

REPUBLIC OF SOUTH AFRICA



IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CAC CASE NO: **148/CAC/NOV16**CT CASE NO: **CR125DEC14****JO1029MAY16****JO1047JUN16**

In the appeal on joinder and amendment between:

Pistorius, HWC N.O.	First appellant
Pistorius, LC N.O.	Second appellant
Pistorius, H N.O.	Third appellant
Pistorius, AK N.O.	Fourth appellant
McIntyre, I N.O.	Fifth appellant
Du Plessis, DH N.O.	Sixth appellant
Kalkor (Pty) Ltd	Seventh appellant
and	
The Competition Commission of South Africa	Respondent

Judgment

Van der Linde, AJA (Davis, JP and Makgoba, AJA concurring):

Introduction:

- [1] This is an appeal against two distinct decisions of the Competition Tribunal in terms of s.37(1)(b)(i) of the Competition Act, 89 of 1998 ("the Act"). The one, call it the joinder appeal, was to join the fifth and sixth appellants to a pending complaint referral, and the other, call it the amendment appeal, was to allow an amendment to the complaint referral. Although initially the Commission took the point that both decisions were in fact interlocutory as envisaged in s.37(1)(b)(ii) of the Act and so not appealable, this submission was not pressed before us and nothing more need be said about it.
- [2] In the joinder appeal the Commission had applied to join the fifth and sixth appellants to the complaint referral because they are the remaining two trustees of a trust which, as a "*firm*" as defined in the Act, is a respondent in the complaint referral. The first four appellants are the other trustees of the trust, called the Hendrik Pistorius Trust.
- [3] The first four appellants¹ resisted the joinder of the remaining two trustees on the basis that the pending complaint referral was a nullity from the outset because all the trustees had not been joined from the outset. Their argument was that as a nullity the proceedings could, in principle, not be validated ex post facto by the joinder; and which in any event, ought not to be permitted because the complaint referral will have been extinguished by "prescription"² by the time the trust was properly joined by all the trustees having been properly joined.
- [4] In the amendment appeal the Commission had applied to amend its complaint referral so that it would expressly cover the period January 1995 until April 2009 and not only until May 2008. The appellants resisted the amendment on the basis that the complaint referral so extended will have become "prescribed."³

¹ The fifth and sixth appellants did not oppose the joinder applications.

² The reference here was to s.67(1) of the Act which provides as follows: "(1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."

³ Ibid.

[5] The Tribunal granted both applications; hence this appeal. I deal first with the facts relative to both decisions and then sequentially with the two decisions and the issues they raise.

The facts

[6] The appellants and others produce agricultural lime, also known as “aglime”, which is marketed, sold and distributed by agents employed by fertilizer companies. On 20 August 2008 the Commission received a complaint by Enviro Lime (Pty) Ltd against a concern described as “*H. Pistorius & Co*” of 1100 Church Street, Colbyn, Pretoria.⁴ The complaint included conduct offensive to sections 8(a), 8(b), 8(d)(i), and 9(1)(c)(i) & (ii) of the Act.⁵

[7] On 21 December 2009 the Commissioner initiated a complaint that “*H. Pistorius & Co*” and others had potentially contravened sections 4(1)(a) and 4(b)(i) & (ii) of the Act because members of the FSSA had met quarterly to discuss sales of lime, total provincial sales of aglime, net prices of lime and transport components, and gypsum sales for agricultural uses.

[8] Two amendments to the complaint initiation followed on respectively 10 August 2010⁶ and 27 January 2012.⁷ Both these amendments referred to “*H. Pistorius & Co (Pty) Ltd*” and no longer to simply “*H. Pistorius & Co.*” When on 4 December 2014 the Commission filed the complaint referral with the Tribunal, it referred to “*H. Pistorius & Co*” as a trust that trades at 1100 Church Street (East), Colbyn, Pretoria, and it identified the first four appellants as its trustees.

[9] In preparing the complaint referral the Commission relied on the amended trust deed of the trust as the source of identification of the trustees. That document, which is not included in

⁴ Since that date Church Street, Pretoria in that area has been renamed as “*Stanza Bopape Street*”. It is common cause in these proceedings that the trust trades under the name of “*H. Pistorius & Co*” at 1100 Stanza Bopape Street, Colbyn, Pretoria.

⁵ This appears from annexure RA1 to the replying affidavit of PBD Boeredienste (Pty) Ltd in its application to dismiss the complaint, at vol 3 p 314 to 316 of the appeal record. It does appear that the annexure is however not complete because at the top of p315 it starts with paragraph 2), and so it is not clear whether the current alleged restrictive horizontal practices were implicated from the outset.

