Multi-Links Telecommunications v Africa Pre-Paid* 2014 (3) SA 265 (GP). In his judgment Fabricius J, after examining the decision in *Strang,* said:

'[i]t seems to me that one must determine the forum most suitable for the ends of justice, and because pursuit of the litigation in that forum is most likely to secure those ends. The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the court would look at all the connecting factors including all background facts, convenience, experts, the law governing the relevant transaction or action, the place where the parties reside or carry on business etc'. (para 23) [6]

[51] What emerges from these two decisions are the following:

1. there is a need to develop the common law of personal jurisdiction when a court applies reasonable practical expedients which dictate moving away from historical practices which cannot achieve that which was intended, given the context of a modern economy;

2. the responsibility for achieving effectiveness is essentially that of the parties and particularly the plaintiff such that economic considerations will doubtless dictate whether a South African judgment has prospects of successful enforcement abroad;

3. in a jurisdictional dispute, such as the present, courts should examine whether the forum which is sought to be employed has a real and substantial connection with the action; and whether the relevant connecting factors tie the action to the forum in question.[7]

[52] A series of submissions were made by counsel for the various banks regarding the possible development of the common law. These included:

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[6] See also *Holloway and another v Padi Emea Limited* [2017] ZAGPJHC 381

[7] The question of reconciling the principle of personal jurisdiction with the emergence of a global economy was highlighted in an opinion by Breyer J in J McIntyre Mach Ltd v NICASTRO 131 SCT 2780 (2011). Although he declined to develop the law in NICASTRO, Breyer J articulated the very problems confronting this Court and the possible need for change. See the helpful article by Robert Pollack "Not of any particular State: J McIntyre Machinery Ltd v NICASTRO and non-specific purposeful availment" 2014 (89) New York University Law Review 1088. In his opinion Justice Breyer warned against both the strict no jurisdiction rule and the permissive absolute approach based, as he put it, on reasonable foreseeability that a product in a nationwide distribution system might end up in every state being sufficient to confer jurisdiction in the state.

1. Were the common law to be developed by this court, the development could not be confined to competition matters and would therefore run the risk of a series of detrimental and unpredictable polycentric consequences for all disputes rather than merely competition cases.

2. There was still a need to "hail the party" to court by way of proper service;

3. Any development of the law would require addressing the question of the doctrine of effectiveness. In the present dispute this doctrine dictated that the Commission's case on jurisdiction be dismissed

[53] In my view, the challenge posed to this court is not about a full blown development of the common law regarding personal jurisdiction. It turns essentially on whether the law relating to personal jurisdiction can be rendered congruent with the objectives of s 3 (1) of the Act and more generally with the overall purposes of the Act, including the promotion of efficiency, adaptability and development of the economy and the provision to consumers of competitive prices and product choices as set out in s 2 (a) and (b) of the Act.

[54] As indicated, the issue of subject matter jurisdiction is addressed in s 3 which clearly envisaged that the Act applied to all economic activity that was located outside of South Africa but where the conduct complained of had direct and foreseeable' substantial consequences in South Africa. (See *American Natural Soda Corporation* (CAC), *supra* at para 18) Were the arguments of the respondent banks to be correct, it would mean that egregiously uncompetitive conduct which had direct and foreseeable consequences upon the economy of South Africa and the welfare of consumers would fall outside of the scope of the Act and thus of domestic enforcement.

[55] For this reason, there is a powerful argument grounded in the normative framework of the Act which dictates against the adoption of the submissions raised by the respondent banks.

[56] A failure to develop the common law so as to refuse to consider the presence of adequate connecting factors between the complaint brought by the Competition Commission and the jurisdiction of the Tribunal and thus the issues of appropriateness and convenience as sufficient to found personal jurisdiction would mean that a central objective of the Act, namely the protection of the South African economy from egregious anti-competitive conduct would be stymied. Expressed differently, on the assumption that the Competition Commission could make an adequate showing that there was an overarching conspiracy between the respondent banks to fix the rand / dollar exchange rate in contravention of ss 4 (1)(b)(i) and (ii) of the Act, this would mean that the case brought by the Competition Commission would involve the participation of all of the banks, that is local, local peregrini and pure peregrini in an activity which would contravene a central provision of the Act, namely the prevention of cartel activity. Assuming that the Competition Commission could make such a showing, this itself could indicate that there were adequate connecting factors between each of the parties and the practice sought to be adjudicated upon by the Tribunal.

