THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 784/12

In the matter between:

COMPETITION COMMISSION **APPELLANT**

v

YARA (SOUTH AFRICA)(PTY) LTD **FIRST RESPONDENT**
OMNIA FERTILIZER LTD **SECOND RESPONDENT**
SASOL CHEMICAL INDUSTRIES LTD **THIRD RESPONDENT**

Neutral citation: *Competition Commission v Yara (SA)(Pty) Ltd* (784/12) [2013] ZASCA 107 (13 September 2013).

Coram: Brand, Nugent, Malan, Petse and Saldulker JJA

Heard: **19 August 2013**

Delivered: **13 September 2013**

Summary: **Competition Act 89 of 1998 – initiation of complaint by Commissioner in terms of s 49B(1) can be informal and even tacit – where referral to the Tribunal embodies new complaints not covered by complaint submitted by a complainant in terms of s 49B(2)(b) – the enquiry is whether new complaints were as a fact initiated by the Commission.**

ORDER

On appeal from: The Competition Appeal Court (Dambuza JA; Davis JP and Mailula JA concurring sitting as court of appeal from the Competition Tribunal):

1 The appeal is upheld with costs, including the costs of two counsel, to be paid by the second respondent.

2 The order of the Competition Appeal Court is set aside and replaced with the following:

'The appeal is dismissed and the appellants are ordered, jointly and severally, to pay the respondent's costs, including the costs of two counsel.'

JUDGMENT

BRAND JA (NUGENT, MALAN, PETSE AND SALDULKER JJA concurring):

[1] This is an appeal against an order of the Competition Appeal Court (the CAC) which overturned an order of the Competition Tribunal (the Tribunal). Proceedings commenced with an application by the Competition Commission (the Commission) to amend its referral of a complaint to the Tribunal against the three respondents. At the same time the second respondent brought a counter-application to have that referral declared invalid and set aside. The Tribunal granted the application to amend and dismissed the counter-application. The first and second respondents successfully appealed to the CAC against both facets of the Tribunal's order. What the appellant effectively seeks in this appeal is a reinstatement of the Tribunal's order. The appeal is with the leave of the CAC, following upon an unsuccessful application by the Commission for direct access to the Constitutional Court. The judgment of the Constitutional Court has since been reported sub nom *Competition Commission v Yara South Africa (Pty) Ltd* 2012 (9) BCLR 923 (CC).

[2] The appellant is the Commission. The first respondent is Yara (South Africa) (Pty) Ltd (Yara). The second respondent is Omnia Fertiliser Ltd (Omnia), while the third respondent is Sasol Chemical Industries Limited (Sasol). Due to Yara's recent liquidation, it did not take part in the appeal proceedings. For reasons that will soon become apparent, Sasol neither supported nor opposed the appeal. This left Omnia as the only persisting respondent.

[3] The issue to be determined is in essence whether a particular complaint referral to the Tribunal by the Commission, and an amendment to that referral, complied with the requirements of the Competition Act 89 of 1998 (the Act). The outcome turns in the main on an interpretation of s 49B and s 50 of the Act. By the nature of things, the provisions of these two sections will require detailed examination in due course. However, suffice it to say by way of introduction, that s 49B provides for two ways in which complaints against alleged prohibited practices can start, ie: the Commission may initiate a complaint in terms of s 49B(1), or a private person – referred to as the complainant – may submit a complaint to the Commission in terms of s 49B(2)*(b)*. In terms of s 50(1) the Commission may refer its own complaint to the Tribunal at any time after initiating. With regard to complaints submitted by complainants, the Commission does not have the same freedom in its referral. In terms of s 50(2) it must within one year after the submission, either refer the complaint to the Tribunal – if it determines that a prohibited practice has been established – or issue a notice of non-referral to the complainant. If it does neither, it is deemed by s 50(5) to have issued a notice of non-referral. In either event the complainant itself may then refer the complaint to the Tribunal.