⁶ This was to include Rozie Agencies CC.

⁷ This was expressly to include the allegation that the then respondents had agreed on the amount of or trading condition in respect of commissions that each would pay to fertilizer companies that employ agents who distribute aglime in contravention of s.4(1)(b)(i) of the Act.

the appeal record and in respect of which none of the parties were able to make submissions to us, specified the first four appellants only as the trustees, at least according to the Commission.⁸ Consequently only those four trustees were joined to the Commission's complaint referral of 4 December 2014.

[10]The complaint referral alleged that from January 1995 until May 2008 the respondents agreed the extent of the commissions that each of them would pay to the fertilizer companies for on-payment to the agents. The alleged perpetrators would meet annually, at around the time of the AGM of the FSSA, and agree to fix the agents' commission, effective for the ensuing year. It was alleged that the appellants and others, which included the Fertilizer Society of South Africa ("FSSA"), had accordingly contravened s.4(1)(b)(i) of the Act by using the FSSA as a platform to engage in the restrictive horizontal practice of *"directly or indirectly fixing a purchase or selling price or other trading condition."*

[11]In paragraphs 28 and 32 respectively of the affidavit dated 2 December 2014 made in terms of s.50(1) of the Act, read with Tribunal Rules 14(1)(a) and 15, the deponent said, in relation to the annual agreement regarding the quantum of the agents' commission:

"28. During the period between January 1995 until May 2008, the respondents met annually and agreed to fix the rates of the agents' commission."

And

"32. The agreements reached by the respondents in respect of the agents' commissions were effective for a one year period, and were revised on an annual basis at the time of the AGM."

[12]The deponent annexed three letters to the affidavit, all dated 12 May 2008, by the then chairperson of the FSSA to three different fertilizer companies, each of which contained the

⁸ This bit of parol evidence was not disputed by the first four appellants in their answering affidavit and may thus be accepted as admissible and as correct. But what one still does not know, are the provisions of the amended trust deed relative to the minimum number of trustees required to be appointed for the trust to be able to pass binding resolutions (i.e. capacity provisions), nor whether there are trust provisions authorising a lesser number of trustees than the full contingent to represent all the trustees in legal proceedings (i.e. agency provisions). This issue is dealt with more fully below.

following sentence with reference to agents' commission (freely translated, and emphasis supplied):

The lime companies connected to the MVSA have recently agreed that the above increases to R8.00 per ton as yardstick as from 1 May 2008."

[13]On 9 February 2015 the first four appellants, before they filed answering affidavits, applied for what they called an "exception" to the complaint referral on six disparate bases. This application was supported by an affidavit, which proved a resolution of the trust dated 9 February 2015 to oppose the complaint referral. The resolution was signed not only by the first four appellants, but also by the fifth appellant (not the sixth appellant) as trustees. That eventually led to the Commission formally applying on 10 May 2016 for the joinder of the fifth appellant.

[14]Thereafter, on 26 May 2016 the Commission applied for leave "*to supplement or amend*" its complaint referral affidavit by including, amongst others, the following paragraph:

"13. For the sake of clarity I state the following:

13.1 The agents' commissions that were agreed by the respondents in May 2008 were implemented for a period of a year thereafter.

13.2 This means that the duration of the contravention lasted until a year after May 2008 and, at the very least, until April 2009."

[15]Subsequently, following a hearing before the Tribunal on 2 June 2016, the legal representatives of the first four appellants revealed Letters of Authority in respect of the trust issued by the Master of the High Court. These were dated 12 March 2015 and reflected the first to sixth appellants as trustees. That led to the Commission's application on 10 June 2016 to join also the sixth appellant to the complaint referral.

[16]The appellants' answering affidavits in the joinder applications did not disclose on what dates the fifth and sixth respondents became trustees. On appeal before us none of the parties were able to provide those dates from the Bar. In the result, as noted by the

Tribunal,⁹ one does not know whether the fifth and sixth appellants became trustees before or after the complaint was referred to the Tribunal on 4 December 2014.

The legal issues in the joinder appeal

[17]The exceptions are not before us.¹⁰ That includes the exception to the jurisdiction of the Tribunal on the basis that the complaint initiation on 21 December 2009 was made against “H. Pistorius & Co (Pty) Ltd” and never, not even subsequently, against the trust. We would nonetheless point out *en passant*, as already alluded to above, that the complaint initiation was not against “H. Pistorius & Co (Pty) Ltd” but expressly against simply “H. Pistorius & Co”,¹¹ an economic rather than juristic entity¹² that traded from what was then known as 1100 Church Street, Colbyn, Pretoria,¹³ the same address at which, and the same trading name under which, it is common cause the trust still trades.

