Republic of South Africa

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

REPORTABLE

CAC CASE NO: 112/CAC/SEP11
CT CASE NO: 15/CR/MAR10

In the matter between:

PARAMOUNT MILLS (PTY) LIMITED Appellant

and

THE COMPETITION COMMISSION Respondent

CORAM	:	**DAVIS, JP et DAMBUZA and ZONDI, JJA**
JUDGMENT BY	:	**ZONDI JA**
FOR THE APPELLANT	:	**ADV. MM LE ROUX**
INSTRUCTED BY	:	**BOWMAN GILFILLAN INC**
FOR THE RESPONDENT	:	**ADV. DN UNTERHALTER (SC) & ADV. KH SHOZI**
INSTRUCTED BY	:	**CHEADLE THOMPSON & HAYSOM INC. ATTORNEYS**
DATE OF HEARING	:	**9 MARCH 2012**
DATE OF JUDGMENT	:	**27 JULY 2012**

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ZONDI, JA:

INTRODUCTION

[1] The appellant ("Paramount") brought an application before the Competition Tribunal ("the Tribunal") seeking the dismissal of the referral of a complaint by the Competition Commission ("the Commission") against it. In the complaint referral, in which Paramount is the fourteenth respondent, the Commission alleged that the respondents violated section 4 (1) (b) (i)[1] of the Competition Act 89 of 1998 ("the Act").

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[1] ***4 Restrictive horizontal practices prohibited***
(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-
(a) ...
(b) it involves any of the following restrictive horizontal practices:
(i) directly or indirectly fixing a purchase or selling price or any other trading condition...

[2] Paramount sought the dismissal of the complaint referral on two separate and independent grounds, namely that the claims are time-barred and that they are not legally competent and thus do not reveal a case for Paramount to answer before the Tribunal. The Tribunal dismissed the application. The appeal is against the Tribunal's orders.

Factual Background

[3] It is common cause that, during December 2006, the Commission received information of a possible bread cartel operating in the Western Cape. Acting on the basis of the information that the Commission received and following a preliminary investigation, the Competition Commissioner on 14 March 2007, proceeded in terms of section 49 B (1) of the Act and initiated a complaint against Premier Foods, Tiger Foods and Pioneer Foods, all of whom had been allegedly involved in the said bread cartel. A formal complaint was also lodged by one of the bread distributors in the Western Cape against all three firms and the Commission thereafter embarked on its investigation.

[4] During the early stages of the Commission's investigation, Premier Foods approached the Commission and indicated that it was willing to co-operate with the Commission and to confess its role in the bread cartel, in return for immunity from prosecution. Premier Foods fully co-operated with the Commission, as a result of which, it was granted conditional immunity from prosecution on 14 February 2007, in respect of its participation in the bread cartel in the Western Cape. On 16 March 2007, it was also granted conditional immunity from prosecution for its participation in the national bread cartel, the wheat and maize milling cartels.

[5] Acting on the basis of the co-operation given to the Commission by Premier Foods, and following its own investigation, the Commission on 14 February 2007, proceeded to refer the complaint against the alleged remaining members of the bread cartel, namely Tiger Brands and Pioneer Foods, to the Tribunal.

[6] Tiger Brands and Pioneer Foods filed their answering affidavits to the complaint referral on 14 March 2007. Pioneer Foods denied that it operated a bread cartel and indicated that it would oppose the matter before the Tribunal.

[7] Tiger Brands on the other hand, indicated, in its answering affidavit, that it was willing to co-operate with the Commission and offered to disclose the extent of its involvement and participation in the alleged cartel activities.

[8] Tiger Brands' co-operation with the Commission culminated in the conclusion of the consent agreement between the Commission and Tiger Brands on 9 November 2007. Insofar as the operation of the cartel in the maize milling sector was concerned, Tiger Brands also applied for, and was granted conditional immunity from prosecution in terms of the Commission's Corporate Leniency Policy.

