IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 215/CAC/APR23[1]

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
BANK OF AMERICA MERRILL LYNCH INTERNATIONAL DESIGNATED ACTIVITY COMPANY	First Respondent
BNP PARIBAS	Second Respondent
JP MORGAN CHASE AND 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	Eighth Respondent
NOMURA INTERNATIONAL PLC	Ninth Respondent
STANDARD CHARTERED BANK	Tenth Respondent

[1] The Judgment deals with the various applications under Competition Appeal Court Case Numbers: 213/CAC/Apr23; 214/CAC/Apr23; 215/CAC/Apr23 ; 216/CAC/Apr23 ; 217/CAC/Apr23 ; 218/CAC/Apr23 ; 219/CAC/Apr23 ; 220/CAC/Apr23 ; 221/CAC/Apr23 ; 222/CAC/Apr23 ; 223/CAC/Apr23 ; 224/CAC/Apr23 ; 225/CAC/Apr23 ; 226/CAC/Apr23 ; 227/CAC/Apr23; 228/CAC/Apr23; 229/CAC/Apr23/ 230/CAC/Apr23; 231/CAC/Apr23; 232/CAC/Apr23; 233/CAC/Apr23; 234/CAC/Apr23; 235/CAC/Apr23; 236/CAC/Apr23; 237/CAC/Apr23; 238/CAC/Apr23; 239/CAC/Apr23; 240/CAC/Apr23; 241/CAC/Apr23; 242/CAC/Apr23; 243/CAC/Apr23; 244/CAC/Apr23.

CREDIT SUISSE GROUP	Eleventh Respondent
COMMERZ BANK 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
MERRIL LYNCH PIERCE FENNER AND SMITH INC.	Twentieth Respondent
BANK OF AMERICA, N.A.	Twenty First Respondent
INVESTEC BANK LIMITED	Twenty Second Respondent
CREDIT SUISSE SECURITIES (USA) LLC	Twenty Third Respondent
NEDBANK GROUP LIMITED	Twenty Fourth Respondent
NEDBANK LIMITED	Twenty Fifth Respondent
FIRSTRAND LIMITED	Twenty Sixth Respondent
FIRSTRAND BANK LIMITED	Twenty Seventh Respondent
STANDARD AMERICAS INC	Twenty Eighth Respondent

JUDGEMENT

THE COURT

Introduction

[1] This appeal is triggered by a decision of the applicant ('the Commission') to prosecute 28 banks ('the respondent banks') including South African and foreign banks which, the Commission alleges, colluded and conspired with each other to manipulate the foreign exchange rate in respect of the United States Dollar (USD) and the South African Rand (ZAR) to their own benefit. The Commission has brought this case on the basis that the respondent banks have contravened s 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998 ('the Act').

The chronology leading to this appeal

[2] The litigation relating to this complaint has a long and torturous history. On 15 February 2017 the Commission referred its complaint against some nineteen respondents for alleged price fixing and market division in contraventions of s 4(1)(b)(i) and (ii) of the Act.

[3] The referral to the Competition Tribunal elicited a flood of exceptions generated by the respondent banks. Eventually on 12 June 2019 the Tribunal handed down its decision in respect thereof, the basis of which will be discussed presently. Following appeals by a number of the respondent banks and a cross appeal by the Commission, a decision was taken by this Court on 28 February 2020, the effect of which was to give the Commission a 'final opportunity' to file a new referral affidavit to substitute and replace the referral affidavit which had been placed before the Tribunal in 2017. The details of this judgment will be discussed later.

[4] The referral which the Commission was ordered to file was duly done on 1 June 2020. Again the respondent banks filed exceptions together with applications for

dismissal of this referral. The matter was heard by the Tribunal between 29 November and 6 December 2021 but for unexplained reasons an order and the reasons upon which the order was predicated were only issued on 30 March 2023. It is against this order that the respondent banks have approached this Court on appeal.

[5] The appeal raises complex points of principle with regard to competition law. It requires of this Court that it negotiate between the Scylla of cartel behavior, the most egregious form of anti-competitive conduct, and the Charybdis of the potential of regulatory overreach of the principle relating to the prohibition of cartel behavior; hence the justification offered by the respondent banks for the ensuing litigation.

[6] It is useful to provide a more detailed description of the earlier litigation, in that aspects thereof including the significance of the order of this Court of 20 February 2020 were subject to intense forensic scrutiny by the parties to this litigation.

The 2019 decision of the Competition Tribunal

[7] The major issue which confronted the Tribunal in its 2019 decision concerned its jurisdiction to hear the 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. The distinction was then 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 South Africa by way of a local branch or a representative office in South Africa. In addition, the Tribunal was confronted with arguments with regard to subject matter

jurisdiction. In this connection it held that none of the referral affidavit provided evidence as to how the conduct of any of the traders employed by the respondent banks were linked to an effect within the Republic sufficient to justify subject matter jurisdiction in terms of s 3(1) of the Act. The Tribunal concluded thus:

> 'If the Commission clarified its referral in the manner it suggested in this oral argument with the addition of the particular required in these reasons. These will resolve most of the exceptions which relate both to no cause of action or vague and embarrassing. There will now be a coherent case of what the conspiracy was, what was entered into and how it ended. If it indeed has. It will also explain why the relationship in the firms is one of competitors as distinct from one between buyer and seller.'

[8] The Tribunal held that it had jurisdiction over the local *peregrini* but, insofar as the pure *peregrini* were concerned, it decided that they could be subjected only to a declaratory order which would include the proviso that the relief that could be granted at the end of a trial excluded the operation of sections 59 and 65 of the Act. An order to this effect was then issued which was the subject of an appeal to this Court.

[9] At para 53 of its 2020 judgment, this Court described the challenge posed by this dispute as turning;

> 'Essentially on whether the law relating to personal jurisdiction can be rendered congruent with the objects of s 3(1) of the Act and more generally with the overall purposes of the Act, including the promotion of efficiency, adaptability and the development of economy and the provision of consumers to competitive prices and product choices as set out in s 2(a) and (b) of the Act.'

[10] In developed the common law relating to personal jurisdiction the Court said:

'On the assumption that the Competition Commission can make out an adequate showing that there was an overarching conspiracy between the respondent banks to fix the rand / $ exchange rate in contravention of ss 4(1)(b)(i) and (ii), 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 *peregrine,* in an activity which would contravene the central provision of the Act, namely, the prevention of cartel activity. Assuming that the Competition Commission could make such a showing, this in 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.' (para 56)

[11] In terms of this development of the law the Court held;

'As the Competition Commission is afforded the last opportunity to file a legally coherent complaint against the local *peregrini* banks (in terms of Tribunal's order) 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 they 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.' (para 61)

[12] As a result of this reasoning the court made the following order.

'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 forty 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.'

[13] This brief chronology of the torturous litigation that has taken place to date holds significant implications for the disposition of this appeal. I highlight two consequences of which account must be taken in the evaluation of the respective arguments which have been placed before the Court.

[14] In the first place the order of the Court which followed upon the earlier order of the Tribunal did not envisage an expansion of the parties to the case which had been brought before the Tribunal at the 2019 hearing. In other words, the order mandated the Commission to reconfigure its referral affidavit so as to ensure that it met the requirements of both personal and subject matter jurisdiction in respect of the parties who had been already referred to the Tribunal.[2]

[15] The idea advanced by the Commission in the present dispute that further parties could be added to its case subsequent to the order of this Court flies in the face, not only of the text of the order of this Court but of the very purpose of the order itself. That order speaks specifically to the fact that 'the new referral affidavit applies to the parties referred to in paragraph 1 of the substituted order and must 'in the case of all the named respondents set out the facts the Commission relies on to at least a net that it was foreseeable that the impugned conduct would have a direct or immediate and substantial effect in the Republic'.

[16] It is clear that the express wording of the text of this order envisaged a fresh referral affidavit only insofar as the named respondents to the litigation which had taken place before this Court were concerned. Of particular importance to the very purpose of this order was the use of the words 'to grant the Commission a final opportunity' to bring before the competition adjudication bodies, being the Tribunal and, if necessary, this Court, a referral affidavit that passed legal muster. This order was designed as a result of an attempt by this Court to provide the Commission an

[2] This Court in its 2020 judgment at para 67 confirmed that the Commission can add parties to the complaint but only prior to referral to the Tribunal. This legal position is also relevant to a justifiable reading of the 2020 order.

opportunity to reconfigure its case. It did so because of the gravity of the allegations which had been made in respect of cartel activity by the respondent banks.

[17] A further implication of both the 2019 decision of the Tribunal and the 2020 decision of this Court was that it was incumbent upon the Commission to confine its case to a single overall conspiracy (SOC) in which it would show that all of the named respondent banks were participants therein. This would allow the Commission to contend that the Tribunal had both the necessary personal and subject matter jurisdiction over all the respondent banks.

The further referral affidavit

[18] The Commission was obliged to file a referral affidavit which addressed the inadequacies of its initial referral affidavit which had been found so lamentably: wanting by the Tribunal and this Court. It did so on 1 June 2020 by compiling a referral affidavit comprising some 106 pages.

[19] The key paragraphs of the affidavit are the following: In the first place, the Commission alleges that, with effect from September 2007 until at least September 2013, the respondent banks reached an agreement and/or coordinated their activities to participate in a single overarching conspiracy. The participants of the conspiracy pursued a single anti-competitive economic objective, namely, the manipulation and the extortion of normal competitive conditions in the trading of the USD/ZAR currency…' The Commission alleged that the banks had achieved this objective through direct and/or indirect fixing of prices in respect of the trade in the USD/ZAR currency pair and the division of markets through the allocation of customers in the USD/ZAR currency pair.

[20] The Commission summarized the conspiracy thus:

> 'The general and consistent terms of the conspiracy were: the respondents' traders would participate, actively and passively, in frequent and regular communication and contact with one or more traders employed by or representing competing banks … when engaging in trading the USD/ZAR currency pair. The Commission went on to state that 'it does not know the date on which the single overarching conspiracy between the respondent banks ceased to operate or if it has indeed ceased to operate.'

[21] The Commission averred that the existence of a SOC, its terms and objectives can be inferred from certain key facts. In particular, the Commission relied on extensive level of communication and contact between competing traders being engaged in trading of the USD/ZAR currency pair; the lengthy period over which the frequent and regular communication and contact between the competing traders persisted, the continuity and the mode of communication between competing traders when engaged in trading of the USD/ZAR currency pair. The Commission emphasized the existence of numerous engagements in chatrooms on the Bloomberg instant messaging platform whose participants were competing traders engaged in the USD/ZAR currency pair and the frequent presence of competing traders in the Bloomberg chatrooms.

[22] It also referred to 'unusual behavior in the markets in 2007 and 2013, in particular consistent prices over time, across banks, an absence of random fluctuations and volatility in foreign exchange market prices over time and across

banks, the use of round figures for quotes, lack of randomness and volatility in the spot exchange rate and the consistent spread of 0.0500 and 0.1000 charged by South African local banks (except for RMB).

[23] Of significant importance to the referral affidavit was the mode of communication for implementing the conspiracy. The Commission took the view that 'the respondents made the instant messaging platform of the Bloomberg terminal available to their employees and representatives.' A member of the chatroom is defined in the referral affidavit as the person who is the creator and administrator of the chatroom or has accepted an invitation to join a chatroom'. A participant in the chatroom is defined as a person 'who logged onto, alternatively opened, the instant messaging platform on the Bloomberg terminal, entered a chatroom to which they were a member; alternatively created a new chatroom and invited others to join, and remained present in the chatroom as either an active or passive participant.

[24] In turn these terms are defined as follows: An active participant 'is a person who had entered a chatroom at a particular time or over a particular period, is posting instant messages in the chatroom or receiving messages by other participants in response to an instant message they posted'. A passive participant 'is a person who had entered a chatroom and at a particular time or over a particular period is not 'posting instant messages in the chatroom but remained present in the chatroom in that they had not exited the chatroom.' Significantly, the Commission then says the following:

> 'As members or alternatively participants in implicated chatrooms, the respondents' traders knew of the conduct planned or put into effect by the other participants of the conspiracy to implement the terms or further the objective of the conspiracy; or they could reasonably have foreseen it and were prepared to take risk.