[18]Our remit therefore commences with the complaint referral of 4 December 2014¹⁴ and the submission that since the fifth and sixth appellants were not joined then, the proceedings thus far against the first four appellants are a nullity.¹⁵

[19]There is a point allied to this, raised by the appellants: that the joinder applications should not have been granted because they would in any event only be effective from the date of joinder; that the trust would thus be joined only from that date; and that by then the claim against the trust will have prescribed.

[20]We commence this part of the judgment by considering relevant recent judgments concerning the effect of not joining all the trustees to legal proceedings. We do so despite the fact that since the Tribunal is not a court of law, the complaint referral is not a legal

⁹ Tribunal judgment, vol 4, p323, paragraphs 24 to 27.

¹⁰ Tribunal judgment, vol 4, p322, paragraph 21.

¹¹ Vol 3, p280.

¹² A “firm” as defined in the Act is an economic rather than juristic entity: “... a person, partnership or a trust.”

¹³ Vol 3, p 314.

¹⁴ Vol 1, p67 ff.

¹⁵ See generally answering affidavit LC Pistorius, vol 1 pp 41 to 51. This was also the scope of the appellants’ argument before the Tribunal; see vol 4, p323, paragraph 28.

proceeding in procedural (common) law parlance. We note too that the definition in the Act of a “firm”, the entity which is statutorily targeted, includes a “trust.” Still, the judgments on the topic are concerned with the nature of a trust and the powers of trustees generally and, so it is assumed for present purposes, they would thus have equal application to the present context.

[21]Two Supreme Court of Appeal judgments are pertinent. The first is *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*¹⁶ and the second *Land and Agricultural Bank of South Africa v Parker and Others*.¹⁷ *Nieuwoudt* concerned the power of trustees contractually to bind a trust. The trust had two trustees but only one of them had signed a contract for the supply of maize. The question was whether the contract was enforceable.

[22]The court held, with reference to *Coetzee v Peet Smith Trust en Andere*,¹⁸ that absent an appropriate empowering provision in the trust deed, a trust could only be bound if all the trustees acted jointly. Since the trust deed did not contain an appropriately empowering provision, there was no power to have bound the trust, and the contract was invalid and unenforceable.

[23]*Nieuwoudt* was referred to in *Parker*. There a bank had lent money to a trust of which the trust deed required a minimum of three trustees. In fact only two had been appointed at the time the loans were made. The bank subsequently sequestrated the trust estate and the estate of one of the two trustees. On appeal to the full court, the trust successfully argued that since a sub-minimum of trustees could not bind the trust, the loans were invalid.

[24]The Supreme Court of Appeal subsequently upheld the bank’s appeal. In doing so, it nonetheless firmly restated the joint action requirement:¹⁹

“[15] ... It is a fundamental rule of trust law, which this Court recently restated in Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The

¹⁶ 2004 (3) SA 486 (SCA).

¹⁷ 2005 (2) SA 77 (SCA).

¹⁸ 2003 (5) SA 674 (T), esp at p679, quoting as authority the substantial English law position to this effect.

¹⁹ At [15], footnotes omitted.

rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honoré's authoritative historical exposition has shown that the joint action requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and half."

[25]In response to the bank's argument that although the trust deed required a sub-minimum of three trustees, the two existing trustees would in any event constitute a majority that could bind the trust, the court said:²⁰

"[17] The bank contended that since the Parkers were a majority of the trustees in office, and since they could form a quorum at trust meetings, they could bind the trust acting together. But this is to confuse power to act with its due exercise. The deed empowered the majority of the trustees to meet and to make decisions. To this extent the joint action requirement was abrogated - but the majority remained part of a three-trustee complement, and it had to exercise its will in relation to that complement."

[26]Still the bank succeeded before the Supreme Court of Appeal in overturning the full court judgment because of the following quirk: the trust deed provided that upon sequestration a trustee ceased immediately to have capacity so to act. That meant that when the one trustee was sequestrated by the court of first instance, his trusteeship ceased. In terms of s.150(3) of the Insolvency Act 24 of 1936 his subsequent application for leave to appeal did not suspend his sequestration. Therefore, despite the fact that in the meantime a third trustee had been appointed, the number of trustees lapsed back to two only.