[9] As regards the price implementation process, the Commission's investigation revealed that securing price increases through unilateral conduct is fraught with uncertainty and risk. To be a first mover in increasing prices allows rivals to maintain price differentials and thereby gain market share at the expense of the first mover.

[10] The Commission's investigation also revealed that, since the industry had a long history of co-operation, a salient answer to the problem of market attrition was

an agreement between competitors as to price increases and their timing. The Commission's investigation further revealed, that there was a well understood relationship that existed between the respondent firms, manifested in periods of co-operation that occasionally break down and usher in periods of price competition which then give rise to renewed agreements to avoid the commercial attrition of unbridled rivalry.

[11] In setting out the scene in which the cartel's *modus operandi* operated, the Commission points out that the South African milled white maize market may be divided into regions by reason of the manner in which firms operating in this market organise their business activities. Amongst these regions are the KwaZulu-Natal, Western Cape, Eastern Cape, Northern Gauteng (comprising the North of Johannesburg and Pretoria), Gauteng Region (comprising Johannesburg and surroundings), Mpumalanga, Limpopo, Free State and Northern Cape.

[12] According to the Commission, meetings took place at a national and regional level. For various reasons, the agreements which were concluded at these meetings operated at a national level. First, all the meetings, whether held at a national level or regional level, occurred in a national market and hence the agreements concluded are agreements within this market. Second, the agreements concluded at these meetings were used to secure co-ordination at both a regional and national level. Third, meetings took place at a national as well as at a regional level, and these were mutually reinforcing. The agreements that were concluded at a national level were then conveyed through to a regional level, particularly through those firms that had a national presence and this informed the regional agreements. This was also reinforced through the designated chairpersons of each of the regions, some of

which chairpersonships were fixed and others rotated.

[13] The Commission points out that, even though these agreements were struck over a period of time (1999 to at least January 2007) and took place in different regions, they all formed part of a continuing course of conduct. In other words, they were simply part of a set of arrangements and understandings by the respondents, who chose to determine key aspects of their conduct by reference to agreement rather than competition. Put differently, the regional agreements were not discrete agreements with different adherents but were part of the execution of a national, continuing agreement with the same participants, the same procedures and the same common object, namely to establish a mechanism for fixing prices and other trading conditions over a period of several years.

[14] The Commission says the respondents were able to meet from time to time in respect of price, not on the basis that each regional agreement was entirely independently from every other regional agreement, but rather that the respondents were in a relationship with one another in terms of which they agreed that they could, from time to time, in their respective regions, enter into agreements governing price. At these meetings, Pioneer Foods, Premier Foods and Tiger Brands were represented by their respective employees.

[15] According to the Commission, the cartel arrangements endured until at least January 2007, although the Commission's investigation revealed that it may have continued after that date, given the pervasive nature of the conduct and the extended period of time over which it took place. The Commission points out that the respondents also communicated by telephone to discuss price fixing and other

trading conditions.

[16] The Commission alleges that the sole purpose of these meetings was to reach agreements in terms of which Premier Foods, Tiger Brands, Pioneer Foods, Foodcrop and Pride Milling represented as aforesaid, would eliminate competition between themselves by fixing their selling prices and other trading conditions. It contends that these agreements contravened section 4 (1) (b) (i) of the Act and had the effect of substantially preventing or lessening competition in the market.

[17] On 2 October 2009 the Commission expanded its investigation so as to include *inter alia* Paramount, as its investigation relating to the first complaint revealed that Paramount and other named firms "*were also players in the industry who were party to the collusion in that they attended the meetings and discussions where these agreements were reached*".

[18] It is significant to note that the Commission alleges in the second initiation statement that Paramount and other respondents were engaged in the following conduct:

- Fixing of prices of wheat and maize products;
- Creating uniform prices lists for wholesalers, retail and general trade customers;
- Agreeing not to use exact pricing in an effort to "*fool customers*", and
- Agreeing the timing of price increases and implementation dates.

[19] In the amended initiation statement filed by the Commission on 24 March 2010, the Commission alleges *inter alia* that Paramount together with other firms had

during the period 1997 to 2007 held meetings and/or discussions, to discuss, inter alia the conduct referred to in the second initiation statement.