[57] This conclusion brings us back to the question of subject matter jurisdiction. A failure to align the common law regarding personal jurisdiction with the Act, in particular the s 3 (1) of the Act, namely that the Act applies to all economic activity having an effect within the Republic would render this central provision which establishes the basis for subject matter jurisdiction meaningless in numerous cases involving peregrini. These cases all follow from the consequences of economic globalisation over the past three decades.

[58] Expressed in the terms employed by this Court to determine subject matter jurisdiction in *American Natural Soda Corporation*, *supra,* the conduct complained of has must have “direct and foreseeably” substantial consequences within South Africa. This would render the vindication of subject matter jurisdiction almost nugatory, when viewed from the perspective of the South African competition authorities. By contrast the judgments in *Strang*

and *Multilink supra* foreshadowed the possibility of common law development, which only strengthens this conclusion.[8]

[59] There was a debate with certain of the counsel for respondent banks concerning the trigger for the development of the common law. Unlike the

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[8] There was a vigorous debate about whether our law should adopt a qualified effects test. This issue was a subject of controversy within the European Union following the decision in *Intel Corporation v European Commission ECLIE: EU*: C 2017:632 where the Court of Justice said: 'The qualified effects test pursues the same objective as the implementation test: (namely preventing conduct which, while not adopted within the EU has anti-competitive effects liable to have impact on the EU market'. para 45 The court then went on to say that this test is justified under public international law when 'it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.' (para 49) Professor Fox, *supra*, throws doubt upon whether the Court of Justice did apply a test of foreseeable, immediate and substantial effects in the EU economic area. As she notes at 992:

> 'There seemed to have been no fact-finding to support a conclusion that Intel's agreements with Lenovo had foreseeable immediate and substantial effects in the EEA. The hidden holding of the case is: where offshore conduct not directly implemented in the EEA and potentially although not immediately affecting the EEA is an integral part of a strategy covered by the EU law.' EU law covers the conduct.'

Within the context of South African law, there does not appear to be any substantial reason as to why the approach adopted by this court in ANSAC should now be disturbed nor does a different test really affect the approach which this court seeks to adopt. To an extent this approach to extraterritoriality was recently adopted by Unterhalter J in *Achuko v Absa Bank Limited* [2019 JDR 1469 (GJ)] et paras 15-18:

> 'Our Courts have recognised that territoriality is the traditional basis upon which jurisdiction is established, and that the extra-territorial assumption of jurisdiction may interfere with the sovereignty of other states. However, the territorial principle of jurisdiction has a subjective and an objective aspect. The subjective aspect recognises the power of the state to enact laws that govern conduct taking place within the territorial borders of the state. The objective aspect of territorial jurisdiction recognises the power of the state to enact laws that concern conduct taking place outside of the borders of the state, the effects of which take place within the borders of the state.
>
> In *S v Basson*, the Constitutional Court accepted the general proposition that our courts have declined to exercise jurisdiction over persons who commit crimes in other countries based upon a presumption against the extraterritorial operation of the criminal law. However that presumption does not invariably hold, and the Constitutional Court acknowledged that jurisdiction, in the context of the criminal law, may be assumed where there is a real and substantial link between the offence and the country in which the courts seek to exercise jurisdiction. One way in which that link may be established is where the harmful consequences of an offence committed in one country are felt in another.
>
> The objective aspect of territorial jurisdiction is not confined to the criminal law. Justice Learned Hand put the matter this way in *Alcoa*.
>
> > 'Any state may impose liabilities even upon persons not within its allegiance, for conduct outside its border which has consequences within its borders that the state reprehends.'
>
> One area of the law in which the effects doctrine holds sway is competition law. Competition law, in many jurisdictions, including our own, makes provision for the regulation of anti-competitive conduct that takes place outside the territory of the state but has an effect within it. While the United States has shown the greatest propensity to apply the effects doctrine to the assumption of jurisdiction, as ever more commerce has international dimensions, more jurisdictions have shown a willingness to entertain the doctrine. So too international crimes under multilateral treaties permits of wide jurisdictional powers.'