[4] It appears that Omnia would have had no objection if, on the facts of this case, the Commission had initiated and referred its own complaint to the Tribunal via the s 49B(1) and s 50(1) route. The nub of Omnia's case is that this is not what the Commission purported to do. What the Commission purported to do, so Omnia

contended, was to refer the complaint submitted to it in terms of s 49B(2)*(b)* by two entities, Nutri-Flo CC, and Nutri-Fertiliser CC – referred to, collectively, for present purposes, as 'Nutri-Flo' – to the Tribunal in terms of s 50(2)*(a)*. When the Commission subsequently brought an application to amend its referral, it was opposed by Omnia. In addition, Omnia brought a counter-application for the referral to be set aside on the basis that it was not covered by Nutri-Flo's complaint and that the position was exacerbated by the amendments sought. The Tribunal did not uphold Omnia's contentions, but the CAC did. The question whether we agree with the one rather than the other falls to be determined in the light of the background facts.

[5] Nutri-Flo blends, distributes and supplies fertiliser in the province of KwaZulu-Natal. On 3 November 2003 it submitted a complaint to the Commission in terms of s 49B(2)*(b)* in the prescribed form, CC1, dated 30 October 2003. At around the same time Nutri-Flo lodged an urgent application for interim relief with the Tribunal in terms of s 49C. The CC1 form was accompanied by the same affidavit which had earlier been filed in support of Nutri-Flo's notice of motion seeking interim relief. The CC1 form stated that the complaint was one concerning two identified companies in the Sasol group – collectively referred to as Sasol – and no one else. In the part of the CC1 form headed 'description of complaints' it is stated that '[t]he respondents (Sasol) have imposed price increases in respect of raw materials it supplies to [Nutri-Flo] to such an extent as to render its continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached hereto'. In the accompanying affidavit, as in the notice of motion which it accompanied earlier, three parties were cited as respondents, namely, Sasol, Yara – known at the time as Kynoch – and Omnia – known at the time as Nitrochem. The affidavit specifically stated, however, that Yara and Omnia 'have been joined in this application because of their legal interest in the matter' and that 'no relief is sought against' them.

[6] The deponent to the affidavit was a member of Nutri-Flo, Mr William Lyle. He started out by explaining that the three respondents were all involved in the

manufacture and supply of fertiliser and that Yara and Omnia were the direct competitors of Nutri-Flo in the downstream market of KwaZulu-Natal. But the main focus of the attack in the affidavit was clearly aimed at Sasol as Nutri-Flo's supplier of raw materials. In broad outline the attack rested on the following allegations.

a) Two of the basic elements of fertilisers are Nitrogen and Potassium. The main sources of Nitrogen are ammonia and ammonia derivatives like Ammonium Nitrate Solution (ANS) and Limestone Ammonium Nitrate (LAN). Sasol manufactures ammonia as a by-product of the coal to oil process. In fact, it is the only producer of ammonia in South Africa. Moreover, because of the physical characteristics of ammonia, its importation is not viable. Consequently, Sasol is the only source of ammonia and ammonia derivatives as raw materials in this country.

b) Ammonia derivatives can often, but not always, be replaced with Urea since both are nitrogenous fertilizers. But the chemical manufacture of Urea is no longer undertaken in this country. It has to be imported from elsewhere. The same goes for the main source of Potassium which is Potassium Chloride (KCL). It does not occur naturally in South Africa. In consequence it is also imported.

(c) With regard to Urea and KCL, Lyle then went on to say:

'KCL and Urea are imported by a cartel ("the cartel"), of which Sasol is a member and which cartel collusively controls the price at which these products are sold in the local market. The other members of the cartel are the third respondent [Yara] and fourth respondent [Omnia].'

And:

'. . . [T]he importation of [Urea and KCL] by the cartel, which exclusively controls the prices, collusively, of these products in South Africa, gives Sasol considerable market power in relation to these products.

The collusive dealings between the members of the cartel to fix the price of Urea and KCL is evident from what is stated herein.

Moreover, Sasol has exercised its market power in relation to Urea and KCL to impose an insurmountable barrier to Nutri-Flo importing Urea and KCL directly for its use.

This barrier is Sasol's threat to Nutri-Flo of a refusal to supply Nutri-Flo with ANS and LAN if it continued to import Urea and KCL from the world market.'

(d) This led Lyle to conclude that Sasol was not only dominant in the markets for the supply of ANS and LAN, but also in the markets for the supply of Urea and KCL.