Complaint Referral

[20] On 31 March 2010, the Commission referred a complaint to the Tribunal against the seventeenth respondents, including Paramount, alleging that the respondents operated a cartel in milled white maize meal in contravention of section 4 (1) (b) of the Act.

[21] The gist of the Commission's complaint is that, during the period 1999, until at least January 2007, the respondents, acting through their respective representatives and/or employees, engaged in cartel activities in milled white maize in that they telephonically and in meetings, directly fixed the selling price of milled white maize products to their customers as well as agreed on the implementation dates of such price increases.

[22] In the complainant referral the Commission sought *inter alia* an order declaring that the respondents were involved in ongoing price fixing agreements or engaged on concerted practices in respect of fixing maize and other trading conditions in the Republic in the period 1999 to at least January 2007 in a blatant contravention of section 4 (1) (b) (i) of the Act as well as levying an administrative penalty on each of the respondents of 10% of the respondents' total annual turnover for the 2009 financial year.

[23] In the alternative and to the extent that the agreements are found to have been separate regional agreements, the Commission sought the same declaratory

relief and administrative penalty for each regional agreement to which each respondent is found to be party.

[24] It is common cause that, as regards Paramount, the facts, upon which the Commission relied for the contention that Paramount engaged in prohibited conduct, are pleaded as follows in the founding affidavits in support of the complaint referral:

> *"93. As I indicated earlier, the respondents did not only fix prices and other trading conditions in meetings, but also did so telephonically such as in the following instances:*
>
> *...*
>
> *93.3. during the period 2001 to September 2006, Gary O'Brien, Tiger Brands' regional Customer Manager, Eastern Cape, had numerous telephonic conversations with Phillip Poctier from Premier Foods, Grant Smith from Pioneer Foods and Bruce Spanyard from Paramount Mills during which they exchanged information about their pricing structures, fixed the selling prices of their maize meal products as well as the timing of future price increase"*

[25] Furthermore, it is common cause that, on 16 April 2010, Paramount, through its legal representatives, requested a copy of the original complaint and initiation statement in order to ascertain the factual basis and evidential basis of the complaint against it. In reply thereto, the Commission, through its attorneys of record, refused Paramount's request, contending that, as far as it was concerned, Paramount had been furnished with all material facts and points of law relevant to the complaint in the referral affidavit. Not satisfied with the response, Paramount served a notice in terms of Rule 35 (12) and (14) of the Uniform Rules of Court, in terms of which it

called upon the Commission to produce for inspection and to make copies of documents referred to in the Commission's founding affidavit.

[26] On 26 May 2010, the Commission's attorneys wrote to Paramount's attorneys *inter alia* enclosing the initiation statements of 19 March 2007, 2 October 2009 and 24 March 2010.

[27] In its answering affidavit filed on 8 June 2010, Paramount denied its participation in any cartel meetings with the major market players. It also denied reaching any agreement or understanding or engaging in any concerted practice, relating to price with the major market players.

[28] In response to the allegations in paragraph 93.3 Mr Spanjaard who deposed to Paramount's answering affidavit says:

> "*8.3 It is true that Paramount attended the following meetings at which representatives of the major market players were present:*
>
> *8.3.1 A meeting in 1999 at the Buffalo Club in East London, attended by Immelman, Chris Barnes of Premier ("Barnes") and Gordan Anderson of Algoa Roller Mills, a wheat miller based in Port Elizabeth ("Algoa")("Anderson"). Anderson invited me to attend. He is not a representative of one of the major market players and, to the best of my knowledge, was only engaged in milling flour, not maize, at the time. I recall that we discussed that year's wheat crop condition and size, the impact on the wheat crop of weather conditions, products damage and returns,*

uncreditworthy customers, pallet control, Safex and transport. At the time, Paramount was not milling maize, only wheat. I do not recall that we discussed price of any product;

8.3.2 *A meeting in 1999 between myself and Barnes at my office when Barnes introduced himself to me as the East London mill manager for Tiger. No commercially sensitive information was discussed;*