cautionary *dicta* of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at paras 63-66 in the present case, the question of the development of the common law was raised before the Tribunal and considered in its judgment. (See paras 40-44 of the Tribunal's judgment). In the present dispute, this Court, on the basis of the dicta in *Strang* and *Multilinks,* has also taken into account the normative framework of the Act, the widespread international consensus about the egregious nature of cartel activity and the changed context of the economic activity. As an OECD paper of 1/12/2017 at para 9 observes:

> '**An increasing number of jurisdictions rely on the domestic effects of the relevant conduct as the jurisdictional trigger, known as the effects doctrine. Under this doctrine, jurisdictions can legitimately take enforcement action against conduct that is carried out outside their territory by non-nationals as long as it is unlawful under their domestic rules and produces effects within their territory.** While the effects doctrine can be understood as an extension of the territoriality principle, it can result in the laws of more than one jurisdiction applying when a particular conduct effects more than one territory. It also means that remedial measures required to cure the competitive harm may need to be enforced extra territorially, against companies based and action occurring within another state.' (my emphasis)

Service

[60] Turning to the argument about service, the Tribunal rules do not appear to distinguish between service within the Republic and service abroad. While valid service under the Tribunal rules can be affected by any means authorised by the High Court, the former rules appear to be more permissive than the High Court rules and provide for service by fax and email. Therefore, it appears not to constitute an obstacle to the general approach to service for the Commission to serve on any peregrinus firm without the need for a local domicilium, an approach which clearly would deal with the problem of

responding to conduct based upon an overarching conspiracy between *peregrini* and incolae, the overall effect of which is to breach s 4 (1) (b) of the Act. Certainly, on the facts, all the parties were 'hailed' to the Tribunal for the purposes of the present litigation.

Enforcement

[61] Regarding the question of enforcement, s 58 of the Act provides the Tribunal with wide powers. It states 'in addition to its other powers in terms of the Act, the Competition Tribunal may make an appropriate order in relation to a prohibited practice including declaring conduct of a firm to be a prohibited practice in terms of this Act for the purposes of s 65 (that is for the purpose of a civil action which follows upon the Tribunal's finding on the merits). There does not appear to be any obstacle for the Tribunal to issue a declaratory order of the kind envisaged by the Tribunal, save that the Tribunal has to be clothed with the requisite jurisdiction in order to make this kind of order. Unfortunately, the Tribunal did not appear to follow the logic of its own conclusion on jurisdiction. Once it had determined that it did not have jurisdiction, it had no legal power to grant any order. However, once it is accepted that the Tribunal does have jurisdiction then, given the general consensus that cartel activity is the most egregious form of anti-competitive conduct (see Fox, *supra* at 990), a declaratory order issued by the Tribunal may well hold significant consequences for a peregrinus which has been found to have participated in a cartel.

The joinder question

[62] In its decision, the Tribunal deferred a decision in respect of the Competition Commission's application to join the nineteenth, twentieth, twenty first and twenty third respondents, pending compliance with the requirement that it file a new affidavit to substitute for and replace the complaint referral affidavits. Two different approaches were adopted to this decision by the various parties to this appeal.

[63] In the case of the nineteenth, twentieth and twenty first respondents, the approach adopted by their counsel was that the order granted by the Tribunal was clearly invalid, in that the Tribunal itself had held that it had no jurisdiction to hear the matter. Counsel conceded that, if this Court was of the mind to order that a new referral affidavit be filed by the Competition Commission in respect of its alleged case against the pure peregrini in similar fashion to the order contained in paragraph 3.4 of the order relating to local peregrini, then this decision could be deferred.

[64] By contrast, counsel for the twenty third respondent contended that an order should be granted by this Court dismissing the Competition Commission's application to join the twenty third respondent to the complaint referral. Given the approach that is to be adopted by this Court to the referral affidavit, it is the latter argument that requires particular attention. In essence, counsel for the twenty third respondent's argument was that there had been no proper complaint initiation against his client. It was too late to initiate a complaint at this stage and hence it followed that the Tribunal had no jurisdiction to determine the complaint referral against it.