These allegations clearly foreshadowed Nutri-Flo's complaints against Sasol, in terms of s 8 and s 9 of the Act, that were to follow.

(e) Under the heading '[t]he new complaint against Sasol' Lyle set out the circumstances that had caused Nutri-Flo to submit the complaint and to seek urgent relief by way of an interim interdict against Sasol. According to this exposition Nutri-Flo's actions were triggered, in essence, by substantial increases of Sasol's prices to Nutri-Flo which took effect on 1 September 2003. The imposition of these new prices, so Lyle contended, constituted an abuse of dominance by Sasol in contravention of the Act, aimed at intimidating Nutri-Flo into abandoning an earlier complaint against Sasol and driving Nutri-Flo out of the market.

(f) Under the heading '[p]rohibited practices' Lyle then contended that Sasol's anti-competitive conduct in relation, inter alia, to the September 2003 increases, resulted in Sasol committing three prohibited practices, in contravention of ss 8*(a)*, 8*(c)* and 9(1)*(c)* of the Act, namely, exclusionary pricing, excessive pricing and discriminatory pricing.

[7] The Commission investigated Nutri-Flo's initiating complaint and on 4 May 2005 referred a complaint against Sasol, Omnia and Yara to the Tribunal. The referral contained complaints of exclusionary and excessive pricing by Sasol in contravention of ss 8*(a)* and 8*(c)* of the Act. Those are irrelevant for present purposes. In addition, the complaint referral alleged that Sasol, Yara and Omnia had engaged in collusive dealings in contravention of s 4(1)*(b)*, alternatively s 4(1)*(a)* of the Act, inter alia, by engaging in market division, price fixing with regard to KEL and Urea and bid rigging in respect of exports with regard to ammonia derivative products.

[8] On 18 May 2009 the Commission and Sasol entered into a consent and settlement agreement. Sasol admitted that it had acted in contravention of s 4(1)(b) of the Act by agreeing with Yara and Omnia on various pricing formulae for, and discounts applicable to, the products that it, Yara and Omnia, manufactured and/or supplied and by making further collusive arrangements in certain provinces.

Pursuant to the agreement, Sasol provided the Commission with details on how these agreements were reached and enforced. In addition, it undertook to cooperate with the Commission in prosecuting Yara and Omnia.

[9] The Commission, together with Sasol, applied to have the consent and settlement agreement made an order of the Tribunal. Despite Omnia's opposition, the agreement was confirmed as an order of the Tribunal on 20 May 2009. In terms of the consent and settlement agreement Sasol paid to the Commission an administrative penalty of R250 680 000. Subsequently, the Commission included details of the information Sasol had provided to it in its witness statements and further particulars provided to Yara and Omnia at their request. When Yara and Omnia both indicated that they considered the information provided by Sasol to go beyond the scope of the complaint referral, the Commission gave notice of its intention to amend its referral so as to include particulars of collusive meetings disclosed by Sasol in support of the existing complaints. Yara and Omnia opposed the amendment. This led to the Commission's application for the amendment of the referral and to the counter-application by Omnia to have the referral set aside on the basis that it went beyond the scope of Nutri-Flo's initiating complaint. As we now know, the Tribunal allowed the amendment and refused the counter-application while the CAC went the other way on appeal.

[10] A proper understanding of the CAC's judgment requires a more detailed exposition of s 49B, s 50 and s 51 of the Act. In relevant part they provide:

'**49B Initiating complaint**

(1) The Commissioner may initiate a complaint against an alleged prohibited practice.

(2) Any person may –

(a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or

(b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.

(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.

(4) . . .

50 Outcome of complaint

(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

(2) Within one year after a complaint was submitted to it, the Commissioner must –

(a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.

(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)*(a)*, it

(a) may –

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

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

(iii) add particulars to the complaint as submitted by the complainant; and

(b) must issue a notice of non-referral as contemplated in subsection (2) *(b)* in respect of any particulars of the complaint not referred to the Competition Tribunal.

(4) In a particular case –

(a) the Competition Commission and the complainant may agree to extend the period allowed in subsection (2); or

(b) on application by the Competition Commission made before the end of the period contemplated in paragraph *(a)*, the Competition Tribunal may extend that period.

(5) If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2) of the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.