8.3.3 *A Meeting in 2001 at which representatives of Tiger, Premier, Pioneer and Algoa were present at St George's Park in Port Elizabeth. Again, Anderson invited me to the meeting. The meeting was called off when I arrived. I suspect it was abandoned because I had arrived. I was not invited to another meeting of this type and, other than as set out below, was not advised of the outcome of this or another similar meeting by telephone; and*

8.3.4 *Regular social golf days in which representatives of most of the milling companies participated. No commercially sensitive information was discussed.*

8.4 *With respect to telephone calls between the respondents, I have caused a search of Paramount's telephonic system to be undertaken in order to ascertain the number and frequency of telephone calls made from Paramount's telephone system and my cellular telephone to O'Brien. The telephone system contains a record of calls made from 2004 to date.*

8.4.1 The search revealed a total of 12 telephone calls with O'Brien over the entire six-year period 2004 to date.

8.4.2 In November 2004, Paramount bought bran from Tiger in five arms-length transactions concluded on commercial terms. In 2008, Paramount tried to purchase bran from Tiger again. This explains certain of these 12 telephone calls.

8.4.3 Moreover, the calls in October and November 2006 can be explained by the fact that Tiger was rumoured to be considering restarting or selling its East London mill, which had ceased operations in February 2006, Paramount was interested in these developments, as well as in hiring staff retrenched when the mill closed. I therefore called O'Brien to ascertain both what was likely to occur with the mill operation and to obtain recommendations about retrenched employees. I never discussed or agreed pricing during these conversations with O'Brien".

[29] Thereafter, on 7 October 2010, Paramount's attorneys wrote to the Commission urging it to withdraw the complaint referral against it on the ground that the Commission had failed to make out a *prima facie* against Paramount from either the founding affidavit or the complaint referral and that there was no basis in law or fact for Paramount to remain a respondent in the pending proceedings. Paramount relied on Woodlands matter[2] in its representation to the Commission. The Commission refused to withdraw its complaint referral against Paramount contending

[2] *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA)

that it believed that it had sufficiently and properly pleaded the complaint referral so as to establish a *prima facie* case against Paramount.

Paramount's case before the Tribunal

[30] Paramount approached the Tribunal for an order dismissing the referral complaint by the Commission against it on the grounds that the complaint is not legally competent because it does not meet the test of legality and intelligibility ("the legality test") and that the complaint referral is time barred because Paramount is only implicated in the telephone calls in September 2006 and the Commission was precluded from initiating an investigation into that conduct by operation of section 67 (1) of the Act ("the prescription point").

[31] The Tribunal dismissed Paramount's argument based on legality test, holding that there was sufficient information in the Commission's founding affidavit filed in support of a complaint referral to enable Paramount to understand the case against it and to answer it. It reasoned that, as a matter of pleading, if Paramount found the Commission's referral to be inadequate it should have objected to it and the Commission would have an opportunity to rectify it.

[32] The Tribunal pointed out that it has a discretion to manage and conduct its own proceedings. It held that it is entitled to utilise its inquisitorial powers to request further evidence in appropriate circumstances as its proceedings are *sui generis*.

[33] In relation to the prescription point, the Tribunal held that it was not properly pleaded and it dismissed it. It went on to hold that the prescription challenges can only be determined after evidence has been led and the facts are fully ventilated. It

reasoned that to decide the prescription issue only on the basis of legal argument, and not through a factual enquiry, could well result in the unfortunate outcome that the party relying upon it may not get the fullest protection of the section 67 of the Act.

Proceedings before this Court

[34] Paramount's appeal is against all of the findings and/or rulings made by the Tribunal regarding the five points on which its complaint referral dismissal application was based.

[35] When the matter was argued before this Court the dispute turned essentially on the following questions:

(a) whether the complaint referral is time-barred; and

(b) whether the complaint referral is legally competent.