[65] Notwithstanding copious references by counsel for the twenty third respondent to the existing jurisprudence relating to the initiation of complaints all of which flowed from the decision in *Woodlands Dairy (Pty) Ltd and another v Competition Commission* 2010 (6) SA 108 (SCA), particularly at paras 12-20; 33-35, the case which is dispositive of the argument of the twenty third respondent is that of *Power Construction (Western Cape) (Pty) Ltd and another v Competition Commission* [2017] 2 CPLR 4589 (CAC). In dealing with the judgment in *Woodlands,* this Court noted the contents of para 36 of the *Woodlands* judgment which reads thus:

> 'A suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the Commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.'

[66] To this, this Court held at para 33 of the *Power Construction* judgment:

> '[I]f an investigation by respondent [the Commission] takes place and during the course of, or as a result thereof, it learns of further parties which may have committed the prohibited practice, the complaint, from which these firms were initially excluded, can be amended to so include them, triggering further consequences as set out in s 50 of the Act.'

[67] While it is correct that the judgment in *Power Construction* makes it clear that it is necessary for a complaint to be initiated against each firm that is alleged to be a party to the cartel before that complaint is referred to the Tribunal, there is nothing in this judgment which deals with the facts of this present case; namely, in the event that this Court does not disturb the relevant component of the Tribunal's order, namely that the Commission has been granted permission to file a new referral affidavit to substitute for and replace all the complaint referral affidavits so long as the complaint referral deals with the individual parties and shows their connection to the alleged overall conspiracy to form a cartel. In short, the existing jurisprudence presents no fatal obstacle to the granting of a similar order against the pure peregrini and thus deferring the joinder application until such time as that referral affidavit has been filed and can appropriately be considered.

[68] I readily accept that the twenty third respondent is not cited as a party in the April 2015 statement. I also accept that when the initiation statement was amended on 23 August 2016, the company cited and against which the complaint was initiated was not the twenty third respondent. In the event that a new referral affidavit is required from the Commission, it would, at this stage be premature to uphold the twenty third respondent's contention. If indeed the new referral affidavit passes legal muster, insofar as the twenty third respondent is concerned, that is a showing of sufficient connecting factors between the twenty third respondent and an adequately formulated complaint which contains the requisite specificity. It would, therefore, be premature at this stage of the proceedings to make a final ruling in this regard, the effect of which would be to allow a potential participant to a cartel to escape the consequences of its participation. Again, it is necessary to emphasise that this

judgment in no way makes any finding nor articulates any observation on the merits of the case brought by the Competition Commission.

Irregular Step

[69] The sixth respondent sought to set aside the Competition Commission's cross-appeal against it for the following reasons: It argued that, as the Tribunal dismissed the complaint referral brought by the Competition Commission against it, there was no basis for it to appeal against the order of the Tribunal. By contrast, other respondents had formed a different view and noted appeals, within the prescribed time period, raising objections to the Tribunals purported intention to exercise limited jurisdiction over the foreign peregrini, in the event that the Competition Commission sought a declaratory order as foreshadowed in paragraph 3.3.1 of its order.

[70] On 18 July 2019 the Competition Commission noted a cross appeal and it cited amongst others the sixth respondent, notwithstanding that the latter had not noted an appeal. In the cross appeal, the Competition Commission sought to appeal, inter alia, against the order upholding the exceptions brought by the peregrini. It contended that the Tribunal had erred in finding that it had no personal jurisdiction over the pure peregrini and took issue with that finding that 'both the common law requirements for subject matter and personal jurisdiction must be established for the Tribunal to exercise jurisdiction over the purer peregrini.' It further contended that it was an error for the Tribunal to conclude that the provisions of s 3 (1) of the Act could not be read to permit a broader approach to personal jurisdiction than what is set out in existing common law. It further contended that the Tribunal ought not to have rejected the Competition Commission's argument that the doctrine of effectiveness was to be approached in a more flexible manner. For these reasons, it sought an order from this Court upholding the cross appeal and an order setting aside, inter alia, paragraph 1, that is the upholding of the application for dismissal of the complaint referral brought by the pure peregrini and paragraph 3.3.1 that 'any order for the declaratory relief against the pure peregrini must include the proviso that such relief excludes the operation of ss 59 and 65 of the Act.'