51 Referral to Competition Tribunal

(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50 (1), or by a complainant in terms of subsection (1), must be in the prescribed form.'

[11] In upholding the appeal by Yara and Omnia, the CAC proceeded from the premise developed in its own jurisprudence over a series of cases, and designated by counsel for the Commission as 'the referral rule' in the present case. For lack of a more appropriate label and in the interest of conciseness I propose to adopt the same terminology. What the referral rule requires in its original form is, in short, that the referral to the Tribunal must correspond and may not go wider than the complaint submitted by the complainant or initiated by the Commission. If it does, the referral falls to be set aside. In this case the CAC took an even stricter approach by holding that, absent any initiation of a complaint by the Commission itself, it may only refer to the Tribunal those prohibited practices which the complainant intended to constitute distinct complaints. Writing for the CAC Dumbuza JA illustrated this point by the following postulate (par 35):

'For example, information relevant to a s 8 case against X may point to a s 4 contravention by X, Y and Z. However, if the information is supplied by the complainant solely in support of the s 8 case and, in circumstances where the private party did not signal an intention also to be a complainant in respect of a s 4 case, the submission of the information does not constitute the initiation of a s 4 complaint.'

[12] In applying the referral rule thus extended the CAC concluded, firstly, that the complaint by Nutri-Flo was aimed exclusively at Sasol and was never intended as a complaint against Yara and Omnia at all. Secondly, and in any event, so the CAC held, the complaints of prohibited practices against Yara and Omnia that were referred to the Tribunal went wider than the Nutri-Flo complaint, from which it followed that the referral could not stand.

[13] The Commission's contention on appeal involved a challenge firstly to the extension of the referral rule by the CAC to include the intent of the complainant, and secondly against the referral rule in its original form. These challenges direct the

focus to decisions of the CAC in which the referral rule has its origin. One of these appears to be *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 (21 October 2002). *Glaxo* concerned the referral of a complaint by the complainant itself pursuant to s 51(1) after a deemed non-referral by the Commission as contemplated in s 50(5). The respondents in the case objected to the referral on the basis that it did not represent the complaints initially submitted complaint to the Commission in terms of s 49B(2)*(b)*. In upholding the objection, the CAC pointed out that although the Act provides for a blend of public and private prosecutions of prohibited practices, the Commission is clearly the legislature's investigator and prosecutor of first choice (para 26). Only after it has investigated a complaint and decided not to prosecute may the private complainant do so. In conformance with this scheme, the Act does not allow for a complainant to bypass the Commission by holding back some of its complaints, get a non-referral and then add to the complaint that which the Commission was never told (see paras 26-28 of the judgment). In this light, so the CAC held in *Glaxo* (at para 33):

'The proper approach is to determine first what conduct is alleged in the complaint and what prohibited practices such conduct may be said to invoke or be rationally connected to. Then, consideration is given to the referral to see whether the conduct there alleged is substantially the same.'

[14] The extension of the referral rule to include the intention on the part of the complainant to complain against a prohibited practice by the respondent appears to have its origin in the decision of the CAC in *Clover Industries Ltd v The Competition Commission* 78/CAC/1 Jul 08 (12 November 2008). In this case the Commission referred a complaint against Clover and others to the Tribunal. Clover and its co-respondents objected to the referral on the basis that it derived from a complaint submitted to the Commission by a dairy farmer, Mrs Malherbe, in terms of s 49B(2) *(b)*; that the time period of one year provided for in s 50(2) had lapsed since Mrs Malherbe had submitted a complaint; and that a referral of her complaint was thus time barred by the section. The Commission's response was a denial that it acted in terms of s 50(2). The complaint referred, so it contended, did not derive from a

complaint submitted by Mrs Malherbe; it was a complaint initiated by the Commission in terms of s 49B(1) on information provided to it by Mrs Malherbe in terms of s 49B(2)*(a)*; in consequence the referral was in terms of s 50(1) which, unlike s 50(2), contains no time bar.