Time Barred argument

[36] Ms **Le Roux** submitted on behalf of Paramount that the complaint referral should be dismissed on the basis that it is time-barred as against Paramount. In developing her argument, Ms **Le Roux** pointed out that Paramount is named as respondent alleged to have contravened the Act for the first time in the second initiation statement, which is dated 2 October 2009, which, so Ms **Le Roux** argued, is more than three years from the latest date, September 2006, on which the Commission actually alleges that Paramount engaged in conduct that constitutes a contravention of the Act in paragraph 93.3 of the complaint referral.

[37] With reference to section 67 (1) of the Act, which provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased, she argued that the prohibited practice in which Paramount is

alleged to have engaged is the conclusion of the agreement either at the meeting or by telephone and that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

[38] Ms **Le Roux** submitted that the Tribunal erred in dismissing Paramount's argument on the basis that Paramount had failed to show that the prohibited practice had ceased in 2006. She argued that this allocation of *onus* to Paramount was absurd as it is not Paramount but the Commission that alleges that the prohibited conduct had ceased in 2006.

[39] By contrast Mr **Unterhalter**, who appeared with Mr **Shozi** on behalf of the Commission, submitted that Paramount's time bar objection has to be dismissed as it was not properly pleaded, both in its answering and founding affidavits. As far as the answering affidavit is concerned, he pointed out that Paramount dealt with the time bar objection in very terse terms, describing it only as a "*preliminary matter*". As regards the founding affidavit Mr **Unterhalter** pointed out that the time bar objection was mentioned blithely in the last sentence of paragraph 7. He submitted with reference to section 67 (1) of the Act that the prohibited practice ceases when the agreement has been fully implemented. He argued that the phrase "*practice*" appearing in section 67 (1) must be given a broader definition and includes not only the conclusion of the agreement but also the implementation thereof.

[40] The Tribunal dismissed Paramount's prescription point on the ground that Paramount had failed to place evidence in its answering affidavit showing that the conduct had ceased in 2006. The Tribunal held that a party who wishes to rely upon the provisions of section 67 (1) must put up some facts, which would ordinarily be

within its own knowledge, to show that such conduct had ceased.

[41] Secondly, the Tribunal dismissed the prescription challenge on the ground that it can only be determined after evidence has been led and the facts fully ventilated. In the view of the Tribunal to decide prescription issue only on the basis of legal argument, and not through a factual enquiry, could well result in the unfortunate outcome that a party relying upon it may not get the fullest protection of the section.

[42] In my view the Tribunal's findings cannot be faulted. The suggestion by Paramount that the determination of the prescription challenge must be made by having regard to the allegations contained in paragraph 93.3 of the Commission's complaint referral, is not correct.

[43] Firstly, the Commission's pleaded case is that the respondents' conduct persisted up until at least January 2007, but may "*have continued after that date, given the pervasive nature of the conduct and the extended period of time over which it took place*" which in my view is a clear indication that the prohibited conduct in which Paramount is alleged to have participated is not confined to the events which occurred up until September 2006.

[44] Secondly, it is clear, upon a proper reading of paragraph 93.3, that the prohibited conduct which is pleaded and in which Paramount is alleged to have participated is the fixing of the selling prices of maize meal products and the timing of future price increases. As correctly pointed out by Mr **Unterhalter**, the prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist and its effect continues to be felt when the future

prices, agreed upon pursuant thereto are implemented. It is therefore not proper to read the allegations in paragraph 93.3 of the affidavit in support of the complaint referral as if they related to conduct which in terms of time has already ceased to exist.

[45] Thirdly, Paramount's prescription challenge is not specifically pleaded as required by Rule 16 (4) which requires the respondent to set out in its answering affidavit the material facts upon which its plea is based. In para 7 of the founding affidavit filed in support of the application to dismiss the complaint referral, Paramount in pleading prescription merely says "*critically, the initiation statement raises the likelihood that the allegations against [it] are time-barred*". It does not provide factual material to support this statement. In any event, on its own version as set out in para 8.4.3 of its answering affidavit, Spanjaard made the telephone calls in October and November 2006. These are the calls which the Commission alleges were made for the purposes of discussing *inter alia* the fixing of prices of wheat and maize products. The fact that telephone calls were made during the relevant period is therefore not in dispute. What is disputed by Paramount is the purposes for which Spanjaard made these calls. It is therefore clear, even on Paramount's version, that the prohibited conduct, in which it is alleged that it participated, could not have become prescribed by the time that the Commission filed its complaint referral. The prescription challenge must therefore fail.