[71] Sixth respondent's counsel submitted that it is not competent for the Competition Commission to note what he referred to as 'a so called' cross appeal in relation to the sixth respondent in circumstances where the sixth respondent had not noted an appeal against the order of the Tribunal. Accordingly, he contended that the decision dismissing the complaint against sixth respondent had become final; in other words the Competition Commission's cross appeal was not truly a cross appeal but was, in his view, a belated attempt at an appeal outside of the time limits prescribed for the noting of an appeal and, in circumstances, where no application for condonation had been made.

[72] Counsel for the sixth respondent also noted that the Competition Commission had been informed of sixth respondent's position that it considered the cross appeal against it to be a nullity within two business days of it being filed. The Competition Commission had elected to do nothing in response thereto, even though it had ample time, for example, to bring an application for condonation in respect of the late filing of an appeal against sixth respondent in order to address the latter's complaint.

[73] The core argument of sixth respondent was that while a number of the pure peregrini respondents had filed notices of appeal aimed essentially at setting aside paragraph 3.3.1 of the order of the Tribunal entitling the Competition Commission to seek an order for declaratory relief against these peregrini, the Commission did not elect to appeal against paragraph 1 of the order (upholding the application by the pure peregrini respondents to dismiss the complaint) in the time period allowed for appeals. What it did was to note a cross appeal against that part of the order as well as the order in which the Tribunal upheld, in part, certain exceptions raised by the local peregrini. The point of sixth respondent's argument was that the cross appeal was directed at parties other than itself. The Competition Commission, being an unsuccessful litigant insofar as the holding of the exception raised by the foreign peregrini was concerned, did not visit an intention to appeal when it allowed the date of the lodging of the appeal to pass.

[74] Sixth respondent contended that this cross appeal was "simply an appeal which is conveniently tacked onto another appeal". *Goodrich v Botha and others* 1954 (2) SA 540 (A) at 544; *Itzikowitz v Absa Bank* 2016 (4) SA 432 (SCA) at para 25. If a cross appeal is no more than an appeal and the cross appeal brought by the Competition Commission was directed at dismissing the order upholding the exceptions brought by the pure peregrini in relation to the Tribunal's personal subject matter jurisdiction, then, on the basis of the jurisprudence relating to cross appeals as cited, the cross appeal was no more than an appeal which included as one of the respondents, the sixth respondent.

[75] Significantly, in *General Council of the Bar (GCB) v Jiba and others* [2019] ZACC 23 the GCB had brought an application to strike from the role of advocates Ms Jiba, Mr Mrwebi and Mr Mzinyathi. The High Court struck the former two from the role of advocates and dismissed the application against Mr Mzinyathi with costs. Ms Jiba and Mr Mrwebi then appealed against this order. Mr Mzinyathi did not file an appeal because he had been granted an order in his favour. However, the GCB filed a cross appeal in respect of the costs order against the later. Neither in the SCA nor in the Constitutional Court was this considered to be an incorrect procedure. The following passage from the judgment of the Supreme Court of Appeal in *Jiba and another v General Council of the Bar of South Africa and another: Mrwebi v General Council of the Bar of South Africa* 2019 (1) SA 130 (SCA) at para 2 is instructive:

> 'This appeal is against the order of the Gauteng Division, Pretoria (Legodi and Hughes JJ), striking from the roll of advocates, the names of Jiba and Mrwebi with costs including the costs of two counsel, the one paying the other to be absolved. The application against Mzinyathi was dismissed with costs to include the costs of two counsel. Against the order of costs, the GCB filed a counter-appeal. The appeals are with the leave of the court *a quo*. The three applications were dealt with in one hearing and were therefore heard together in this court as the factual and legal background was similar.'

[76] This approach accords with the clear *dictum* of Ponnan JA in *Itzikowitz v Absa Bank supra* at para 25:

> 'Importantly, *Maize Board* drew no distinction between appeals and cross–appeals. A cross-appeal, as Schreiner JA pointed out in *Goodrich v Botha and others* 1954 (2) SA 540 (A) at 544, is 'simply an appeal which is conveniently tacked on to another appeal'. And, in general, the rules applicable to appeals apply to cross-appeals. Moreover, the considerations of principle and policy alluded to above, that militate against entertaining an appeal against the dismissal of an exception, must no doubt apply with equal force to a cross-appeal against the dismissal of an exception.'