[15] In support of their objection Clover and its correspondents relied on *Glaxo* for the proposition that the Act did not require an exact correspondence between the complaint submitted by Mrs Malherbe and the one formulated in the referral, as long as the conduct complained of in the former and the latter is essentially the same. The CAC's answer to this argument was that, on a proper interpretation of Mrs Malherbe's letter, she did not intend to submit any complaint at all. In this light, so the CAC held (in para 11), *Glaxo* was distinguishable on the facts 'in that irrespective of the manner and the language in which the complaint served before the Commission, the party who completed the document in the Glaxo case was clearly intent on being a complainant and hence a party to the litigation'. Further (also in para 11), the CAC found that '[a]t best Mrs Malherbe's letter can only be interpreted as an articulation of a grievance alternatively a submission of information'.

[16] In applying these authorities I agree with the factual finding of the CAC that, on a proper interpretation of the complaint submitted by Nutri-Flo, it was aimed exclusively at Sasol. It was never aimed at Omnia. In other words, Nutri-Flo never intended to complain against any prohibited practice by Omnia. At the same time I do not believe that it is the kind of intent that *Clover* had in mind. All *Clover* said was that s 49B(2) draws a clear distinction between the submission of information, on the one hand, and the submission of a complaint by a private person, on the other, and that a feature distinguishing the two would be the intent of the private person: did he or she intend to submit a complaint or was the intention merely to submit information? Once it is determined that what was submitted was indeed intended to be a complaint, it makes no difference at whom the complaint was aimed. If what was submitted amounts to a complaint that A and B were involved in an agreement of price fixing, or in a concerted practice of collusive tendering, it makes no

difference that the complainant's quarrel was only with A and not with B. Ordinary language dictates that it also constitutes a complaint of a prohibited practice against B. And I can find no contrary indication in the wording of the Act. It follows, in my view, that the extension of the referral rule that the CAC subscribed to in this case cannot be sustained. I therefore found it of no consequence that Nutri-Flo's complaint was aimed exclusively at Sasol and not at Omnia.

[17] That brings me to the CAC's further finding that the complaint formulated in the referral to the Tribunal went wider than the complaint submitted by Nutri-Flo. Despite the Commission's argument to the contrary, I again find myself in agreement with the CAC's findings of fact. As we know, the referral relies on prohibited practices by Sasol, Omnia and Yara in contravention of s 4(1)*(b)*, alternatively s 4(1)*(a)*. If the Nutri-Flo complaint was indeed the only source of this complaint, it would have been hopelessly deficient. Though it relies on bald statements of cartel behaviour between the three respondents, these statements do not seem to be based on any accompanying facts. The charges in the referral of alleged prohibited practices of market division, price fixing and bid rigging in respect of exports were not covered by the complaint which Nutri-Flo submitted. There was, for example, no mention in the Nutri-Flo complaint of any alleged collusion in relation to the separate and distinct product markets for ANS, LAN or phosphate products let alone any purported collusion in respect of these products. Nor was there any mention of possible bid rigging in respect of exports. Nutri-Flo's concern was purely with the local market and, more particularly, KwaZulu-Natal. In fact, as I see it, there is an implied admission in the referral itself that the complaints referred to the Tribunal do not exclusively derive from Nutri-Flo. After setting out the Nutri-Flo complaint the referral continues (in para 11):

'The Commission has investigated the complaints and concluded that they have substance. The Commission has accordingly resolved to refer the complaints to this Tribunal in terms of this referral. In addition, the Commission has in the course of its investigations, uncovered further instances of anti-competitive conduct committed by the respondents, more fully described below. These activities are referred to the Tribunal herewith as well.'

[18] Strict application of the referral rule would therefore dictate the order that the CAC made, namely to set the referral aside. This brings me to the Commission's challenge of the referral rule itself. At the outset it seems to me that, in cases such as *Glaxo* and *Clover*, there is merit in the requirement of a correlation between the complaint submitted by the private person and the complaint eventually referred in the referral. In cases like *Glaxo*, where the complaint is referred by the original complainant and not by the Commission, the purpose of the requirement is to protect the legislature's preference of the Commission as its investigator and prosecutor of first choice. As was said in *Glaxo*, this preference dictates that the private complainant is not allowed to bypass the Commission by keeping part of the complaint in its pocket, as it were, then to introduce it for the first time after a non-referral. In *Clover,* on the other hand, the referral would have been time-barred in terms of s 50(2) if it was the complaint submitted by the original complainant. Again it was therefore necessary to investigate the correlation between the complaint submitted by the complainant and the one referred.