The complaint referral is not legally competent

[46] The second basis on which Paramount seeks the dismissal of the complaint referral is that it is not legally competent since it fails to properly state a valid claim

against Paramount and there is no evidentiary basis for its continued prosecution before the Tribunal.

[47] Paramount advances two grounds upon which it seeks the dismissal of the complaint referral on this basis. First, it contends that the complaint referral does not contain *prima facie* evidence of Paramount's violation of the Act and secondly, that it fails to pass muster in terms of the *Woodlands*[3] test, which requires the Commission to, at the very least, have been in possession of information concerning an alleged practice, which, objectively speaking could give rise to a reasonable suspicion of the existence of a prohibited practice and without which there could not be a rational exercise of the powers of Commission to investigate, refer and prosecute complaints before the Tribunal.

[48] When the matter was argued before us, Ms **Le Roux** abandoned the first ground on which the dismissal of the complaint referral was sought by Paramount and confined her arguments to the second ground, namely that the complaint referral fails to pass the *Woodlands* test.

[49] Ms **Le Roux** submitted that the complaint referral standing alone fails the *Woodlands* test of legality and intelligibility in that it does not contain sufficient specificity to cognise Paramount of any section 4 (1) (b) case against it. She argued that the complaint referral, when read with the answering affidavit, does not establish a *prima facie* case and therefore it should be dismissed. She pointed out that the allegations in paragraph 93.3 of the Commission's founding affidavit in support of the complaint referral cannot sustain a valid complaint against Paramount in that they

[3] At paras 20 and 35

describe the conduct that is alleged to have ceased by September 2006 and is time-barred and they fail to state in what conduct Paramount and its representative Bruce Spanjaard, is alleged to have engaged.

[50] She urged this Court in deciding the dismissal application in light of *Woodlands* test to consider, firstly, the status of the affidavits in referral proceedings before the Tribunal, namely whether they are pleadings or rather are evidence akin to that considered in application proceedings and secondly, whether deficiencies in the affidavits can be cured by the delivery of witness statements or receipts of evidence through discovery and testimony later, during the course of Tribunal proceedings.

[51] In relation to the first question Ms **Le Roux** submitted that the affidavits in referral proceedings must satisfy the *Woodlands* test and must make out a valid and proper case against a named respondent on their face. Relying on the authority of *Loungefoam*[4], she submitted that the Tribunal proceedings are equivalent to motion or application proceedings in the High Court[5] and that being the case, she argued, if the complaint referral and answering affidavits before the Tribunal do not make out a *prima facie* case, the complaint referral must be dismissed. She emphasised that the affidavits in the referral proceedings must comply with the provisions of the Tribunal Rules 15, 16, and 17[6]. She submitted that the *Plascon-Evans*[7] rule applies to

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[4] *Loungefoam (Pty) Ltd and Others v Competition Commission of South Africa* 102/CAC/Jun10 (6 May 2011).

[5] *Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464 (D) at 469 C – E . Quoted with approval in Radebe v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 796 D – E.*

[6] ***15. Form of Complaint Referral***
(1)...
(2) Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –

complaint referral proceedings and that being the case, then in the event of there being a factual dispute, the matter must be decided on the basis of Paramount's version.

[52] In relation to the second question Ms **Le Roux** submitted that deficiencies in the affidavits in referral proceedings cannot be cured by subsequently delivered unsworn witness statements. She argued that the affidavits alone must on their face reveal a legally competent and intelligible case against a respondent.

[53] Mr **Unterhalter** on behalf of the Commission submitted that Paramount's reliance on Woodlands is misplaced. He pointed out that the Court in *Woodlands* was concerned with the jurisdictional standard that is relevant to the initiation of

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(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...