> The respondents' traders accordingly acted with the intention to implement the terms or further the objective of the conspiracy when they created chatrooms or accepted invitations to become members, entered and became participants in implicated chatrooms, alternatively remained as participants in the implicated chatroom.'

[25] The Commission sets out its view of the effect of this conduct as follows:

> 'The conspiracy had a direct or immediate and substantial effect in the Republic and it was foreseeable that the impugned conduct would or had the potential to have such an effect. The common manner in which the effects of the impugned conduct are felt is buyers of ZAR pay artificially inflated prices for buying the currency and sell at artificially reduced prices when selling the currency.'

[26] The foundation of the Commission's case with regard to personal jurisdiction was that the significant connecting factor was a clear single overall conspiracy to manipulate the rand in which all of the respondent banks were participants.. The subject matter jurisdiction, on the other hand, was satisfied in that all the respondent banks were participants in the very conspiracy which had a direct immediate and substantial effect in the Republic and that it was foreseeable that the impugned conduct would have or had the potential to have this effect. This passage from the referral affidavit clearly mirrors the provisions of s 3(1) of the Act which provides that this Act applies to all economic activity within or having effect within the Republic, the section which describes the requirements for subject matter jurisdiction.

[27] It is evident from the description of the core of the referral affidavit that the Commission's case was based on a single overarching conspiracy. It is to that concept that I must now turn.

A single overarching conspiracy (SOC)

[28] Counsel for the Commission contended that the requirements to establish an infringement based on a SOC could be found in European jurisprudence, in particular, in *Commission v Anic Partecipazioni* [1999] ECR 1-4 125 and *Team Relocations v Commission* Case T-205/08EUT (2011). On this basis counsel for the Commission summarized the requirements for an SOC as:

(i) A common anti-competitive objective, being the existence of an overall plan pursing a common economic objective;

(ii) participation, being each firm's "intentional' contribution by its own conduct to the common objectives pursued by all the participants; and

(iii) knowledge, being that the firm was either aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or it could reasonably have foreseen it and that it was prepared to take the risk.

[29] It is important when borrowing from comparative authority to ensure that the factual context in which the test which is now sought to be applied is South Africa is carefully analyzed. *Team Relocations* involved the participation by parties to a cartel in the international removal services sector in Belgium in which prices were fixed, sharing customers and manipulating the procedure for the submission of tenders were present thereby constituting a single continuous infringement of Article 81 EC (now Article 101 of the European Treaty). It appeared that the cartel lasted from October 1984 until September 2003. In brief the cartel operated on the basis of written price

fixing agreements with the practice of commissions and cover quotes having been introduced at the same time. There was clear evidence of the practice of manipulation of commissions which were treated as an indirect fixing of prices for international removal services in Belgium since a cartel member issued invoices to other members for commissions or rejected offers or offers which were not made by referring to fictitious services. The amounts represented by those commissions were then invoiced to customers.

[30] In respect of the cover quotes the European Commission contended that through the submissions of these quotes a removal company which wanted the contract ensured that the customer paying for a removal service received several quotes. To that end, a company indicated to its competitors the total price that it would quote for the planned removal which was higher than the price quoted by the company itself. Thus, the system in operation was based on fictitious quotes submitted by companies which did not intend to carry out the removal. This was, in the view of the European Commission, a manipulation of the tendering procedure to ensure that the price quoted for removal was higher than it would have been in a competitive environment. These arrangements were in place until 2003. Having the clear objective of price fixing and market sharing and thus distorting competition.

[31] In setting out the basis for a SOC the European Court said:

> '[A]ccording to the settled case law of the Court the infringement of Article 81EC can result not only from an isolated act but also from a series of acts or continuous conduct even where one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of that provision.' (para 49)

[32] Applying this principle to the facts the Court said:

> '[t]he Commission's agreement and the cover quotes agreement pursued the same objective as the price fixing agreement, that common objective being to establish and maintain a high price level for the provision of international removal services in Belgium and to share this market. It then stated that it was common ground that Team Relocations had participated in two out of the three agreements described in contested decision.' (para 52)

[33] The Court then qualified this *dictum* by saying the following:

> '[B]y making clear that the responsibility of an undertaking which participated in a single and continuous infringement is limited with regard to the conduct planned or put into effect by the other participants and of which it was or should have been aware to the actions which occurred during the period of participation of that undertaking in that infringement, the case law referred to … necessarily accepts that an undertaking may be held responsible for a single and continuous infringement even if it does not participate in all of the offending conduct of which it is made up.' (para 55)

[34] In short, this judgment does not hold that the intentional contribution to the common objectives can be established only where the undertaking concerned has contributed to those objectives since the start of the infringement or on condition that it pursued ways identical to those put into effect when the infringement commenced.' (para 56)

[35] It is now possible to examine the implications of this judgment for the present dispute in the light of the reliance placed thereon by the Commission's counsel. Not all of the parties have to participate in all of the activity which constituted the overall conspiracy. Not all of the parties have to have participated since the commencement of the conspiracy nor has their participation to be identical to that of other parties in the conspiracy. But what is clear from the facts of *Team Relocations* is that by reference to the commission agreements and the cover quote agreements, the same objective was pursued; that is a price fixing agreement designed to establish and maintain a high price level for the provision of the international removal services in Belgium and to share this market in terms of a clear agreement. In the case of Team Relocations, it had participated in two of the three agreements described; hence the evidence that the commissions and cover quotes agreed to by Team Relocations were deemed to justify the conclusion that it was a participant in the overall conspiracy.

[36] For these reasons, pleading a SOC is an onerous exercise which requires, in this case, that the Commission provides plausible evidence that, even if not a participant in all of the events which made up the SOC, a respondent bank's conduct, based essentially on that of its traders constitutes sufficient evidence to justify that there was an intentional contribution to the common objectives of the conspiracy and that the respondent bank were aware or should have been aware of the offending conduct of the initial participants and hence was party to the infringement by way of a SOC. Thus, it could be held to be a party to the overall conspiracy, notwithstanding that it might not have participated in each and every event that made up the overall conspiracy.

Further implications from the analysis of the 2020 order

[37] The analysis which has now been undertaken concerning the 2020 order of this Court leads inexorably to the conclusion that the Commission was required to revisit its significantly imperfect referral affidavit which had been the subject of the litigation before the Tribunal and Court culminating in the 2020 order and that it reconfigure the referral in order that it passes the test which had been set down by this Court. It was not envisaged that a fresh referral would be generated and that banks which had not been part of the initial referral affidavit could now be added to what was intended to be the redrafting of the initial referral affidavit, as opposed to a generation of a fresh one.

[38] A further implication arises with regard to the question of jurisdiction. In its 2020 judgment the Court rejected the submissions of the Commission that s 3 (1) of the Act encompasses both personal and subject matter jurisdiction. It was only the latter that was dealt with in terms of s 3 (1) of the Act. Insofar as personal jurisdiction was concerned, it is necessary to recapitulate what the Court said at para 56,

> '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/ $ exchange rate in contravention of s 4 (b) (i) and (ii) of the Act, this would mean that the case brought by the Competition Commission involved the participation of all of the banks that is local, local *peregrini* and pure *peregrini* in an activity which had contravened a central provision of the Act, namely, the prevention of cartel activity. Assuming that the Competition Commission could make such a showing, this in 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.'

[39] It is important to emphasize that care must be taken not to conflate subject matter and personal jurisdiction. The point of the 2020 judgement was that, if the jurisprudence regarding personal jurisdiction was developed beyond that of the constraints of the common law, it was important in this case that, at the very least, the overarching conspiracy pleaded by the Commission should show that all of the banks were connected to that overarching conspiracy; that all were participants in an overarching conspiracy designed to have a detrimental effect on the South African economy by virtue of their joint conduct. To plead an SOC meant having careful regard to the principles set out in Team Relocations, thereby ensuring a clear showing that the available evidence fell within these principles. This was key to establishing personal jurisdiction over the *peregrini* respondents.

The Tribunal's decision which is the subject of this appeal

[40] Examining the various contacts between the respondent banks, particularly in the chatrooms on digital platforms with emphasis on the two core chatrooms being the Old Gits and ZAR chatrooms, the Tribunal was required to address an argument of the Commission that there was not an overall SOC between the foreign and local and not, as some of the respondent banks argued, that there were a series of unlinked mini SOC's between various of these banks. In support of the Commission's argument the Tribunal held:

> 'One might ask why and how such a situation would prevail in the world – as if by some act or spontaneous combustion traders in three parts of the globe decided to engage in mini-conspiracies to manipulate the USD/ZAR rate over a similar time period? If we are to assume that these mini-SOCs stood independently of each other with no common participant or contact point, and that the objectives of all these mini-SOCs was the same namely that the USD/ZAR rate should be manipulated to their

> advantage, how they be able to achieve this in a context where the ZAR is one of the most traded currencies in the world and international trading occurs on electronic platforms across the world?' (para 135)

[41] The evidence provided by Mr Duncan Howes of Absa Bank (sixteenth respondent) which was a successful corporate leniency applicant was clearly employed in the Commission's formulation of its theory of harm. In terms thereof the Tribunal ultimately concluded that the Commission's referral 'read holistically, sets out sufficient alleged facts to make out a *prima facie* case that of an SOC between foreign and local banks which suffices to establish adequate connecting factors to establish personal jurisdiction over all the *peregrini*.'

[42] In relation to the question of subject matter jurisdiction the Tribunal concluded thus:

> 'Given that the very objective of the cartelists was to manipulate the USD/ZAR exchange rate so that they could make a higher profit, common sense and logic tells us that it could be foreseeable that customers would suffer as a result, either directly as investors in a given transaction or in the prices of goods and services for export and import purposes.'

[43] The Tribunal then addressed the argument about the limitation of the 2020 order of this Court by dealing with the question of whether there could be a valid initiation after the matter had been referred to the Tribunal. Relying heavily on the decision in *Competition Commission of South African v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) it confirmed that the Commission is required under s 49 B of the Act to initiate a complaint of a prohibited practice but that it could do so, especially in a cartel case by way of a tacit initiation against a respondent at any time without

fearing the specter of prescription in terms of s 67 (1); that is the Commission was not barred from referring against respondents or joining additional respondents after it referred a complaint of a prohibited practice to the Tribunal.

[44] There was much debate in the Tribunal with regard to the question of compliance with the 2020 order of this Court. The Tribunal found that alleged non compliance with the order was not a discreet ground of objection and could not be relied upon by any of the bank respondents to 'have a second bite of the cherry'. It also went on to find that the CAC order could not be interpreted to fetter the Tribunal's discretion or interfere with the Commission's independence and discretion to refer additional details or amendments to its referral.

[45] Finally, the Tribunal dealt with the requirements of Tribunal Rule 15 (2) which reads thus:

> 'Subject to Rule 24(1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –
>
> (a) A concise statement of the grounds of the complaint; and
>
> (b) The material facts or the points of law relevant to the complaint and relied on by the Commission or complaint, as the case may be."

[46] The Tribunal concluded that the referral affidavit which extended to 106 pages contained adequate details to justify a conclusion that, read as a whole, it *prima facie* showed that there was a SOC between foreign and local banks to manipulate trading of the USD/ZAR currency pair.

<u>The question of respondents who were not traders</u>

[47] There was an argument with regard to certain of the respondents who were joined as parties. The sixth respondent, SNYS, had corresponded with the Commission to inform it that the two traders who were alleged to have been involved in currency manipulation on its behalf, namely Messrs. Katz and Friedman, had never been employed by sixth respondent and that they had only been employed to the extent relevant by the twenty eighth respondent, Standard America Inc. To this, the Tribunal said that the Commission had been caught "on the horns of a dilemma", being asked to withdraw its referral against the sixth respondent but it could not be certain that it would succeed in joining the twenty eighth respondent.