[77] If a cross appeal is to be treated as an appeal, the fact that the sixth respondent chose not to appeal against any component of the Tribunal's order as opposed to other respondents cannot be considered to be an obstacle to an appeal (even if described as a cross appeal) against a finding which was adverse to the Competition Commission and in favour of the sixth respondent.

Conclusion

[78] As Fox and Gerard: EU Competition Law: Cases, Texts and Context (2017) at 33 write of cartels:

> 'They are the classic example of anti-competitive agreements. Cartels are a scourge on consumers. They rob consumers of hundreds of millions of euros each year, often for products that are necessities of life.'

[79] Cartel activity is the most egregious form of anti-competitive conduct. It is important again to emphasise that, at this stage of the litigation initiated by the Competition Commission, the question of whether any of the respondent banks is involved in cartel activity is not before this Court and thus it has nothing to say about the merits thereof. However the battle between the parties regarding jurisdiction has significant implications for the fight against

cartel activity in general. In a Round Table On the Extra Territorial Reach of Competition Remedies conducted by the OECD (working party number three on cooperation and enforcement: OECD: DAF/COMP/WP3 (2017) (at para8) the following passage reflects the challenges posed by the structure of the global economy to national competition authorities:

> 'The growing interdependence of markets and economies and the fact that business activities increasingly take place across borders means that the behaviour of market participants and the effects of this behaviour is often not contained within the territory of the country where the behaviour takes place or of which the parties are nationals. Thus, conduct occurring abroad by foreign parties – which in principle would satisfy neither the territoriality not the nationality principles – have negative impact for domestic markets. Over the years jurisdictions have developed case law and rules to assess in which case they can extend jurisdiction extraterritorially and what is the appropriate nexus between domestic harm and foreign conduct.'

See further the judgments in *Intel v Commission* (Case C – 413/14P (2017); *F. Hoffman – Le Roche v Empagram* SA 542 US 155)

[80] The decision of this Court is based upon giving full effect to the purpose of the Act, including its objective (s 2) and the wide scope envisaged for the Act as set out in s 3 (1) of the Act which establishes subject matter jurisdiction. It is important to emphasise that the Tribunal had already given the Competition Commission a final opportunity to file a new referral affidavit to substitute for and replace all of the complaint referral affidavits insofar as the local peregrini are concerned. That part of the order is uncontested. It seems to be clearly within the interests of justice to provide the Competition Commission with a similar opportunity to file a new referral affidavit in respect of the pure peregrini respondents. This will provide the Competition Commission with a final opportunity to establish adequate connecting factors between the respondent parties and the jurisdiction of the Tribunal to establish

personal jurisdiction in addition to proving the requirements of subject matter jurisdiction on facts which may be set out in the fresh referral affidavit.

[81] In summary, this Court holds that there can be cases where an agreement between or a concerted practice involving peregrini and which consist, for example, of direct or indirect fixing of a purchase or selling price or any other trading condition, reveal that adequate connecting factors are established to justify a finding of both subject matter and personal jurisdiction. As the Competition Commission has been afforded a last opportunity to file a legally coherent complaint against the local peregrini banks, it follows that it should be afforded a similar opportunity against the foreign peregrini. At that point of the litigation it will be possible to make a sound and informed determination as to whether, there are sufficiently adequate connecting factors between the foreign peregrini conduct and the suit brought by the Competition Commission to justify the assumption of jurisdiction, both personal and subject matter. It is thus important to emphasise that, until a final complaint within the time limits prescribed in the order of this Court is forthcoming, from the Competition Commission the question of jurisdiction over the pure peregrini in this case cannot be determined.

Costs

As the Competition Commission has been substantially successful it should be granted a costs order in its favour.

[82] For all of these reasons the following order is made:

1. The appeal against paragraph 3 of the order of the Competition Tribunal read in conjunction with paragraph 1 thereof is upheld.