16. Answer
(1) ...
(4) Any other Answer must be in affidavit form, setting out in numbered paragraph –
(a) a concise statement of the grounds on which the Complaint Referral is opposed;
(b) the material facts or points of law on which the respondent relies; and
(c) an admission or denial of each ground and of each material fact relevant to each ground set out in the Complaint Referral.
(5) An allegation of fact set out in the Complaint Referral that is not specifically denied or admitted in an Answer will be deemed to have been admitted.
(6) In an answer, the respondent must qualify or explain a denial of an allegation, if necessary in the circumstances.

17. Reply
(1)..
(2) A reply must be in affidavit form, setting out in numbered paragraphs –
(a) an admission or denial of each new ground or material fact raised in the Answer; and
(b)the position of the replying party on any point of law raised in the Answer.
(3) If a person who filed a Complaint Referral does not file a Reply, they will be deemed to have denied each new issue raised in the Answer, and each allegation of fact relevant to each of those issues.

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 3 SA 623 (A) 635 ("It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.")*

complaints and provides the standard under which one can determine whether a complaint has been initiated in a fashion that permits the Commission to exercise its powers of investigation, and in due course, a referral to the Tribunal, if necessary.

[54] I agree with Mr **Unterhalter's** submission. It is important to interpret and apply the dicta in Woodlands within the specific context of that dispute. Thus, Paramount's reliance on *Woodlands* as a basis for an attack on the Commission's complaint referral is misplaced in that in *Woodlands* the Court was not at all concerned with the content of the Commission's referral. In *Woodlands,* the Court was concerned firstly, with the validity of a summons that had been issued by the Commission against the appellants and secondly, with the validity of the Commission's initiation statement. It set aside the referral because, in its view, the Commission's initiation, statement and subsequent investigation had to relate to the information available or the complaint so filed by the complainant.[8] In other words, what was challenged in *Woodlands* was the validity of the initiation statement not the complaint referral. In the matter before this Court, what is being challenged is the sufficiency and adequacy of the complaint referral, in respect of which issue, the *Woodlands* judgment holds no application.

[55] As regards Ms **Le Roux's** argument which seeks the dismissal of the complaint referral on the basis that the referral affidavit and the answering affidavits do not make out a *prima facie* case, Mr **Unterhalter** submitted that there was no basis for the contention that, in circumstances where a referral was made on the basis of an affidavit, and an answering affidavit has been filed, then somehow, a trial action is converted into motion proceedings and that the Tribunal should determine the proceedings as if they were motion proceedings.

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[8] At para 34

[56] In arguing the matter before the Tribunal and also in this Court Ms **Le Roux** relied heavily on a dictum at para 12 in *Loungefoam* supra for the contention that the Tribunal referral proceedings are equivalent to motion or application proceedings in the High Court. The Tribunal rejected Ms **Le Roux's** contention on two grounds, namely, firstly, on the basis that no such decision was made by this Court in *Loungefoam* and secondly, that her argument ignores the fact that the Tribunal is a creature of a statue with statutory provision empowering it to regulate the conduct of its proceedings.

[57] I agree with the Tribunal's finding that *Loungefoam* does not provide support for the contention which Ms **Le Roux** seeks to advance. In *Loungefoam* supra at para 7 this Court, in the process of considering the specific issues which were squarely before it for determination, found it necessary to comment on the procedure which had been adopted by the Commission in seeking to raise the issues before the Tribunal.

[58] The first issue on which this Court commented related to the amendment application in which the Commission *inter alia* sought leave to amend its notice of motion, the founding, supplementary and replying affidavits in the complaint referral. The appellants had objected to the amendment, contending that it is not competent in law for a deponent to amend an affidavit. In response to the objection, the Commission contended that it was entitled to amend its affidavits on the ground that "*the objections to amendments to affidavits in ordinary motion proceedings in a Court of law do not apply. A founding affidavit in a complaint referral is not required to contain evidence in support of allegations of prohibited practices*".