[27]These statements of trust law could have potentially important ramifications for the appeal before us, because the SCA held that the petition by the trust for leave to appeal to the SCA, and the appeal by the trust before the full court, were incapacitated for lack of the sub-minimum of trustees. In other words, the SCA firmly applied the requirement of proper trustee capacitation – as distinct from mere proper authority - to steps taken in legal proceedings, at least where the litigant trust was initiating the proceedings.

[28]The takeaway then from these two SCA judgments is the following three propositions: first, where the sub-minimum of trustees is not appointed, the trust cannot act, nor can it initiate

²⁰ At [17].

legal proceedings. Second, absent an appropriate provision in the trust deed, all the appointed trustees must, as a general proposition, act jointly. This is an issue that goes to authority, not capacity. And third, importantly, as an extension of the second proposition, the trust deed may by appropriate provision authorise the appointment of a lesser number of trustees properly to represent them, even in legal proceedings.

[29] Three lower courts were recently called upon to apply these principles to the issue of trust litigation where not all the trustees were present at the initiating stage of the proceedings. In the first, a full court of the Western Cape Division in *Hyde Construction CC v Deuchar Family Trust and Another*,²¹ a trust had applied to the high court for the removal of an arbitrator. The trust deed required a sub-minimum of three trustees and when the application was brought there were four. However, only two of the trustees had resolved to bring the application. However subsequently, in another resolution, all four trustees had ratified the institution of proceedings.

[30] In dismissing an appeal and holding that the ratification was competent, the full court reasoned as follows:

"[31] Mr Bruwer referred us to the decisions in Parker supra and Lupacchini NO and Another v Minister of Safety and Security 2010 (6) SA 457 (SCA) ([2010] ZASCA 108), submitting that their effect was that the unauthorised institution of proceedings on behalf of a trust cannot be ratified by a subsequent decision of all the trustees. I do not think that these cases, properly understood, support Mr Bruwer's contention.

[32] In Nieuwoudt supra Harms JA said, in a judgment concurred in by the other members of the court, that the fact that trustees have to act jointly 'does not mean that the ordinary principles of the law of agency do not apply' (para 23). For example, he said, the trustees might expressly or impliedly authorise someone to act on their behalf and that person might be one of the trustees. Ratification is one of the ordinary principles of the law of agency. In principle, therefore, there appears to be no good reason why a decision taken ostensibly in the name of the trust by (say) two out of the four trustees should not subsequently be ratified by the full body of trustees. It is no objection that the original decision was unauthorised; that is always so where ratification comes into play. The principle that the trustees must act jointly is satisfied by the ratifying conduct of the full body of trustees. The position is in principle no different, to my mind, from the case where a decision is initially made on behalf

²¹ 2015 (5) SA 388 (WCC).

of a company by (say) two out of four directors and the decision is subsequently ratified by the full board.

[33] Parker and Lupacchini do not bring this analysis of general agency principles into question. Those cases address the position which arises where the trust deed requires that there should be no fewer than a specified number of trustees and where, at the time the act which is sought to be attributed to the trust was performed, fewer than that number existed. Where that is the case the trust lacks the capacity to act; it is not a problem of authority but capacity."

[31] The full court held too, albeit obiter, that where the sub-minimum of trustees had not been appointed, the institution of proceedings by a trust would be a nullity and could not be ratified:

"[40] It is apparent from Lupacchini that, where there is an incapacity to transact or to institute proceedings because of the absence of the specified minimum number of trustees, the transaction or the institution of the proceedings is a nullity and cannot be ratified. In Lupacchini itself the second trustee, Ms Conradie, self-evidently continued to support the proceedings after she received her letters of authority but this was not regarded as saving the proceedings. In Simplex (at 113F – 114G) and Van der Merwe (para 21), which Nugent JA cited with approval, it was specifically said that ratification could not apply in such circumstances. (In those two cases there was no duly appointed trustee at all at the time the relevant transactions were concluded.)"

[32] It must be observed that the SCA in *Lupacchini NO and Another v Minister of Safety and Security*,²² referred to by the full court, was concerned with the case where the trust initiates the litigation. It does seem self-evident, I suggest, that a trust wishing voluntarily to embark on litigation should have capacity and authority so to act.

[33] But where the trust - duly capacitated and authorised - has engaged in conduct giving rise to obligations enforceable by others against it, be they the State or private parties, the position may be very different. The trust may be a recalcitrant defendant, and may not be forthcoming concerning the required trustees' information; and the Master's office may not be able to assist.