[19] Apart from these instances, there are other situations where it is necessary to determine the ambit of the complaint submitted by a complainant. It flows from the concept subscribed to by the legislature that the complainant's 'ownership' of its complaint does not merely entitle it to prosecute the complaint if the Commission refuses or fails to do so. The complainant also enjoys limited protection pending the Commission's investigation and prosecution of the complaint. So, for instance, the complainant may apply for interim relief in terms of s 49C; it must consent to an award of damages pursuant to a consent order in term of s 49D(3); and it may participate in the hearing of its complaint by the Tribunal in terms of s 53*(a)*(ii)*(aa)*. One of the purposes of determining the ambit of the complaint submitted by the private complainant, is therefore to define the scope of the complainant's 'ownership' of the complaint and to regulate the interrelationship between the complainant and the Commission pertaining to that complaint.

[20] My problem with the referral rule lies in the transposal of the same requirements from a complaint submitted by a private person to a complaint initiated by the Commissioner, as if the two complaint forms are exactly the same. This transposal appears clearly from the following statement by the CAC in *Netstar (Pty) Ltd v Competition Commission* 2011 (3) SA 171 (CAC) para 26:

'The process starts with the commissioner initiating a complaint in terms of s 49B(1) of the Act, or some other person submitting a complaint to the commission under s 49B(2)*(b)* of the Act. In either case the complaint must be investigated and, if the commission concludes that a prohibited practice has been established, must be referred to the tribunal under s 50 of the Act. The tribunal's jurisdiction is confined to a consideration of the complaint so referred, and the terms of that complaint are likewise constrained by the terms of the complaint initiated by the commissioner or made by some other person. Accordingly, if the original ground for the complaint is that there was a prohibited agreement, the tribunal cannot determine it on the basis that there was a concerted practice or *vice versa*.' (My emphasis.)

[21] A vital consideration in evaluating the cogency of the CAC's equation of the two complaint forms, is that with regard to formalities, the legislature draws a clear distinction between a complaint initiated by the Commission (in terms of s 49B(1)) and a complaint submitted by a private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former. Taken literally 'initiating a complaint' appears to be an awkward concept. The Commission does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the *Glaxo* case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the

initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act.

[22] The CAC's equation of the two forms of complaints gave rise to its further insistence that in both instances the complaint should contain sufficient information so as to enable the target of the complaint to respond. That appears from the next para 27 of the *Netstar* judgment which reads:

'What is required is that the conduct said to contravene the Act must be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is, and be able to prepare to meet and rebut it. It is true that the competition issues upon which the tribunal is called to adjudicate may be broader, more general and less clear-cut than those that arise in a conventional civil case in the High Court. That does not mean, however, that broad and unspecific generalities should take the place of a properly articulated complaint before the tribunal to which the target of the complaint can respond.'

[23] The motivation that the complaint – whether submitted by a complainant or initiated by the Commission – must express the conduct said to contravene the Act with sufficient clarity for the party against whom the allegations are made to know what the charge is, and be able to rebut it, was expanded upon by the CAC in the later case of *Loungefoam (Pty) Ltd v Competition Commission and others* [2011] 1 CPLR 19 (CAC) para 53. In this case it added a further rationale for the requirement by saying (in para 49):

'[I]t affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act.'

[24] But as I see it, the CAC's motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in *Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) para 17, which in turn relies on statements in the decision of the Tribunal in *Novartis SA (Pty) Ltd v Competition Commission* (CT22/CR/B Jun 01 paras 35-61). What these statements of *Novartis*

make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.

[25] Not unexpectedly, the formalism insisted upon by the CAC gave rise to difficulty where the investigation following upon a complaint revealed some ante-competitive conduct other than that objected to in the original complaint, as in fact happened in this case. The panacea proposed in *Loungefoam* (para 48) is for the Commission 'to amend the original complaint initiation, institute an investigation (however cursory) and then refer this complaint . . . to the Tribunal . . .'. But in the judgment of the CAC in the present case it specifically held (in para 39) that there is no provision in the Act or the rules of the Tribunal for amendment of a complaint. With regard to a complaint submitted by a private person this must clearly be so. I cannot see how the Commission can amend the complaint submitted by another. But it seems equally clear that the same position does not necessarily prevail with regard to complaints initiated by the Commission.