[48] Similar objections were taken by the twenty first respondent (BANA) that it was the holding company for the twentieth respondent (Merril Lynch Pierce Fenner and Smith Inc) and therefore it was improperly joined to these proceedings. To this the Tribunal said 'the Commission was entitled to join a holding company. Joining BANA, a holding company, might in its view, be relevant for the purposes of s 59 (3) A in the event that the Commission seeks to hold it jointly and severally liable for the actions of its subsidiaries.

[49] The same approach was taken by the twenty fourth respondent, Nedbank Group Bank, which was also a holding company and not a registered or authorized bank and which did not trade in foreign currency. The Tribunal again relied on s 59 (3) A, to join the Nedbank Group to this litigation. The Tribunal also adopted this approach to the twenty sixth respondent, First Rand Limited, which was not authorized to deal in foreign currency and was only connected by virtue that the twenty seventh respondent (FirstRand Bank Ltd) was a wholly owned subsidiary.

The Appeal

[50] Apart from the tenth respondent which announced during the hearing that it had reached a settlement agreement with the Commission before this Court, the rest of the respondent banks persisted with their case based on an exception and/or dismissal of the referral.

[51] The first question which was raised by counsel for the Commission concerned the appealability of the decisions taken by the Tribunal. It is this issue to which I must first turn.

Appealability

[52] Counsel for the Commission, in contending that the Tribunal's order was not appealable, submitted that the Tribunal's finding in respect of the various applications were in substance exceptions and thus their dismissals were based on the ordinary principles applying to the dismissal of an exception. Relying on the recent decision of the Supreme Court of Appeal in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerdery Belleggings (Pty) Ltd* 2023 (5) SA 163, the Commission contended that the Tribunal's findings and orders in its determination were not definitive of the rights between the parties. On the basis of the general rule as articulated in TWK, relating to the dismissal of exceptions, no appeal could be brought against these decisions of this Court. In this connection paragraph 31 of TWK was cited.

> 'We are here concerned with a particular matter: the dismissal of two grounds of exception that go to the heart of the plaintiffs' cause of action. Applying the doctrine of finality, as I have sought to explain, a long line of authority in this Court has held that the dismissal of an exception is not appealable because no legal obstacle stands in the way of the trial court finally deciding the point of law. The dismissal of an exception is simply not a final decision, and until the matter is finally decided, an appeal should not lie to this Court to pre-empt what the high court has yet to bring to finality.'

[53] In addition, counsel submitted that s 37(1) of the Act was definitive of this issue. To the extent relevant it reads thus:

> 'The Competition Appeal Court may-
>
> (a) review any decision of the Competition Tribunal; or
>
> (b) consider an appeal arising from the Competition Tribunal in respect of –
>
> (i) any of its final decisions other than a consent order made in terms of s 63; or
>
> (ii) any of its interim or interlocutory decision that may, in terms of this Act, be taken on appeal.'

[54] Emphasis was placed on the provision that this Court can only consider an appeal arising in respect of '<u>any of its final decisions</u>'; that is of the Tribunal. In the view of the Commission, the Act had effectively incorporated the principles of *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), namely that the only order of the Tribunal that could be appealed to this Court, save for certain interim interlocutory decisions which are not necessarily relevant to this case, was one that had to be final in effect, it could not be susceptible to alterations by the court which handed it down,

it had to be definitive of the rights between the parties and it had to have the effect of disposing at least of a substantial portion of the relief claimed in the main proceedings.'

[55] Following *TWK, supra* the Commission advanced a submission that the concept of 'interests of justice' should not be taken into account in deciding whether this matter could be appealed to this Court. The reliance on *TWK* requires significant qualification. Firstly, the Court in TWK confirmed *dicta* of the Supreme Court of Appeal in *Maize Board v Tiger Oats Ltd and others* 2002 (5) SA 365 (SCA) at para 10 of *TWK* where it was made clear that, while a dismissal of an exception is not appealable, an exception in respect of the jurisdiction of a court is appealable. For this reason alone, it is incorrect to contend that a final decision in respect of s 37 (1) (b) of the Act is not envisaged where an exception taken to the jurisdiction of Tribunal is not in and of itself a final decision which could be subject to the right of an appeal to this Court. This kind of exception had clearly been treated by our courts as final and thus susceptible to an appeal.

[56] The submissions of the Commission then became even more curious. Almost a year before TWK was delivered, the Constitutional Court handed down judgment in *United Democratic Movement and another v Lubashe Investment Group (Pty) Ltd and others* (2023) (1) SA 353 (CC). Briefly this appeal concerned a situation where the Supreme Court of Appeal struck a matter from the role because it was not within its jurisdiction to entertain it, in that what was involved was an interim order which was not regarded as final. Therefore, in the view of the Supreme Court of Appeal. it was not appealable. The Constitutional Court examined the existing jurisprudence sourced in the *Zweni* test and held that the test of appealability now includes

consideration of the interests of justice and no longer is restricted to the common law test as set out in Zweni. (para 43)

[57] The Court also held that the majority of the Supreme Court of Appeal had erred in holding that the interests of justice did not render the impugned interim interdict an appealable decision within the meaning of s 16 (1) (a) of the Superior Couts Act. Further, the Court held that the Supreme Court of Appeal was required to make a value judgment as to whether the impugned interim interdict was the kind of decision that is subject to appeal. (para 46)

[58] Inexplicably this judgment was ignored in the *TWK* judgment raising the obvious difficulty confronting this Court which must be resolved. The judgment in *TWK* is cited as authority of the SCA but in effect it ignored the jurisprudence of the Constitutional Court with regard to the question of interest of justice. This permits this Court to take account of the interests of justice in assessing whether a decision is of the kind which under the present law is subject to appeal and which law is therefore relevant to the wording of s37(1) of the Act. It is regrettable that this latest jurisprudence was not referred to by counsel in argument before this Court.[3] It should be noted that without explanation and within the same term of the Supreme Court of Appeal, the Court in *Polokwane Municipality v Double Four Properties and another* [2023] ZASCA 158 the SCA at para 8 finally referred to the binding authority of *Lubashe*.

[3] See also *Ciba Packaging (Pty) Ltd t/a CIB APAC v Timelink Cargo (Pty) Ltd* [2023] ZASCA 161 for the same omission of the Constitutional Court judgement in *Lubashe*

[59] In addition, this issue was also canvassed in considerable detail in the instructive judgment of this Court in *Competition Commission v Shoprite Checkers (Pty) Ltd and another* [2020] ZACAC 9. Although not relying on the interests of justice test Vally J said at para 20:

> 'Both the Zweni and the interest of justice tests are fact specific. The interests of justice test have not made the requirement of the attributes referred to in Zweni redundant. The differences between the two tests should not be exaggerated. The interests of justice test merely make allowance for a situation where one or more attributes referred to in Zweni may be absent or if there are other attributes which standout such as an ongoing harm to the appellant caused by the interim order into the interest of justice test has certainly opened the sluice gates allowing for all interim orders to flow freely to the appeal court.'[4]

[60] In summary, the argument of the Commission against the appealability of the decision of the Tribunal must stand to be rejected. In the first place, the question of personal and subject matter jurisdictions is central to the appeal. Many of the arguments which were put up by the respondent banks and which manifestly required determination by this Court was that the Tribunal had made a determination regarding its jurisdiction which, in effect, was a final decision. To the extent that it was argued that at some point in the midst or even towards the end of an extremely lengthy trial (and if all of the respondent banks are subjected to a trial it is likely that the length thereof will break all South African jurisprudential records) the question of jurisdiction can somehow be raised is a signal to apply the interest of justice test. Manifestly it is in the interests of justice that this prior question be dealt with before embarking on a

[4] Another example of adopting a test other than the strict *Zweni* test by this Court is to be found in *Counsel for Medical Schemes and another v South African Medical Association and others* [2015] ZACAC 6

lengthy and costly trial which of its nature will raise profound reputational questions for respondent banks, namely that they participated in an SOC. It is not that cartels should not be held accountable to the law; far from it, but expedition of the resolution of this kind of dispute is important. A further reason for justifying appealability is that this Court is entitled to examine the nature of its own order of 2020 and whether there has been compliance therewith.

The merits of the Appeal

[61] The core finding of the Tribunal was that 'the Commission's referral read holistically sets out sufficient alleged facts to make out a *prima facie* case for a SOC between foreign and local banks. To come to this conclusion the Tribunal was required to find that on the basis of the referral a *prima facie* case of a single overarching conspiracy had been made.

[62] In summary, the respondent banks raised four issues, albeit that different respondent banks relied, on some or at least one of the following:

1. the referral has not complied with the requirements of the 2020 order of this Court in that the Commission failed to plead facts which that order required the Commission to do in its redrafted referral affidavit.
2. the referral failed to demonstrate the existence of personal and subject matter jurisdiction in respect of *peregrini* banks and subject matter jurisdiction in respect of *incola* banks and local *peregrini* banks;
3. the referral is vague and embarrassing in that insufficient facts was set out in the referral affidavit to show that the respondent banks had joined and/or participated in a single overarching conspiracy,

4. certain of the respondent banks were improperly joined by the Commission.

[63] There are thus discreet pieces to the legal puzzle created by this litigation. It is best to demarcate them into their separate elements:

1. Can a holding company be joined where it is not a trader in currency and employed none of the implicated transfers?
2. Can parties be joined which were not part of the referral to the Tribunal when the matter was referred to it and heard in 2019?
3. What is the position regarding parties who provided information that they did not employ any implicated person, or that even though an implicated person was employed by it, such person was not employed in the capacity of an authorized trader?
4. In the case against the pure *peregrini,* was personal jurisdiction established. This finding is relevant in that this Court's 2020 order required that the Commission provide greater detail to show the existence of an SOC among the respondent banks referred to in the referral affidavit.
5. Has the establishment of subject matter jurisdiction in respect of local *peregrinus* and *incola* banks been established?

<u>The holding company question</u>

[64] The first respondent (Bank of America Merril Lynch), twenty first respondent (BANA), twenty fourth respondent (Nedbank Group Ltd) and twenty sixth respondent (FirstRand Ltd) were joined on the basis that they were holding companies of banks which it was alleged were involved in the conspiracy.

[65] In the case of holding companies, the Tribunal regrettably seemed to defer uncritically to the Commission and thus failed to take account of the fact that a holding company and a subsidiary are distinct corporate entities. The mere fact that the holding company owns the shares of a subsidiary does not establish a case against the former. Indeed, the only basis by which the Tribunal could come to this conclusion was by way of reference to s 59 (3)(A) of the Act; that is that the Tribunal's finding of liability for contravention of s4 of the Act was not the only basis for the joinder of a holding company because the latter could also be joined on the basis that the Commission sought an administrative penalty in terms of s 59(3)A of the Act. Regrettably this is an extremely ill-considered justification for such a decision in that this section was only introduced with effect from 12 July 2019, that is after the referral. It was clear that the section does not operate retrospectively. Besides, no suggestion was made by the Commission in the referral affidavit that the purported joinder of the holding companies concerned was pursuant to the provisions of s 59(3)(A) of the Act.

[66] This finding disposes of the case brought against first respondent, the twenty fourth respondent and twenty sixth respondent. Furthermore, the fact that the sixth respondent clearly stated on affidavit that neither Katz nor Friedman was employed by it but in fact were employed by the twenty eighth respondent and that this had been clear from the papers before this Court justifies a similar conclusion that there was no basis for the joinder of the sixth respondent. The Commission, knowing these facts and knowing therefore that it was the twenty eighth respondent who employed the said Katz and Friedman, should have desisted from attempting to join the sixth respondent.

<u>The effect of the of the order of this Court of 2020</u>

[67] The Commission contended that it was permissible to include additional parties even after the complaint had been referred to the Tribunal as it had in 2017 and which formed the basis of the case considered by the Tribunal in 2019. The Commission relied on the judgment of the Constitutional Court in *Pickfords* particularly at para 21 of decision. This *dictum* does not support the argument, that, after a referral to the Tribunal has been made, further parties can be added. What the judgment in *Pickfords* made clear (particularly at para 21) was that a complaint is against a practice not specific parties; hence the Commission can add parties to the complaint after the generation of the initial complaint but there is no basis to contradict this Court's 2020 judgment at para 67 regarding the 'cut off' point for a further party to be added to the complaint; that is, after the referral.