²² 2010 (6) SA 457 (SCA).

[34]In the next case, *Rupert Investments (Pty) Ltd v J.H. Petzer Inc and Others*,²³ the court dealt with the converse situation; the trust was the respondent, but not all the trustees had been cited and joined. The facts were that the applicant had applied to cancel mortgage bonds that had been passed in favour of two trusts over property that it had bought from those trusts. The trusts were cited by their names, but only one of the individual trustees was joined. That trustee opposed the application on the basis of a resolution by all the trustees in both trusts. The respondents took the point that the trusts had not been properly cited and joined.

[35]The court dismissed the objection on the following basis:²⁴

“In my view, the answer could be found in Honoré in South African Law of Trusts 4th Edition at 266 where the author said the following: “All the Trustees must join in suing and all must be sued though it is sufficient for one Trustee, if properly authorised by the remaining Trustees to sign the power of attorney on their behalf. There appears moreover to be no requirement of formality regarding how the remaining Trustees should signify their association with the action so long as adequate proof is produced that the litigating Trustee is properly authorized to act on behalf of all the other Trustees.” I agree with Ngwenya J in Desai-Chilwan N.O vs Ross and Another 2003 (2) SA 644 where he said at 650 par. 21 that: “If it is permissible that Trustees can delegate or authorize one of them to sign power of attorney for all of them to institute legal proceedings, then surely it must be correct to authorize one of them to consult with a lawyer and to depose to an affidavit and bring an action to Court on their behalf. If this is correct, then what is the magic in the citation of all the Trustees in the legal proceedings. Though it is preferable and ideally all the Trustees must be cited in legal proceedings, I do not think where one of the Trustees has not been properly cited that this omission should non-suit the Trust where there was clear authority to bring the proceedings to Court.”

[36]So here too the court applied the principle that not all the trustees need be cited, in this case as respondent and not initiator of the proceedings, provided that the trustee actually joined was authorised by the remaining trustees to represent the trust – and presumably, provided the trust deed permitted of such authorisation.

[37]In *Desai-Chilwan NO v Ross and Another*,²⁵ referred to by the court, only one of two trustees had commenced application proceedings on behalf of a trust. That trustee had however

²³(36878/2013) [2015] ZAGPPHC 118 (13 February 2015).

²⁴At p6.

been authorised by the other trustee to institute the proceedings. The court dismissed the objection to the applicant's citation and, in so doing, declined to follow the apparent contrary position adopted in *Van der Westhuizen v Van Sandwyk*.²⁶ *Desai-Chilwan* was also followed in *Pro-Khaya Construction CC v Independent Development Trust*.²⁷

[38] Finally, in *Vogel, N.O. v Melamed and Others*²⁸ the applicant as sole trustee instituted an application despite the trust deed requiring a sub-minimum of two trustees properly to capacitate the trust. The respondents took the point that the applicant had no capacity to represent the trust.

[39] The court rejected the point, holding that the trust deed expressly authorised the sub-minimum number of trustees to take steps “... *for the maintenance and administration of the trust fund*...”; and that that was good enough on the facts to capacitate the application proceedings.

[40] Returning to the present matter: as noted before, the amended trust deed is not part of the appeal record, nor the facts relating to the dates of the appointment as trustees of the fifth and sixth appellants. It is therefore quite impossible for this court to discern whether or not the number of trustees here ever fell below the capacity-defining sub-minimum; nor whether the first four appellants had the authority to represent the trust in the complaint referral proceedings.

²⁵ 2003 (2) SA 644 (C).

²⁶ 1996(2) SA 490 (W). In *Desai-Chilwan* the court said: “[21] *If it is permissible that the trustees can delegate or authorise one of them to sign a power of attorney for all of them to institute legal proceedings, surely it must be correct to authorise one of them to consult with a lawyer and to depose to an affidavit and bring an action to court on their behalf. If this is correct, then what is the magic in the citation of all the trustees in the legal proceedings. While it is preferable and ideally all the trustees must be cited in legal proceedings, I do not think that where one of the trustees has not been properly cited that this omission should non-suit the trust where there was clear authority to bring the proceedings to court. It should be noted that, unlike directors in a company, the trustees, irrespective of their number, hold one office. Even if they hold different views, they still bind one another, regardless of the dissenting views. The powers which the trustees have vest in them jointly.*”

²⁷ (3065/2015) [2016] ZAECPHC 10; [2016] 2 All SA 909 (ECP) (22 March 2016).