[26] The CAC also found support for the referral rule in the judgment of this court in *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA). As I see it, however, *Woodlands* does not provide that support. *Woodlands* concerned the validity of two summonses issued by the Commission in terms of s 49A of the Act, pursuant to an investigation into the milk industry as a whole. This court considered the scope of the initiating complaint to determine whether the summonses issued during the course of this investigation were valid. What it held, in

essence, was that there can be no investigation in terms of the Act without a complaint submitted by a complainant or initiated by the Commission against an alleged prohibited practice; that a complaint can only be initiated by the Commission on the basis of a reasonable suspicion; and that information of a prohibited practice involving nominated members of the milk industry did not warrant the initiation of a complaint nor an investigation into the milk industry as a whole. In *Woodlands* the focus of this court was therefore not on the degree of correlation there has to be between an initiating complaint, on the one hand, and the ultimate referral on the other. Rather loose statements in the judgment on these subjects should therefore not be submitted to a process of interpretation akin to the construction of statutory provisions. On the other hand, this judgment should not be understood to authorise a formal investigation without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the Commission of its obligation to provide those grounds when challenged to do so.

[27] The proposition relied upon in *Netstar* (para 26) in support of the referral rule, that the Tribunal's jurisdiction is confined to a consideration of the complaint formulated in the referral and that the terms of that complaint are likewise constrained by the terms of the complaint as initiated by the Commission, are in conflict with the judgment of the Constitutional Court in *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC). In *Senwes* the Constitutional Court held that the Tribunal was not precluded from determining a complaint not covered by the referral. It found that, although the Tribunal cannot initiate a hearing, 'this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral' (para 48). If the Tribunal may consider a complaint not raised in the referral it must follow, *a fortiori*, in my view, that a referral is not confined to the parameters of the original complaint. *Senwes* thus appears to be wholly destructive of the CAC's formulation of the referral rule.

[28] Once it is appreciated that the initiation by the Commission demands no more than an informal and even tacit decision to set the process in motion, it becomes

apparent that the enquiry into whether or not the Commission can introduce a new complaint by amending a complaint initiated by itself, is inappropriate. All the Commission has to do is to decide to initiate a new complaint, to investigate that complaint and, if appropriate, refer that complaint to the Tribunal. If the Commission already has enough information to warrant a referral, the intervening investigation can be quite cursory, as envisaged by the CAC in *Loungefoam*. What also seems clear to me, is that the concept of an informal initiation – by way of a decision to open a case – leaves no room for the referral rule as applied by the CAC. To demand that the referral corresponds with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate.

[29] Moreover, I can find nothing in the Act which prevents several complaints, some submitted by a complainant and the others initiated by the Commission, to be incorporated in one referral document. In so far as the referral contains a complaint not covered by the complaint submitted by a complainant, the enquiry will thus be whether the additional complaint had, as a matter of fact, been initiated by the Commission. 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 enquiry whether or not it is the most probable conclusion from all the facts, that the Commission had decided to initiate the additional complaint?

[30] Applied to the present facts I believe the probabilities favour the inference that the Commission indeed decided to initiate complaints that fell outside the ambit of the original Nutri-Flo complaint against all three the respondents, including Omnia. Thereafter it decided to refer those complaints, contained in the referral, together with the original Nutri-Flo complaint, to the Tribunal. I find support for this inference primarily in the following statements (in para 11 of the referral) which bears repetition, although it has been quoted earlier in a different context. It reads:

‘The Commission has investigated the complaints [submitted by Nutri-Flo] and concluded that they have substance. The Commission has accordingly resolved to refer the complaints to this Tribunal in terms of this referral. In addition, the Commission has in the course of its investigations, uncovered further instances of ante-competitive conduct committed by the respondents, more fully described below. These activities are referred to the Tribunal herewith as well.’