Allegations to establish the single overarching conspiracy: A detailed examination

[68] Relying on the decision in *Teams Relocations, supra,* the Commission based its entire case on the three requirements which were necessary to *prima facie* establish a single overarching conspiracy, namely a common anti-competitive objective, each firm's intentional contribution by its own conduct to the common objectives pursued by all the participants and that each firm was either aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or it could reasonably have foreseen the consequence it was prepared to take the risk.

[69] To show the presence of these requirements, the referral affidavit states that the respondent banks:

> 'Pursued a single anti-competitive economic objective namely the manipulation and distortion of normal competitive conditions in the trading of USD/ZAR currency pair; either by a direct or indirect fixing of prices or the division of markets.'

[70] The referral affidavit suggests that "general and consistent terms of the conspiracy" were to be found in the respondent banks' traders participating actively or passively in frequent and regular engagement and contact with one or more traders employed by or representing competing respondent banks when engaged in trading of the USD/ZAR currency pair.

[71] Through this communication and conduct, competing traders either offered or provided assistance to their competitors by way of the coordination of trading activities, requested and accepted assistance from competing traders by means of the coordination of trading activities, offered and provided information to competing traders, requested and accepted information from competing traders and reached understandings on trading strategies and ensured the coordination of trading activity in order to assist of be assisted by competing traders. In this way, they colluded in respect of the bid-office spread for certain volumes on the relevant currency, the coordination of trading strategies and trading activities and the treatment of certain customers who purchased or sold the Rand.

[72] The referral affidavit then continues:

> 'The Commission does not know the date on which the single overarching conspiracy between the respondent banks ceased to operate, or if it has indeed ceased to operate. The existence of the single overarching conspiracy, its terms and objective can be inferred from the following facts:

[73] The referral affidavit then sets out in some detail the conduct and communication which created and perpetuated the conspiracy. In a section of this Referral Affidavit entitled “Conduct Implementing the Agreement”, the following appears:

1.1. The extensive level of communication and contact between competing traders when engaged in trading of the USD/ZAR currency pair;

1.2. The lengthy period over which the frequent and regular communication and contact between competing traders persisted;

1.3. The continuity in the mode of communication between competing traders when engaged in trading of the USD/ZAR currency pair;

1.4. The existence of numerous permanent chatrooms on the Bloomberg instant messaging platform whose participants were competing traders engaged in the trading of the USD/ZAR currency pair; and

1.5. The frequent presence of competing traders in the Bloomberg chatrooms;

2. The unusual behavior of the markets during 2007 to 2013 set out in the section of this referral Affidavit entitled “The Effect of the Conduct”. In particular:

2.1. Consistent prices over time and across banks and an absence of random fluctuations and volatility in the foreign exchange market prices over time and across banks;

2.2. The use of “round figures” for quotes;

2.3. Lack of randomness and volatility in the spot exchange rate; and

2.4. The consistent spread of 0.0500 and 0.1000 charged by South African local banks (except for RMB).’

[74] Counsel for the Commission submitted that the Commission's referral had contained sufficient allegations to establish the existence of the SOC's anti-competitive objects and effects. He accepted that it was necessary for the referral affidavit to contain sufficient allegations to show each of the respondent bank's participation in this conspiracy. In counsel's view, this intentional contribution to the conspiracy was established in one of two ways. Firstly there were factual allegations to demonstrate there was either a trader employed by the respondent bank who joined and became a member or entered a chatroom in which conduct that implemented the terms or furthered the objects of the conspiracy took place. Secondly the Commission pointed to factual allegations that the relevant respondent banks with its employees or representatives engaged in conduct including trading behavior that implemented the terms of or furthered the objective of the conspiracy.

[75] The referral alleges that there were two central implicated chatrooms in the conspiracy being:

1. The Old Gits chatroom, the longest running and most prolific of all the implicated chatrooms on the Bloomberg platform which had between 10 and 15 members from 10 or more different banks.
2. The ZAR chatroom which had 3 and later 4 members from 4 different banks

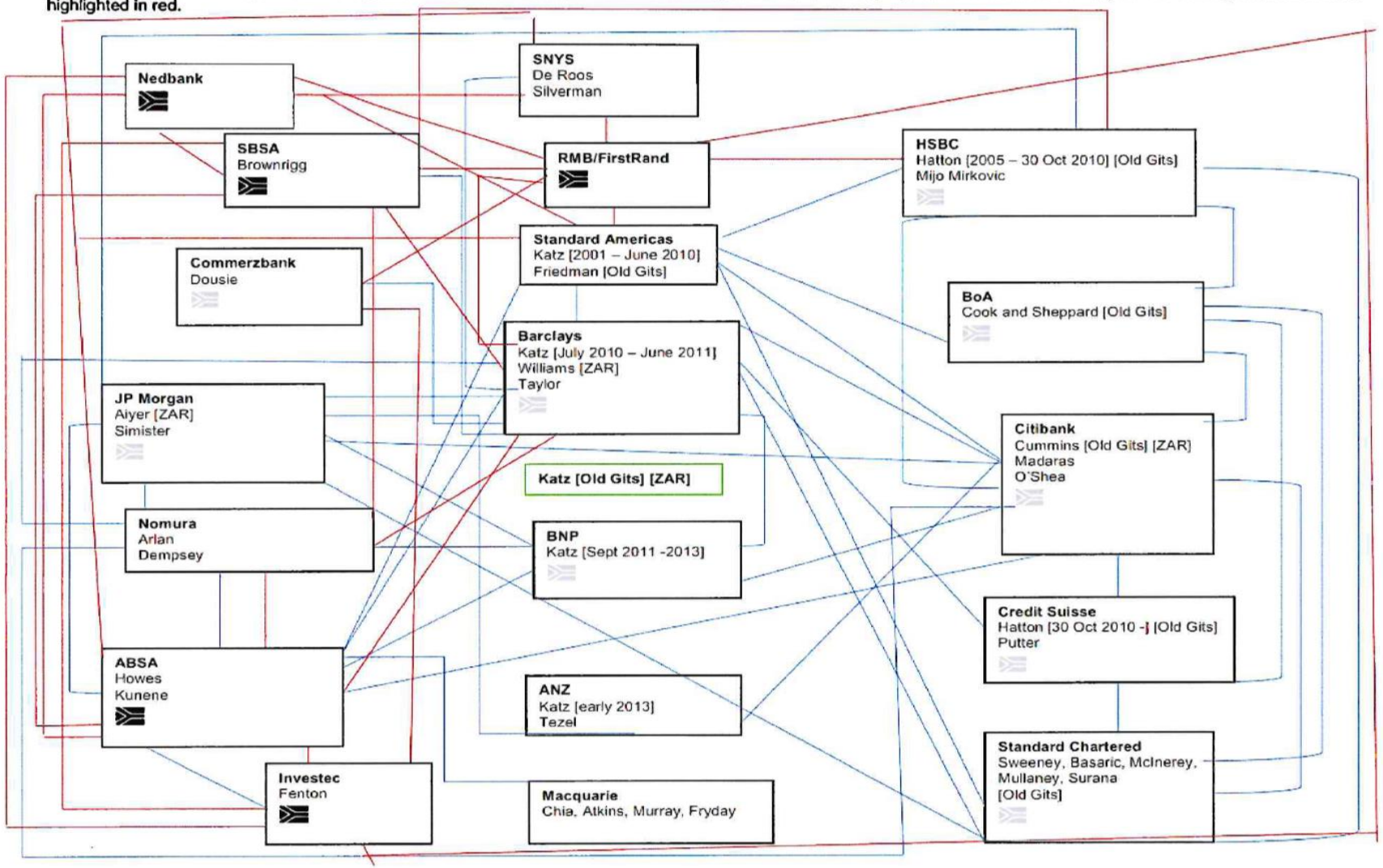
[76] These two chatrooms were employed by multiple traders from multiple competing banks which, in the view of the Commission, was the site of engagement and conduct implementing the terms and furthering the objectives of the SOC.

[77] Much of the evidence which was placed before the Tribunal was designed to show the conduct of various members of one or both of these chatrooms. The

relationship between traders who participated in these chatrooms was summarized by the Commission in the following diagram, presented to the Tribunal:

Annexure D

Diagram 3: Combines Diagram 1 and Diagram 2. Please note that the contacts from Diagram 1 have been highlighted in blue and the trading data from Diagram 2 have been highlighted in red.



[78] This diagram seeks to highlight the links between various traders and various states and the respective respondent banks. The essential case therefore brought by the Commission in its referral affidavit is that there was sufficient connection between traders employed by the respondent banks through these chatrooms which provides sufficient evidence for each of the bank's conduct fell within the scope of a single overarching conspiracy.

The question of personal and subject matter jurisdiction

[79] Before dealing with the role of each of these banks and whether the Commission made out a sufficient case for each of these banks to be referred to the Tribunal, it is necessary, albeit briefly, to again emphasize the question of subject matter and personal jurisdiction. These requirements lay at the heart of the earlier litigation which culminated in the 2020 order this Court.

[80] Section 3 (1) of the Act which provides that the Act applies to all economic activity within or having an effect within the Republic sets out the terms of subject matter jurisdiction. It was described by this Court in *American Soda Ash Corporation CHC Global (Pty) v Competition Commission of South Africa and others* [2003] ZACAC 6 at para 18 as follows:

> '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.'

[81] In the 2020 judgment of this Court it stipulated that the Commission set out the facts that the Commission relies on to allege that it was foreseeable that the impugned conduct would have a direct or immediate or substantial effect in the Republic.

[82] The referral affidavit seeks to describe the manner in which the Commission establishes subject matter jurisdiction thus:

> 'The conspiracy had a direct or immediate and substantial effect in the Republic and it was foreseeable that impugned conduct would, or had the potential, to have such an effect.
>
> The common manner in which the effect of the impugned conduct are felt is that the buyers of ZAR pay artificially inflated prices for buying the currency and sell at artificially reduced prices when selling the currency.'

[83] So much for subject matter jurisdiction. In respect of personal jurisdiction as it pertained to *peregrini* banks, the Court in its 2020 decision said the following as it was applicable to *peregrini* banks.

> 'Given the very objective of the cartelists was to manipulate the USD/ZAR exchange rate so that they could make a higher profit, common sense and logic tell us that it would be foreseeable that customers would suffer as a result, either directly as investors in a given transaction or in the prices of goods and services for export and import purposes.'

[84] Ultimately the Tribunal came to the conclusion that for the establishment of personal jurisdiction had been established for 'at this stage … the inquiry into jurisdiction requires the Tribunal to decide whether its forum is appropriate and convenient to adjudicate on the alleged conduct of the foreign Respondents'.

[85] That, in turn, requires an examination as to whether there was an SOC between the respondent banks of a kind that reveals not simply that the Rand was the subject of the trades but that the conspiracy was sufficiently connected to South Africa because by virtue of it being an overall conspiracy, foreign banks had effectively entered into "business with South African banks". This provided sufficient connection between these respondent banks and South African jurisdiction to sustain a finding of personal jurisdiction in the circumstances of the case. This concept of personal jurisdiction as developed by this Court was predicated on an economy where business is no longer based on bricks and mortar but rather on modern technology which has created the conditions for a global economy where national borders are transcended by virtue of technological development. It follows that to sustain an argument that there was sufficient connecting factors the need is to provide clear evidence of linkages to the South African banks as part of an overall conspiracy and which thus linked the incolae banks with the *peregrini* banks.

[86] With these considerations in mind I can now turn to the case brought against the individual respondent banks. I deal first with the pure *peregrini* banks in which both personal and subject matter jurisdiction are required.

Bank of America

[87] It is common cause that the first respondent (BAMLI) is a *peregrinus*. The link that the Commission alleges it can show between BAMLI and the alleged conspiracy is that 'at certain material times from at least 1 October 2007 the first and / or twentieth and / or twenty first respondents were represented inter alia, by Gavin Cook acting within the course of his employment. At certain material times from at least 1 October

2007, the first and/or twentieth and/or twenty first respondents were also represented inter alia by Mark Sheppard acting within the course of his employment. Furthermore, the first, twentieth and twenty first respondents (Bana) and twentieth respondent (Merrill Lynch Pierce Fenner and Smith Inc) are members of the same group of companies and are therefore directly or indirectly linked to one another. Hence the allegation that the Bank of America group was represented by Cook and Sheppard is the critical component of the Commission's case in respect of jurisdiction.