²⁸ (35494/16) [2017] ZAGPJHC 127 (5 April 2017).

[41]It is therefore not possible either for this court to consider whether there is any scope for development of the trust form in our law along the lines suggested at paragraphs [37.1] to [37.3] of Parker, including the notion that:

“[37.1] As mentioned earlier, within its scope the rule that outsiders contracting with an entity and dealing in good faith may assume that acts performed within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular, may well in suitable cases have a useful role to play in safeguarding outsiders from unwarranted contestation of liability by trusts that conclude business transactions.”

[42]In this case the Commission “... made a diligent and proper enquiry into the names of the trustees of the Trust. The Commission relied on the Trust’s amended trust deed ...”,²⁹ and this did not identify the fifth and sixth appellants as trustees. There may therefore well have been room to apply an adjusted version of the Turquand principle in this case, given the type of difficulties alluded to in Nieuwoudt³⁰ and taking the lead from the SCA; and to hold that it would be sufficient in such a case if the known trustees were joined as defendants/respondents in litigation, leaving it to the trustees so joined to apply join the non-joined trustees.

[43]What is clear on the above authorities, however, is that it is not sound trust law unqualifiedly to assert that merely because all of the trustees were not joined as respondents from the outset, therefore the institution of the proceedings is a nullity. This was the appellants’ main legal argument before the Tribunal and also before us.³¹ It follows that the resistance to the joinder application on this basis cannot succeed.

[44]That leaves the “prescription” basis for opposing the joinder application. The answering affidavit raises prescription without identifying the particular statutory provision relied upon. Section 67 of the Act may, however, comfortably be excluded, because it deals with

²⁹ Vol 1, p14, paragraphs 30 – 32. See also, in regard to the joinder of the sixth appellant, vol 1, p26, paragraph 22.

³⁰ At paragraphs [19] and [24]. Compare too *Cupido v Kings Lodge Hotel*, [1999]3 All SA 578 (EC) at 385, cited in the Tribunal judgment, vol 4, p324, paragraph 36.

³¹ Tribunal judgment, vol 4, p322, paragraph 24.

the period between the cessation of the impugned conduct and the commencement of the complaint initiation. The point put up for consideration in this appeal, is whether or not the joinder of only some of the trustees and not all of them in the complaint referral resulted, without more, in that proceeding being a nullity from the outset. I have concluded above that it does not.

[45] Could it be that the appellants had the Prescription Act 68 of 1969 in mind? That is unclear, not only because the answering affidavit does not say so, but also because the period between the date of the complaint referral of 4 December 2014 and the joinder applications of 10 May 2016 and 10 June 2016 respectively does not resonate with any relevant period of prescription mentioned in the latter Act.

[46] In the result the resistance to the joinder applications was ill-founded, and so therefore this joinder appeal. It should be dismissed.

The amendment appeal

[47] It will be recalled that the Commission had applied to amend its complaint referral so that it would expressly cover the period January 1995 until April 2009 and not only until May 2008; and that appellants resisted the amendment on the basis that the complaint referral so extended will have prescribed.

[48] The facts pertaining to the original complaint referral and its subsequent amendments have been set out above. It seems evident from those that the affidavit supporting the complaint referral stated that the contentious agreements were annually concluded during the period January 1995 until May 2008, and that each agreement had an effective duration of one year.

[49] That seems to imply, inexorably, that the last agreement's duration would have spanned the period up to April 2009. The three letters, all dated 12 May 2008, annexed to the affidavit

corroborate this inference. As the Tribunal observed, the prohibited practice continues to exist when the future prices are implemented.³²

[50] It may well be asked why the Commission felt the need to apply for the amendment at all, if the facts asserted in support of the complaint referral so self-evidently conveyed a period ending only in April 2009. But there could not have been any harm in seeking to make things expressly plain for everyone, and so the resistance to that application was also, in my view, unwarranted.³³

Conclusion

[51] It follows that in my view the appeal against the Tribunal's order on both the joinder application and the amendment application must fail. I would therefore propose the following order:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.



Van der Linde, AJA

I agree, and it is so ordered.

Davis, JP

I agree.

Makgoba, AJA

For the first to sixth appellants:

³² Tribunal judgment, vol 4, p330, paragraph 58.

³³ The appellants submitted too that if the amendment were granted they would be prejudiced for not being able to raise prescription. But even if the submission is sound in law, in fact nothing stops them from still raising prescription; see Tribunal judgment, vol 4, p330, paragraph 59.

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