[31] By deciding to investigate the additional complaints and by subsequently referring them to the Tribunal, the Commission in effect tacitly initiated the complaints not covered by the original Nutri-Flo complaint. It is not suggested that the Commission did not have reasonable grounds to initiate and refer these new complaints. It follows, in my view, that the referral by the Commission was not invalid and that its striking out by the CAC was therefore unwarranted. Moreover, counsel for Omnia conceded, rightly in my view, that the amendments sought by the Commission constituted no more than further particulars to complaints already covered by the referral and that if the referral were to be held valid, the amendment application must inevitable succeed. The outcome of the views that I hold is therefore that the Tribunal was right in the first place with regard to both facets of its order and that the appeal against the CAC’s judgment to the contrary must be upheld.

[32] Normally these findings would sound the end of the case. But the Commission urged us to take one step further. A starting point that the initiation of a complaint by the Commission amounts to no more than a decision to start an investigation, which decision can be taken informally and even tacitly, must inevitably lead to the conclusion, so the Commission argued, that there is no justification for insisting on an initiation of every new complaint at all. Once an investigation has been set in motion because of an initiation by the Commission or a submission by a complainant, so the argument went, there is no reason for requiring that new complaints discovered during the investigation should first be initiated by the Commission before they can be investigated and referred to the Tribunal. Insistence on initiation of every new complaint in these circumstances, so the

Commission argued, would amount to substance being rendered subject to form. The Commission found support for its argument in s 50(3)*(a)*(iii) of the Act which provides that, when private complaints are referred to the Tribunal, the Commission may add particulars to the original complaint. In the context of s 50(3) as a whole, so the Commission argued, 'particulars' must be understood to include separate complaints. This means, so the argument concluded, that s 50(3)*(a)*(iii) allows the Commission to add new complaints which were not included in the initial complaint without requiring that the new complaint be separately initiated.

[33] I do not agree with this line of argument. As was said in *Woodlands*, the Act insists on an initiation of a complaint by the Commission as a juristic act – by way of a decision to set the process in motion – before there can be a formal investigation into that complaint. As I see it, the same goes for s 50(1) which provides that the Commission may refer a complaint to the Tribunal 'after initiating the complaint'. When s 50(3) refers to 'a complaint as submitted by the complainant', it must be understood as a complaint against a specific prohibited practice submitted by a complainant. Adding particulars means no more than further information to support that complaint. It cannot mean a new complaint about a different prohibited practice not raised by the original complaint. And I can find nothing in s 50(3) as a whole which would justify any different conclusion.

[34] Negating the requirement of a decision by the Commission to initiate its own complaint will give rise to further problems. For instance, it will blur the demarcation of a complaint submitted by a complainant, which in turn will render it difficult to determine the ambit of the complaint over which the complainant can exercise 'ownership' over its complaint, as I have spoken about earlier. Moreover, if the Commission is allowed to add new complaints to the one submitted by the complainant – not being complaints initiated by it – how does one, for instance, apply the time bar of one year in s 50(2)? If the new complaints are simply allowed to piggy back, as it were, on the original complaint submitted by the complainant, which of these complaints are time-barred by s 50(2)? The problem will of course be

exacerbated if only the new complaints are eventually referred to the Tribunal. Moreover, if the juristic act of initiating new complaints is completely discarded once a complaint had been submitted or initiated against a different prohibited practice, how does one apply s 67(1) of the Act? This section provides that:

'A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.'

[35] It is therefore not only the act of initiation, but also the date of that act that is of vital importance in applying s 67(1). Formal investigation of a new complaint or a direct referral of that complaint to the Tribunal, without a complaint initiation, would therefore deprive the operation of s 67(1) of its foundation. It is true that an informal or tacit initiation may render the establishment of its date problematic, but I do not believe that difficulties of proof could relinquish the Commission from establishing a juristic act that is, in my view, required by both the wording and the scheme of the Act. Self-evidently, however, the refusal to take the further step urged upon us by the Commission does not detract from the view I expressed earlier, namely, that the appeal should be upheld.

[36] It is ordered that:

1 The appeal is upheld with costs, including the costs of two counsel, to be paid by the second respondent.

2 The order of the Competition Appeal Court is set aside and replaced with the following:

'The appeal is dismissed and the appellants are ordered, jointly and severally, to pay the respondent's costs, including the costs of two counsel.'

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F D J BRAND
JUDGE OF APPEAL

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