[88] The difficulty for the Commission is that it had been informed on oath in an exception affidavit generated by BAMLI, that Cook was at all material times employed by MLPFS, a fact never denied by the Commission.

[89] It may well be that as a result thereof the Commission has sought to join MLPFS on the basis that Cook was employed by the latter company. Insofar as Sheppard was concerned, while he is mentioned as a representative of either MLPFS, BAMLI or BANA, there is no evidence which was provided by the Commission that Sheppard participated in a single example of discussion in the implicated chatroom which was the key evidence for the *prima facie* case justifying the conclusion that there was an SOC. At the very least therefore the Commission has not shown the facts which are necessary to justify the conclusion that there was a connecting factor to the extent that BAMLI participated in the conspiracy together with South African respondent banks to manipulate the currency exchange between the USD and ZAR.

[90] In this connection it is again important to emphasize the order of this Court in 2020 which required the Commission for the purpose of pleading a SOC to specify the bank on behalf of which it alleges each trader acted, whether the alleged trader had

acted for more than one respondent at a time, whether a trader ceased to act for a respondent bank and that when did a respondent's participation end or on what basis the participation might have continued. The Commission alleges that Cook and Sheppard 'were employed and/or representing Merrill Lynch alternatively Bank of America and authorized by Merrill Lynch alternatively Bank of America to trade in the USD/ZAR currency pair on its behalf. This is devoid of the kind of specificity which was required by the 2020 order or by a referral that could pass legal muster.

[91] BANA, by contrast, is a local *peregrinus* with a representative office in South Africa. Accordingly, personal jurisdiction is therefore not an issue in this case. The Commission's justification for joining all three of these companies of the Bank of America Group, rested on Mr Cook having an email address "gavincooke@BAI.com or gavin.cooke@ml.com". But on its own this did not provide a basis to join Bana.

[92] As set out earlier in this judgment there is no plausible basis on which a holding company such as Bana could have been joined. The creative conclusion generated by the Tribunal on its own was that s 59 (3) A of the Act could apply, namely, the holding company could be held jointly and severally liable for the action for the subsidiaries. To reiterate s 59 (3) (A)of the Act did not apply retrospectively and, besides, the Commission had not relied upon this section in the complaint referral or its joinder application.

[93] MLPFS is a pure peregrinus. Accordingly, even accepting that Cook and Shepard were employees of MLPFS, there was no evidence linking MLPFS to a South African bank, and none of Cook's chats were linked to a South African bank, save for

one reference to a decision with Katz about the trading position in the Johannesburg office. As to Shephard, there is no evidence meaningfully linked him to the SOC. On balance, given that MLPFS is a pure peregrinus, there are insufficient connecting factors to South Africa to justify personal (as opposed to subject matter) jurisdiction.

Australia and New Zealand Banking Group Limited (the fifth respondent)

[94] It is common cause that the fifth respondent is a *peregrinus*. For this reason, both personal and subject matters jurisdiction must be shown to exist. In evaluating the case against the fifth respondent it is again important to emphasize that the Commission alleges that 'from September 2007 until at least September 2013' the respondents reached an agreement and/or coordinated activities to participate in a single overarching conspiracy with a single anti-competitive object, being the manipulation and distortion of normal competitive conditions in the trading of USD/ZAR pair.' In respect of the fifth respondent the Commission identifies Jason Katz as the trader employed by the fifth respondent from 2013 as well as a Mr Tezel.

[95] There is no doubt that Katz is a central player in the case brought by the Commission. The difficulty however is that every instance of participation in the impugned conduct alleged to have been carried on by Mr Katz predates 2013, the year in which he joined fifth respondent from another bank.

[96] The only reference to Tezel in the referral affidavit is the following:

> 'On 18 October 2012 Katz, Aiyer, Williams and Cummins were participants in an implicated chatroom in which the following communication took place: Katz and Aiyer matched each other's opposite FIX positions in order to off-set their respective

exposure at the upcoming FIX. Aiyer "copied and pasted" a portion of a communication between Madras and Tezel from another chatroom.'

[97] What precisely is meant by 'copied and pasted' is not made clear nor is there any suggestion that Mr Tezel participated in a chatroom or any similar discussion with other traders. But the Commission's case relating to Katz concerns the period of 2 October 2007 to 18 October 2012; that is before he joined fifth respondent and that no participation on the part of Mr Tezel, whether active of passive, is shown in respect of any of the chatrooms. This justifies the conclusion that no case was made out sufficient to find that fifth respondent was a participant in the overall SOC as pleaded by the Commission.

[98] At this stage it is important to note that Mr Katz pleaded guilty to charges brought by the US Department of Justice arising from a global investigation into the manipulation of foreign exchange prices at major banks. In his case it appears that the conspiracy to fix prices in currencies ranged from countries in Central, Eastern Europe, the Middle East and Africa, including Southern Africa.

[99] Given that the Commission would have had access to the case brought against Katz, one would have expected that it possessed evidence about Katz and his role. It could reasonably have been expected that, were their evidence to the effect that fifth respondent exploited Katz's knowledge of manipulation of the Rand, this would have been produced in the referral affidavit. There was simply no such mention. The basis of the referral affidavit provides no case of personal jurisdiction having been

made out. It is thus not necessary to examine the arguments relating to subject matter jurisdiction against the fifth respondent.

The ninth respondent Nomura International PLC

[100] The ninth respondent is a pure *peregrinus*. The case against the ninth respondent is based on the identification of Mr Guido Arlan and Mr Darren Dempsey as the two traders employed or representing ninth respondent in the trading of the USD/ZAR currency pair. The Commission alleges that the ninth respondent joined the conspiracy by at least 18 October 2012 when their employee and/or representative Dempsey was a participant in an implicated chatroom. It is on this date that the Commission alleges that Mr Dempsey and Mr Howes of ABSA were participants in an implicated chatroom in which they discussed the bid-office spread for USD/ZAR. The referral affidavit refers to a chat on 27 May 2010 on the Reuters Trading platform. Where the ninth respondent together with other banks held the USD/ZAR around the focal point of 7.5760'.

[101] On 2 March 2012 Mr Arlan was a participant together with traders in an implicated chatrooms where information was shared about custom quotes. A similar allegation was made in respect of the discussion on the Reuters Trading Platform in which ninth respondent together with other banks including ABSA held the USD/ZAR around the circle point of 7.5760.

[102] The difficulty confronting the Commission with regard to ninth respondent and its alleged participation is that the entire case of participation in the alleged SOC reduced to unrelated online chats over a course of six-year period. Tellingly two of

these chats occurred before the Commission alleges that ninth respondent joined the SOC.

[103] The Tribunal also found that Demsey on 17 October 2012 was a participant with Howes in a chatroom where they discussed 'bid offer spread for USD/ZAR'.

[104] Unfortunately, the Tribunal referred to the single interaction as 'chats'. (para 318). That however was the only relevance to Dempsey. This one reference to Dempsey on its own is so skeletal and vague. It is hardly the evidence needed to sustain a case of personal jurisdiction.

[105] Hence the case brought against the ninth respondent luminously reveals the difficulty of the ambitious case that the Commission sought to bring to satisfy the requirements of SOC. It had to establish in this case that ninth respondent knew or ought to have known its participation in the alleged conduct formed part of an overall plan to develop and implement the SOC. It was aware or ought to have been aware of the essential features of the SOC and intended to contribute to achieving that overall common objective of SOC or alternatively could reasonably foresee that its conduct contribute to the pursuit of the common objective.

[106] To return to the requirement to prove an SOC: In *HSBC Holding Plc and others v European Commission* T105/17 (24 September 2019 at para 199 the following important passage relating to a SOC appears:

> 'The undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other

> participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.'

[107] That the Tribunal in upholding the Commission's case against ninth respondent failed to take account of the fact that two of the three material averments against ninth respondent predated the very date upon which the Commission alleged ninth respondent joined the SOC is regrettable. That it then failed to consider that the implication of the remaining allegation as sufficient to establish personal jurisdiction is equally unfortunate.

[108] In summary, the three instances cited are insufficient to meet the requirements of a SOC. This is abundantly clear from the paucity of information provided in the referral affidavit to provide of the necessary evidence to meet the three requirements to establish that the ninth respondent was a participant which had a common anti competitive objective, that there was international conduct which contributed to the SOC and the requisite knowledge of the SOC. That Dempsey is mentioned with Howes, who provided the Commission with information meant that should there have been evidence which linked ninth respondent to the South African based SOC, it would have found its way into the referral affidavit. The silence is instructive.

Commerz Bank

[109] The central finding of the Tribunal against Commerz Bank was:

> 'The Commission's finding against Commerz Bank is that Dousie and Wilson were employed by and/or represented, Commerz Bank and Dousie was participant in an implicated chatroom.'

[110] The only information which the Commission sets out in its referral affidavit against Commerz Bank is that Mr Dousie is said to have 'shared information with Katz about a potential customer in the market when Katz represented Barclays Capital. This was on 28 July 2010. On 29 July 2012 it was alleged that it initiated a so-called focal point; that is a level of the spot rate at which coordination takes place. Furthermore, it was said to have occurred on the Reuters trading platform.

[111] There is a further averment that on 20 September 2012 that Commerz Bank matched the average of Investec Bank at a price of 8.3277.

[112] Bearing in mind that the Commission is taken to have the evidence of Mr Katz from his DOJ hearing it is significant that the affidavit does not contain any details of the information about the potential customer which was shared. It does not suggest that Commerz Bank was acting in concert with any of the other banks including Barclays, nor does it aver that the information that was shared was commercially sensitive.

[113] In this connection the use of the Reuters information platform becomes relevant. It was explained by Mr Ian Sinton in an affidavit to which he deposed on behalf of the eighth respondent. In evidence which was never contradicted he said:

> 'The Reuters information platform that is primarily a news outlet akin to Bloomberg where trades are not executed but indicative exchange rates are posted by many institutions in order to show those who have access to the platform the trends in the

market. The indicative exchange rates are typically submitted by the market participants to Reuters by way of an automated feed that may update many times in an hour. It is not a trading platform and the indicative rates published by Reuters are neither binding nor used to determine the applicable rate in actual trades.

The Commission (i) identifies which bank allegedly posted the quotes; (ii) is not able to name the traders that engaged in the conduct (save for an incorrect reference to Brownrigg to which I return later); (iii) does not attribute any value or volume to the quotes; (iv) alleges that almost all of the quotes relied upon were posted at times when SBSA would not have been posting quotes that could give rise to a trade; and (v) does not allege that any quote posted was accepted. Without access to data sets, the only reasonable inference that SBSA is able to draw is that the Commission's reference to 'market conduct on Reuters trading platform' refer to automated indicative exchange rates posted on the Reuters information platform.'

[114] It is significant that in the case of Commerz Bank the Commission pleaded that only it (Commerz Bank) initiated a focal point. This stands in contrast to the numerous allegations of focal point which involved the conduct of multiple banks. An allegation of unilateral conduct without more is hardly evidence of participation in an SOC.

[115] In summary, given the manner in which the Commission pleaded this case, namely that there was a SOC, there is insufficient evidence to show that Commerz Bank was a participant in an overall plan pursuing a common economic objective, that its intentional contribution on its own which conduct indicates such participation and that it was either aware of the overall conduct planned in respect of the SOC as a whole or could reasonably have foreseen the existence of a SOC and that it was prepared to take the risk.

[116] At best for the Commission there may have been an explanation to which Commerz Bank was obliged to provide that there was nothing untoward in two traders from competing banks sharing information about a potential customer. But on its own this is insufficient to meet the requirements of the case that was brought by the Commission, that is the ambitious case of a SOC in which all of the respondent banks participated.