2. The cross appeal against paragraph 1 of the order of the Competition Tribunal is upheld.

3. The order of the Competition Tribunal is therefore set aside and replaced with the following:

3.1 The applications for the dismissal of the complaint referral brought by the pure peregrini, Bank of America Merrill Lynch International Limited (1); JP Morgan Chase & Co (3); Australia and New Zealand Bank Limited (5); Standard New York Securities Inc (6); Nomura International PLC (9), Macquarie Bank Limited (13); HBC Bank USA, National Association (NA) (19); Merrill Lynch Pierce Fenner and Smith (20) and Credit Suisse Securities (USA) LLC (23) are dismissed subject to the following.

3.1.1 The Commission must file a new referral affidavit to substitute for and replace all the complaint referral affidavits. This affidavit must be filed within 40 business days of this order.

3.1.2 The respondents will only be required to file their answers to the new referral affidavit. The answers must be filed within 20 days of the service of the new referral affidavit.

3.2 The new referral affidavit applies to the parties referred to in paragraph 1 of the substitute order. It must:

3.2.1 In the case of all the named respondents set out the facts the Commission relies on to allege that it was foreseeable that the impugned conduct would have a direct or immediate, and substantial effect in the Republic;

3.2.2 Confine the case to a single overall conspiracy (SOC), provided, subject to 3.4.3 below, that the Commission is not restricted from alleging that this may be founded on an agreement, arrangement or concerted practice;

3.2.3 Indicate whether the same facts are relied on for proof of the concerted practice or allege any different fact if they are not;

3.2.4 Allege whether its case for an SOC relies on proof of an express agreement or arrangement or whether this is an inference based on facts, if the latter, allege in general terms what those facts are;

3.2.5 Provide each respondent with a date, or period, in which they are alleged to have joined the SOC or deemed to have joined the SOC;

3.2.6 Provide the facts that are relied on to prove that the particular respondent joined or had joined the SOC;

3.2.7 If the SOC ceased;

3.2.7.1 provide what dates the SOC is alleged to have ceased;

3.2.7.2 what facts are relied on for establishing that the conduct had then ceased; and

3.2.7.3 whether all the respondents remained participants in the SOC on that date; and, if not, when the respective respondent/s exited.

3.2.8 If the SOC is still alleged to be ongoing;

3.2.8.1 what facts this is based on; and

3.2.8.2 whether all the respondents are still part of it, if not when the respective respondent/s exited;

3.2.8.3 in relation to the relationship between the respondent bank and their respective traders;

3.2.8.3.1 is it alleged that some traders acted for more than one respondent at the same time? If so, details should be provided;

3.2.8.3.2 if a trader ceased to act for a respondents' bank, did this end the respondents' participation in the SOC or if not, on what basis is it alleged that the respondent's participation continued?

3.2.8.3.3 Is it alleged that all the traders named as participants in paragraph 40 of the December affidavit were so-called active participants or were some so called passive participants.

3.3 The new referral affidavit must in addition:

3.3.1 in the case of all of the named respondents set out the facts on which the Commission relies to allege that there are adequate connecting factors between the parties and the jurisdiction of the Competition Tribunal; sufficient to establish personal jurisdiction against all named respondents

4. In respect of the application for joinder brought by the Competition Commission on 12 January 2018 read with the supplementary affidavit in December 2018.

4.1 Leave to join the twenty sixth respondent (Investec Bank Limited) is granted.

4.2 Leave to join HB US (19); MLPFS (20); BANA (21) and Credit Suisse Securities (23) is deferred for consideration pending the Competition Commission's compliance with the requirements of paragraph 3 of this order.

5. In respect of the application for a striking out brought by the third and fourth respondents:

5.1 paragraph 145 to 152 and corresponding annexures of the December supplementary affidavit if struck out should not be included in the amended referral submitted in terms of this order.

6. The application by the sixth respondent to set aside the Competition Commission's cross appeal insofar as it applies to the sixth respondent is dismissed with costs, including the costs of two counsel.

7. The first to fifth respondents, ninth respondent, eleventh respondent, thirteenth to fourteenth respondents, nineteenth to twenty first respondents and the twenty third respondent are ordered to pay the costs of the appeal and cross appeal, including the costs of two counsel.

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DAVIS JP

BOQWANA JA and KATHREE-SETILOANE AJA concurred