[117] To the extent that there would be doubt in relation to the Commerz Bank, or for that matter Nomura, reference should be made again to the provisions of Tribunal Rule 15 (2) to the effect that the Commission is required to set out a concise statement of the grounds of a complaint which contains the material facts or the points of law relevant to the complaint relied on by the Commission in respect of the allegations that demonstrate that a party was in breach of a provision of the Act; in this case s4(1) (b) of the Act..

[118] The complaint had to be pleaded with sufficient factual particularity to enable a respondent to ascertain the case that it is required to meet; in this case that it participated in a SOC and that its conduct met, at least *prima facie,* all of the requirements necessary to show that it was a participant in the alleged SOC. It is this set of requirements which are a bridge too far for the Commission in regard to these respondent banks; a burden made significantly more onerous by virtue of the Commission's entire case being based on the existence of a SOC. And further that personal jurisdiction had to be established.

Macquarie Bank Limited (thirteenth respondent)

[119] Macquarie is a peregrinus bank. There is but one paragraph which alleges that Macquarie was part of the SOC. In paragraph 116 of the referral affidavit the following was alleged:

> 'On 11 September 2013 Chia, Kunene, Murray, Atkins, Harkins, Donnely, Fryday, Bhana and Naidoo were participants in an implicated chatroom which Chia and Kunene discussed bid offer spread for the USD/ZAR (sic). Murray shared competitively sensitive information.'

[120] It was stated that Chia, Murray, Atkins, Harkins, Donelly and Fryday were representatives of Macquarie. It means that the only other persons implicated in this chatroom were Kunene, Barna and Naidoo. The Commission alleges that Kunene represented Absa Bank Limited but makes no further reference to Barna and Naidoo.

[121] On its own, at best for the Commission this would establish a prohibited practice between Macquarie and Absa involving a single instance of information sharing on a single day, namely 11 September 2013. Such a case could have been brought but it was not. Counsel for the Commission sought to salvage this aspect of the Commission's case by saying that anyone who became a participant in any chatroom or on the Bloomberg terminal somehow would know or should reasonably have known the chatroom was used as a primary mode of communication to implement the terms and further the objectives of the SOC. Thus, it would have known through access to the chatroom that even a participant in but one chat would know of the other conduct alleged or planned to be put into effect by the remaining participants in the SOC.

[122] The difficulty is that there is nothing in the referral affidavit from which these conclusions can be inferred. In effect, the only evidence available was from the Bar which was insufficient, nor did the referral, as indicated earlier in this judgment, distinguish between information in relation to currency trading which is in the public domain and that which was privy to the participants in the SOC. It is difficult to see how a case can be made out that a respondent bank participated in the overall SOC as pleaded on the basis of a single chatroom with a member of Absa. What compounds the difficulty is that Mr Howes of Absa provided detailed information to the Commission, pursuant to the leniency application which had been successfully made by Absa. One would have expected the Commission to specify information Macquarie might have acquired or shared in its engagement on a single occasion with Absa. It is simply insufficient for the referral affidavit to refer blandly to 'other instances of conduct' to implement the SOC without any specification thereof. Most certainly no instances of other conduct by Macquarie are alleged to have taken place.

[123] It is also significant that the Commission's case was based on argument that it was foreseeable that the SOC would have the requisite effect in South Africa in respect of subject matter jurisdiction by *peregrini* banks. There was not a single reference to Macquarie in this regard. Even leaving aside this problem of subject matter jurisdiction, there is simply insufficient evidence to connect Macquarie to the overall SOC which was an essential requirement of the 2020 order of this Court to establish personal jurisdiction.

JP Morgan Chase (the third and fourth respondents)

[124] Significantly, these parties did not appeal the finding that the Tribunal had personal jurisdiction over this case. The case against these respondents was therefore based on the failure to establish subject matter jurisdiction on the part of the Commission. The case of fourth respondent was that the Commission was required to plead facts to establish that the cause of action, being a participant in the SOC, was based on business carried on by fourth respondent's Johannesburg branch or that the collusive conduct was attributable to its appointment as an authorized dealer in South Africa.

[125] In relation to the fourth respondent, the Commission pleaded that Mr Akshay Aiyer and Mr Paul Simister were the two individuals whose conduct was evidence of participation by the fourth respondent in the SOC. However, at no point is there any allegations that either Mr Aiyer or Mr Simister worked for the fourth respondent's South African branch and exercised the powers of an authorized dealer within South Africa. Nor is there any evidence which attribute their conduct to the fourth respondent in respect of participation in the SOC. In summary, the Commission did not plead facts to establish that the cause of action arose out of a business carried on with the fourth respondent's Johannesburg branch or that the collusive conduct was attributable to its appointments and authorized deal in South Africa.

[126] By contrast to establish jurisdiction over the third respondent a *peregrinus* there is a need to plead facts which illustrate both the existence of personal and subject matter jurisdiction.

[127] It is clear that Mr Aiyer and Mr Simister were employed by third respondent. Mr Aiyer was convicted in the US District Court for the Southern District of New York for conspiring to fix prices and rig business in Central and Eastern European, Middle Eastern and African currencies. Thus, the Commission should have had significant information about his participation in the SOC. Nonetheless, there was a plethora of evidence provided in the referral affidavit about the participation; particularly of Aiyer in various chatrooms particularly in the ZAR chatroom. It is so that a number of these engagements were with traders who were employed by peregrinus banks. For example on 10 April 2012 Aiyer participated with Mr Duncan Howes of Absa in an implicated chatroom during which he was provided with information by Howes on a proposed bid spread. There is a further reference to a chat on 10 April 2012, where Howes and Aiyer discussed bid offer spreads. There are also references to participation with a key figure in the entire chain of events, being Mr Jason Katz in particular on March 2012.

[128] The regularity in which Mr Aiyer participated in implicated chatrooms (albeit that Mr Simister does not appear to have been referred to on more than one occasion) provides, at least, a *prima facie* basis for the justification that through the role in particular of Aiyer, the third respondent participated in the SOC as pleaded and that it has a case, at least to answer. The same however cannot be said of fourth respondent.

HSBC Bank PLC (fourteenth respondent) and HSBC USA National Association Inc (nineteenth respondent)

[129] The nineteenth respondent is a pure peregrinus such that both personal and subject matter jurisdiction are required. By contrast, the fourteenth respondent is a local peregrinus; hence only subject matter jurisdiction is required.

[130] The referral affidavit, to a considerable extent, conflates the cases against the fourteenth and nineteenth respondents. It alleges that there is intertwined conduct between the two respondents. Hence the difficulty in analyzing the Commissions case against these respondents is the lack of any separation between conduct alleged to have been implemented by the fourteenth respondent as opposed to the nineteenth respondent.

[131] The key to the Commission's case, read as coherently as possible involves Mr Hatton, who the referral affidavit states was employed by the nineteenth respondent from 1 September 2005 to 30 October 2010. The referral affidavit implicates Mr Hatton in 28 of 160 instances of conduct described as constituting the existence of the SOC which includes six *peregrini* banks. To the extent that a South African bank is alleged to have been involved in any dealing with the nineteenth respondent there are three instances on 27 May 2010, 19 September 2012 and 20 September 2012. However, in none of these cases was any employee or representative of the nineteenth respondent named as having been involved.

[132] In none of these instances has the Commission even identified a single employee or representative of any of the South African banks, (Absa, FirstRand,

Standard Bank, Investec) with whom the nineteenth respondent could have agreed to have participated in the overall SOC.

[133] In terms of the referral affidavit Mr Hatton ceased to be employed by the nineteenth respondent as at 30 October 2010. The other employer of the nineteenth respondent, Mr Mirkovic, was not alleged to have been an active or passive participant in any of the conduct implementing the conspiracy. In the only instances in which Mr Mirkovic was mentioned, his involvement was peripheral and hardly takes the Commission's case any further. Even the fact that Mr Hatton was employed in events that occurred after October 2010 insofar as the nineteenth respondent is concerned can be discounted. In summary, Hatton is implicated in exchanges with six banks, none of which was a South African bank. Unlike the case against fourth respondent, the Commission has failed insofar as the nineteenth respondent is concerned to link it to any South African Bank.

[134] To emphasize again, to establish personal jurisdiction the Commission had to show that all of the respondent banks had reached an agreement and/or coordinated the activities to participate in the SOC and that there was sufficient South African involvement so as to justify a finding of personal jurisdiction as opposed to subject matter jurisdiction.

[135] Turning to the fourteenth respondent, it is a local *peregrini* and only subject matter jurisdiction is required. Mr Hatton was a regular participant in the chatroom. Counsel for the fourteenth respondent conceding that he was implicated on 28 occasions. While counsel argued that this amounted to 28 out of 160 instances. It remains however evidence of regular interaction. There are 31 references to Mr

Hatton in the referral affidavit from 2007 to 2010, that is prior to his termination of employment with these two respondents. It is possible that there were only 28 events in which he participated but there can be no doubt that for the period 2007-2010 there is clear *prima facie* evidence of participation in the SOC as a result of Hatton's conduct. While nineteenth respondent admits that Hatton was its employee, the allegations of participation in trading as contained in the referral affidavit entitles the drawing of an inference that fourteenth respond has been correctly connected to the SOC. Of further significance is the affidavit deposed to by Mr Altini on behalf of both these respondents; in particular the conflation in this affidavit of the respective activities of these two respondents. There is no clear denial that Mr Hatton had nothing to do with the activities of fourteenth respondent. Given the extent of Hatton's role and that only subject matter jurisdiction is required fourteenth respondent has a case to answer.

<u>The Credit Suisse Group and Credit Suisse Securities (USA) LLC (eleventh and twenty third respondents)</u>

[136] The complaint referral against CSG has already been analysed. It was a holding company. It did not trade for its own account. It had not been licensed to conduct a foreign exchange trading business. It did not employ nor was it represented by employees alleged to have participated in the alleged contravention on its behalf. It was thus improperly included in the referral.

[137] In the case of CSS the complaint sets out participation in the implicated chatroom by two individuals Mr Hatton and Mr Putter. The Commission alleges that eight chats involving these employees took place between November 2010 and May 2011. There is one reference to Putter who was a member of a separate chat with

Katz where it was alleged that they exchanged commercially sensitive information and shared information on bid offer spreads. By contrast, Hatton was a particularly active member of the Old Gits chatroom, the longest running and most prolific of all the implicated chatrooms on the Bloomberg Platform. Hatton had significant communication with the key player in the chatroom, being Katz.

[138] CSS' counsel submitted that in the case of CSS, the Commission's case illustrates that it was predominantly in communication with *peregrini* banks, being the Bank of America, Citibank, Standard Chartered and Merril Lynch. However Barclays Capital was also in the Old Gits chatroom. The evidence suggests that the representative of Barclays (the seventeenth respondent which applied for leniency) and Citibank which conducts the business of a bank in South Africa through a branch and which reached an agreement with the Commission confirmed in an order of 26 April 2017 were also present in the chatroom. Standard Chartered also reached an agreement with the Commission. It too had an office in South Africa.

[139] For these reasons it is incorrect to suggest that the case brought against CSS was that it was party to chats in the chatroom, only with "American Banks". In addition, CSS is a local peregrinus and only subject matter jurisdiction is required in this case. Much was made by CSS' counsel of non-compliance with the 2020 order in that her client could not investigate whether the complaint was time barred or could plead a time bar defense on the basis that the Commission had not provided a date on which the SOC ended or particularly at what point the CSS ceased participation in the SOC. However in substance, the referral affidavit in this case, *prima facie,* implicates CSS. The intensity of Hatton's involvement in chatroom exchanges of information on behalf

of a local peregrinus justifies the conclusion that CSS has a case to answer on the basis of the referral affidavit.

Standard New York Securities Inc (SNYS) (sixth respondent); Standard Americas Inc (twenty eighth respondent)

[140] SNYS has been dealt with earlier but because of the link to the twenty-eighth respondent the background to this referral reasons of considerable significance. On 15 February 2017 when the Commission initially referred its complaint referral to the Tribunal, it included SNYS (the sixth respondent) but it did not cite the twenty eighth respondent in the initiation statement, its amendment or the complaint referral.

[141] In March 2017 attorneys representing SNYS informed the Commission that traders alleged to have acted on its behalf were not employed by it but rather by the twenty eighth respondent. For reasons which are unexplained, the Commission ignored all this information for more than three years, notwithstanding the various supplementary affidavits that it filed during this period. Only on 1 June 2020, when it sought to respond to the order of this Court by filing a replacement to the referral affidavit, did it include the twenty eighth respondent. It continued to include the sixth respondent in its referral affidavit.

[142] The problem for the Commission is that SNYS never engaged in forex trading, a point it made repeatedly to the Commission. In addition, SNYS is a peregrinus and no evidence connecting it to the SOC was adequately pleaded. It is simply insufficient to simply state as the Commission had done that SNYS was relevant as a respondent in that:

> ‘[i]n the context of an alleged cartel and in the absence of viva voce evidence, we would be reluctant at this early stage of the proceedings to dismiss the Referral against a particular respondent.’

[143] It is this regrettable failure which is fatal to the case that it brought against the twenty eighth respondent. For reasons already set out in this judgment it is clear that the intention of the order of this Court of 2020 was not to bring additional parties before the Tribunal but to reconfigure the hopelessly inadequate referral affidavit which had been the subject of the earlier proceedings. It did not entitle the Commission to include further parties into a case effectively notwithstanding the need to recraft an inadequate referral affidavit.

[144] In the case of the twenty eighth respondent the Tribunal again sought to come to the assistance of the Commission by reference to the judgment of *Competition Commission v Yara (South Africa) (Pty) Ltd and others* 2013 (6) SA 404 (SCA) and the *Competition Commission v Pickfords Removals SA (Pty) Ltd* 2020 (10) BCLR 1204 (CC). These judgments held that an initiation is targeted against conduct not particular parties and further it is permissible to add a respondent to a complaint initiated at an earlier stage. The Tribunal adopted the view that joining the twenty eighth respondent in June 2020 for the first time would not prejudice it because the matter had not progressed past the pleading stage. Leaving aside the regrettable elision of the Tribunal over the legal significance of the 2020 order, as the Supreme Court of Appeal stated in Yara at para 29:

> ‘Absent any evidence of an express – albeit informal – initiation the question will be whether a tacit initiation had been established. That will be a matter of inference which

depends on the inquiry whether or not it is the most probable conclusion from all of the facts, the Commission had decided to initiate the additional complaint.'

[145] On the facts of the case against the twenty eighth respondent, it is difficult to see how tacit initiation was established. The twenty eighth respondent was not a respondent when the complaint was first initiated in April 2015. It was not the subject of investigation by the Commission at the date of filing of its amended form CC1, nor in the initiation statement in August 2016, nor was it the subject of investigation at the date of referral.

[146] On the Commission's own version it was only when it prepared its amended referral on 1 June 2020 that the Commission considered including the twenty eighth respondent in its referral. This was not the kind of case where the Commission could have argued that as the cartel operated in secret it had difficulty in detection because it had obtained clear information as at 1 April 2015 which, had it wished, it could have also included the twenty eighth respondent. It failed to act prudently. There was, in short, no basis for the Tribunal to have upheld the Commission's application to join Standard America as twenty eighth respondent in the complaint referral.

<u>BNP Paribas (second respondent)</u>

[147] The second respondent is a local peregrinus and accordingly only subject matter jurisdiction needs to be established. According to the Tribunal second respondent sought an order directing the Commission to amend or supplement its referral affidavits, arguing that no cause of action was disclosed, that the alternative referral affidavit was vague and embarrassing due to the Commission not specifying

the end date of the SOC or whether each respondent remained as participants or had exited the SOC. It argued that if it exited from the SOC, there was no indication that it had done so. The essential argument before the Tribunal was that the allegations that have been brought against it were vague and embarrassing on the basis that there was no indication as to when a SOC ended, there was no specification of the period in which the second respondent's participation had began and ended. It was thus embarrassed in pleading to these allegations.

[148] By contrast to a number of respondent banks, second respondent chose not to expressly raise the question of subject matter jurisdiction. On the basis of the law, even as set out in TWK, the question of appealability in relation to jurisdiction is clearly not constrained by the dismissal of an exception. But on the basis of *TWK*, this is not the case with regard to the bringing of an exception based on vague and embarrassing pleadings. To that extent, a point never addressed by counsel for the second respondent concerned a reliance on whether it is in the interests of justice to allow an appeal in the case, against his client.

[149] As indicated, in the judgment of the Constitutional Court in *UDM and others v Lubashe Investment Group (Pty) Ltd and others supra* included such a test for appealability for interim orders, even for courts other than the Constitutional Court. But is it applicable in this case?

[150] In this case it is clear that second respondent employed Mr Katz from September 2011 to 2013. Mr Katz was essential to numerous discussions in the chatroom. As was expressed by a number of counsel during the debate Mr Katz was the 'glue' which bound a number of the other traders together in sharing confidential

information about USD/ZAR exchange rate. That in itself places a burden upon second respondent to explain this conduct over the fairly extended period in which Mr Katz was employed by it.

[151] Furthermore, second respondent was the only respondent bank which did not seek dismissal of the case before the Tribunal. It sought that the Tribunal direct the Commission to amend or supplement its referral affidavit. Its essential argument was based on the concept of vague and embarrassing pleadings. In my view, given the role of Katz, the Commission has made out a sufficient case which requires answers from second respondent. Much was made of the non-compliance with the 2020 order, particularly, regarding the question as to when the SOC ended. Since the averment is that the SOC ended in 2013 and that Mr Katz was employed until that date, there is very little merit insofar as second respondent's argument that it was adversely affected by the alleged non-compliance with the 2020 order.

FirstRand Bank (twenty seventh respondent)

[152] FirstRand Bank was not cited as a respondent in the original complaint referral. When the Commission delivered its amended referral affidavit in June 2020 it included it as the twenty seventh respondent and alleged that it also engaged in conduct prohibited in terms of s 4 (1) (b) of the Act as a participant in the single overarching conspiracy.

[153] In contrast to the case brought against many respondent banks, the Commission did not provide any example in its referral affidavit of the twenty seventh respondent's traders engaging in contact in the chatrooms with other banks which were exchanging information or reaching agreement. Indeed in paragraph 65.20 of

the referral affidavit, the Commission accepts that it does not even know who the FirstRand Bank's traders were and has no evidence that they had participated in any chats on the Bloomberg chatroom at all.

[154] Its case against FirstRand was based on "trading data on the Reuters platform". In short, its case is based on a platform that certain market conduct by FirstRand Bank with other respondent banks took place from particular dates and that the posting of quotations on the Reuters trading platform was coordinated to amount to the manipulation of the currency.

[155] An example of its case against FirstRand Bank is the following: the Commission alleges that on Sunday 11 January 2009 between 22h59:07 and 23h48:23, following the allegation that 'Standard Securities alternatively Standard Americas Inc and UBS quoted the same ask and bid price.' RMB and Nedbank thereafter quoted identical bid prices and the ask price only differs by a pip leading to identical spot exchange rates and spreads.' Further RMB then matched Standard Securities alternatively Standard Americas Inc at the bid prices of 9.7600 and the ask price of 9.8599.'

[156] Similar allegations were raised against FirstRand Bank on 28 May 2010, 7 March 2012, 20 September 2012, 28 September 2012, 21 October 2012.

[157] It is regrettable that the Tribunal's decision against FirstRand Bank was justified on hopelessly incorrect information. For example, in finding that the express allegations in the 2020 June affidavit were that FirstRand Bank had traded through the chatrooms (a point never made in the referral affidavit) the Tribunal referred to a series of footnotes in the referral affidavit (footnote 159 and 160 of its decision to paragraphs

144,145 and 197 of the referral affidavit) as being the source of this finding. Even a cursory reading of these paragraphs reveals that the traders who are mentioned being Katz, Williams, Aiyer, Cummins, Mullaney and McInerney none of whom were ever employed by FirstRand Bank at any stage.

[158] Contrary to the Commission's counsel's attempt to exonerate the Tribunal's unfortunate error, that this was merely "a typographical error" it is not possible to find any paragraph, other than the one cited, inaccurate which could sustain the conclusion to which the Tribunal arrived.

[159] Much was made in the referral affidavit and by the Commission's counsel of consistent prices being observed across time and banks. A fundamental problem with this submission and which percolates itself throughout the referral affidavit is the inability to distinguish between information which is in the public domain; that is information available to all banks who simply have access to Reuters or a similar screen available to all banks and information that could only be the product of some form of nefarious cartel activity.

[160] At the very least the referral affidavit should have made this distinction patently clear and thus located the case which the Commission had brought against respondent banks at FirstRand within the latter as opposed to the former category.

[161] There is no case which was made out in the referral affidavit which implicates FirstRand Bank. Accordingly, the appeal against the decision of the Tribunal to

include FirstRand Bank in the case brought by the Commission clearly stands to be set aside.

[162] Turning to FirstRand Limited (the twenty sixth respondent) even the 2020 June affidavit contains no allegations against it. After the Commission withdrew a complaint against RMB Holdings Ltd as the twenty sixth respondent, it gave notice that it intended to amend the citation of twenty sixth respondent to include FirstRand Limited as a respondent in the complaint referral. Leaving aside the problem that there was no explanation as to how the allegations which had been made against RMB Holdings as a subsidiary of FirstRand Bank could simply be made to apply to FirstRand Bank Limited as the holding company of FirstRand Bank, there was little else to justify this act. Suffice to say that the joining of holding companies on the basis of s59 (3) A of the Act is not justifiable for all reasons set out already in this judgment. The Tribunal's decision to allow the Commission to join FirstRand Bank as respondent must be set aside.

Standard Bank of South Africa Limited (the eighth respondent)

[163] In this case the respondent is an incola; thus only subject matter jurisdiction is relevant. The Commission's case against Standard Bank was that it joined the SOC on 1 January 2008 when it together with Absa withheld quotes to enable Nedbank to fix exchange rate alternatively on 1 October 2012 when its employee and/or representative Brownrigg was a participant in the implicated chatroom'.

[164] Turning to the allegation that Standard Bank entered the SOC on 1 January 2008 (a public holiday in South Africa but presumably om the Commission's case

South African traders was still hard at work) the Commission was not able to refer to a single contact between Absa, Standard Bank and/or Nedbank, whether before or after that date. No trader was named who was employed by or who represented Nedbank.

[165] The first evidence that the Commission had of any contact between an employer of Standard Bank and a party allegedly employed by another respondent bank was more than four years later in 2012. Returning to the New Year's Day allegation, it is significant that the referral affidavit refers to these banks withholding quotes to enable Nedbank to fix the exchange rate at 75850. No further details are provided and one is entitled to speculate reasonably as to whether on New Year's day the withholding of quotes meant that, as the South African forex markets had been closed, the reason for the withholding of quotes may well have been due to the public holiday rather than to any nefarious activity.

[166] A further point made by counsel for Standard Bank which circles back to an observation made earlier in this judgment, is the significance of the Reuters information platform. It is similar to a news outlet in which indicative exchange rates are typically submitted by market participants by way of an automated feed that may update many times in an hour. It is not a trading platform and indicative rates published by Reuters are neither binding nor used to determine the applicable rates in actual trades. This information gleaned from the Reuters platform is hardly indicative of participation in the SOC.

[167] The other evidence cited in the referral affidavit which is relevant to Standard Bank is the following:

> 'On 19 September 2012, between 18:57:14 and 02:37:03 UTC and on Reuters trading platform, Standard Bank, represented by Brownrigg provides an unusually high spread in the market, in line with a conversation he held on the Bloomberg chatroom with Taylor. Standard Bank provides bid and ask prices of 8.2096 and 8.2597 creating a spread of 0.1001. This spread is unusually high, and was in force for quite some time, so that the chat between Brownrigg and Taylor confirmed what was already long agreed between the participants of the conspiracy. The spread is unusually high considering the fact that, although spread depend on market conditions on order sizes, the data shows that banks normally do not charge a spread that exceeds 0.06. the spread of 0.1000 is associated with Standards Bank, Absa and Nedbank.' (referral affidavit at para 192.11)

[168] Significantly, Brownrigg was not an authorized trader but an institutional sales person which role it was to solicit offers from other institutions, including South African and foreign banks, to buy and sell foreign currency from and to Standard Bank in its capacity as an authorized dealer. Brownrigg did not represent Standard Bank on the Reuters trading platform at any time relevant to the complaint. Furthermore, it was never explained as to whether the communication between Brownrigg and Taylor was a normal conversation that took place in the ordinary course of Forex dealing between authorized dealers in South Africa or, alternatively that there was something nefarious in this particular contact.

[169] According to the evidence provided by Taylor, who was an employee of Barclays Investment Bank and on whose behalf he contacted Brownrigg, Barclays was

not a ZAR Bank. That meant that if Taylor wished to buy or sell ZAR he would have needed to approach a 'ZAR Bank' in order to do so, this normally being Absa, because it was a member of the Barclays group.

[170] All of this evidence was made available to the Commission including the identity of Taylor's employer and the nature of his engagement with Brownrigg. The Commission inexplicably persisted in finding that there was plausible evidence of Standard Bank's participation in the SOC, on the basis of this cohort.

[171] The Commission also sought to make much of the role of Messrs. Richard De Roos and Robert Silverman, who the Commission contended, were employed by or represented Standard Bank New York alternatively Standard Bank. Significantly when De Roos and Silverman are cited in the referral affidavit they were cited within the following context:

> 'On 13 April 2011, Katz and Howes were participants in an implicated chatroom in which the following communication took place: Katz told Howes about how his contacts at Citibank, Standard Chartered and Standard Securities pulled their offers in order to allow him to go first and put his offer. I understand that the contacts of Katz at Standard Securities alternatively Standard Americas included Silverman, de Roos and Friedman.'

[172] In this passage in the referral affidavit the Commission avers that de Roos and Silverman were representatives of Standard Securities alternatively Standard Americas. There is no suggestion of participation or a link in this connection with Standard Bank South Africa.

[173] In the case against Standard Bank the skeletal nature of any allegations reveals that there is no basis by which its activity fell within the scope of subject matter jurisdiction. To find, as the Tribunal did, that there are disputes that only can be determined after the benefit of a full hearing bears little relationship to that which is contained in the referral affidavit. The case does not get out of the legal starting blocks.

Conclusion

[174] It is important to emphasize the scope of this judgment. It does not, in any way, sanction cartel conduct. Cartel conduct or behavior is the most egregious form of anti-competitive behavior. But, on appeal, this Court is obliged to assess whether the Commission has made out a case in terms of its pleadings which in this case is contained in the referral affidavit. It should be emphasized that in 2020 a final opportunity was granted to the Commission to reconfigure the referral affidavit after its first effort was found to be lamentably inadequate to prosecute a cartel case.

[175] The Commission based its entire case on a SOC in which all of the respondent banks were said to be participants. As set out in the discussion on the jurisprudence derived from the European courts and which was the basis of the Commission's own employment of the concept of a SOC, it was necessary for the Commission to meet the core requirements thereof.

[176] To repeat, on the Commission’s own version, it was required to show a common anti-competitive objective, that is an overall plan in which all of the respondent banks participated to pursue a common economic objective. It was required to show that each firm had made an intentional contribution by its own conduct to the common

objectives pursued by all of the participants to the SOC. It further was required to show that each respondent bank was aware of the actual conduct planned or put into effect by the other undertakings in pursuit of these objectives; that is to perpetuate a SOC or that each respondent bank could reasonably have foreseen that it participated in the SOC and that it was prepared to take the risk. As is evident from 2020 Court order it behoved the Commission to provide significant further details in the referral affidavit over and above its initiation referral affidavit to show that this overall conspiracy could be proved to include all the respondent banks.

[177] Compounding the difficulty of this ambitious cause of action as developed by the Commission was the fact that a number of the banks were *peregrini* as a result of which the Commissions was required to make a showing of both personal and subject matter jurisdiction. As is evident from the 2020 judgment, this Court was prepared to extend the concept of personal jurisdiction beyond the strictures of the existing common law position; that is beyond the requirements of a local presence in South Africa or a party prepared to consent to jurisdiction. It found that in an appropriate case personal jurisdiction could be extended if there was a case in which *peregrini* were part of a conspiracy in which they participated with South African banks directly such that *peregrini* banks could be considered to be participants in the cartel. That was the very least that was demanded from the 2020 order.

[178] Manifestly, evidence to that effect is designed to meet the requirement of personal jurisdiction. It is an onerous requirement because by so developing the law, this Court was prepared to extend the concept of personal jurisdiction to meet the demands of a global economy in circumstances where this development was suitably circumscribed by means of the evidence required. In addition, the Commission was

required to make a showing of subject matter jurisdiction which in essence is encapsulated in s3 (1) of the Act. The Tribunal, unfortunately, conflated these two requirements. The Tribunal's treatment reduced the personal jurisdiction component to an almost meaningless exercise. It is important to distinguish these two requirements to ensure that both are adequately shown by the Commission in seeking to hold *peregrini* banks accountable for their conduct.

[179] It is for this reason that an occasional participation in a chatroom or unspecified conduct which is tenuously inferred as being part of the overall conspiracy is insufficient to meet these jurisdictional requirements.

[180] While subject matter jurisdiction is widely couched in the words employed in s 3 (1) the basis of subject matter jurisdiction was set out expressly in the referral affidavit as follows:

> 'The conspiracy had a direct or immediate, and substantial effect in the Republic and it was foreseeable that the impugned conduct would, or had the potential to, have such an effect.
>
> The common manner in which the effects of the impugned conduct are felt is that buyers of ZAR pay artificially inflated prices for buying the currency and sell at artificially reduced prices when selling the currency.'

[181] It should be noted that the manner in which 'the effect of the conduct' is set out in the referral affidavit has significant implications. As pointed out in argument by counsel for the third and fourth respondents, between 2007 and 2013, the relevant period for the case brought about the existence of the SOC, daily trades in the South African domestic forex market increased from USD10.7b to USD18b. The daily ZAR foreign exchange on the spot markets amounted to approximately USD 26.28b with

USD 6.6b daily on the outright forwards market. The largest single transaction pleaded by the Commission in respect of the alleged SOC was USD 25m.

[182] It may well be that the effect that various trades documented by the Commission had on the Rand was so insignificant as to have had no material effect thereon. But that is a matter which is better dealt with at trial where the respondent banks, which have a case to answer, can provide evidence to gainsay the case made by out by the Commission.

The finding

[183] In summary this Court has come to the following set of conclusions: A holding company which is not registered as a bank, not authorized to trade in foreign currency and whose role is simply shown to be that one of the subsidiaries traded in foreign currency cannot on this alone be included in the referral affidavit. Accordingly, the twenty fourth respondent, (Nedbank Group) the twenty sixth respondent, (FirstRand Limited), the eleventh respondent (Credit Suisse Group), the twenty first respondent, (BANA), were incorrectly joined in the referral affidavit and their opposition to the Commission's attempt to join them in these proceedings must succeed.

[184] The Tribunal's finding that the referral affidavit which was placed before the Court when it made its 2020 order could be reconfigured to pass legal muster could include further banks subsequent to the initial referral to the Tribunal must be set aside. That means that the twenty fifth (Nedbank Ltd), twenty seventh and twenty eighth respondents (FirstRand Bank Ltd and Standard Americas Inc) which were only

cited in June 2020 were improperly joined. Their application to set aside the joinder must succeed.

[185] This Court has emphasized that there are clear separate requirements to establish personal and subject matter jurisdiction. In the case of the pure peregrini both requirements must be established in order for the referral to meet the requisite legal standards. It was made clear in the 2020 judgment of this Court that the Commission was required to allege that there were adequate connecting facts between the parties and the jurisdiction of the Tribunal sufficient to establish personal jurisdiction against all of the named respondents. As repeatedly emphasized that is an onerous requirement. The reference to occasional participation in a chatroom without any additional evidence and where there was no link to any South African bank is inadequate to meet the test as set out in the 2020 order. Accordingly, the Commission has failed to show the requisite personal jurisdiction in the case of the fifth respondent, (ANZL) ninth respondent, (Nomura) twelfth respondent, (Commerz Bank) thirteenth respondent (MaQuire) and nineteenth respondent (HSBUS).

[186] In the case of the sixth respondent it was made clear to the Commission that none of the alleged traders have been employed by this respondent and accordingly there was no basis by which it should have been joined to these proceedings.

[187] In the case of the incolae and local *peregrini* only subject matter jurisdiction was required. In the case of the fourth respondent (JP Morgan) the Commission has failed for reasons set out above to meet this requirement.

[188] In the case of the balance of the respondents, being the second respondent (BNP Paribas), the third respondent (JP Morgan Chase Bank), the fourteenth respondent (HSBC Bank PCC) and the twenty third respondent (Credit Suisse Securities) sufficient facts were placed in the referral affidavit to justify the referral affidavit and the need for the matter to proceed to trial.

Costs

[189] In the *Competition Commission v Pioneer Hi-Bred International Inc and others* 2014 (2) SA 480 (CC) at para 27 the Constitutional Court held that this Court's discretion to award costs in respect of proceedings before it was subject to the "requirements of the law and fairness". The Constitutional Court held thus:

> 'The principle that should inform the CAC's discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the bona fide fulfilment of its mandate by the threat of an adverse costs award. This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully. The principle would fittingly fall within the requirements of law guiding the exercise of the CAC's discretion, as it is well established in precedent.'

[190] This is a case in which the Commission ought not to be mulcted with costs in that it was prosecuting allegations of cartel conduct in bona fide fulfilment of its mandate in the public interest.

Order

[191] For these reasons the following order is made:

1. The appeals against paragraphs A [1], C [1] 1.1, C [1] 1.3 in respect of the fourth respondent, C [1]1.4, C [1]1.5, C [1] 1.6, C[1] 1.7, C [1] 1.9, in respect of the eleventh respondent, C[1]1.10, C [1] 1.11, C [1] 1.12 in respect of fourteenth respondent, C [1] 1.13, C [1] 1.14 and C [1] 1.15 are upheld.
2. The appeals by the second, third, nineteenth and twenty third respondents are dismissed.
3. The order of the Competition Tribunal of 30 March 2023 is set aside and replaced with the following:

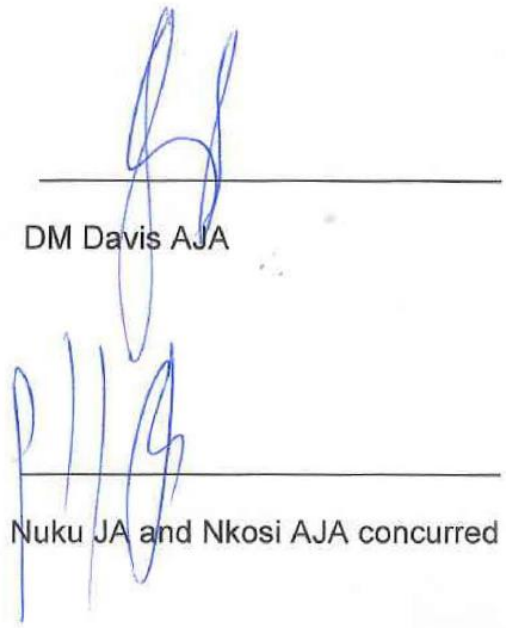
   3.1. The following applications are dismissed.

   3.1.1 BNP Paribas (second respondent) notice of exception under case number CR212FEB17/EXCO55Jun20;

   3.1.2 JP Morgan (third respondent) application brought under case number CR212Feb17/DSMO88Aug20;

   3.1.3 Exception application brought by Credit Suisse Securities (twenty third respondent) under case number CR212FEB17/DSM107AUG20;

   3.1.4 HSBC (fourteenth respondent) dismissal application file under case number CR212FEB17/EXCO93AUG20.
4. The respondents listed under paragraph 3 must file their answering affidavits to the referral within 40 days of the order of this Court.
5. There is no order as to costs.



DM Davis AJA

Nuku JA and Nkosi AJA concurred

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Date of Hearing	:13 – 16 November 2023
Date of Judgment	: 8 January 2024