[59] This Court rejected the Commission's contention. It held in para 12:

> *"An affidavit in competition proceedings has precisely the same character as it has in any other circumstances. It is a sworn statement on oath by a witness that is required by Rule 15 (2) to set out a concise statement of the grounds of the complaint and the material facts and points of law relevant to the complaint and relied on by the Commission. It serves the same purpose as an affidavit in application proceedings, which contains both the allegations necessary in a pleading, including any relevant propositions of law and the essential evidence in support of those allegations."*

[60] This *dictum* makes it clear that this Court was concerned with the nature of the affidavits in complaint referral proceedings before the Tribunal but not with the nature of the complaint referral proceedings . It does not support a conflation of motion proceedings in general and proceedings before the Tribunal. This Court made it clear that an affidavit in the Tribunal referral proceedings has the same character as it has in any other circumstances, which means that it must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. The fact that an affidavit in Tribunal referral proceedings has the same character as it has in motion proceedings does not mean that the proceedings before the Tribunal, subsequent to a referral are akin to motion proceedings. The procedure for the adjudication of the disputes in referral proceedings is different to that used in motion proceedings. The role of the Tribunal in the adjudication of disputes in referral proceedings is set out in sections 52[9] and

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[9] ***52. Hearings before Competition Tribunal***
(1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to

55[10] of the Act which *inter alia* require the Tribunal to conduct its hearings as expeditiously as possible and in accordance with the principles of natural justice.

[61] As regards the role of the Tribunal in the adjudication of competition disputes, this Court made it clear in *Senwes v The Competition Commission of South Africa*[11] that the Act does not view the Tribunal as functioning in the same way as would an ordinary Court, inflexibly constrained by an adversarial model of adjudication. It held that "*while a party against whom a complaint has been lodged, is clearly entitled to sufficient information to determine the nature of the prohibited practice,..., the enquiry as to the requisite level of understanding should not be sourced in the principles which apply to the nature of adversarial proceedings employed in a civil*

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it in terms of this Act.
(2) Subject to subsections (3) and (4), the Competition Tribunal –
(a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and
(b) may conduct its hearings informally or in an inquisitorial manner.
(2A) Despite subsection (2) (a), the Chairperson of the Tribunal may order that matter be heard-
(a) In chambers, if no oral evidence will be heard, or that oral submissions be made at the hearings; or
(b) By telephone or video conference, if it is in the interests of justice and expediency to do so.
(3) Despite subsection (2), the Tribunal member presiding at a hearing may exclude members of the public, or specific persons or categories of persons, from attending the proceedings-
(a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
(b) if the proper conduct of the hearing requires it; or
(c) for any other reason that would be justifiable in civil proceedings in a High Court.
(4) At the conclusion of a hearing, the Commission Tribunal must make any order permitted in terms of this Act, and must issue written reasons for its decision.
(5) The Competition Tribunal must provide the participants and other members of the public reasonable access to the record of each hearing, subject to any ruling to protect confidential information made in terms of subsection (3) (a).

[10] ***55. Rules of procedure***
(1) Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52 (2).
(2) The Tribunal may condone any technical irregularities arising in any of its proceedings.
(3) The Tribunal may –
(a) accept as evidence any relevant oral testimony, document or other thing, whether or not –
(i) it is given or proven under oath or affirmation; or
(ii) would be admissible as evidence in court; but
(b) Refuse to accept any oral testimony, document or other thing that is unduly repetitious.

[11] *87/CAC/FEB09* at paras [39] and [40]

case". I agree entirely with this statement. In the circumstances, the contention that the competition referral proceedings are akin to motion proceedings and that by reason thereof the adequacy of the information in the affidavits in the referral proceedings should be determined in terms of the principles which apply to motion proceedings, should fail.

[62] Responding to Ms **Le Roux** submission that the deficiencies in the affidavits in the referral proceedings before the Tribunal cannot be cured by subsequently delivered witness statements, Mr **Unterhalter** submitted that the question as to whether witness statements can cure a pleading is, in effect, to ask a fundamentally wrong question to ask because this is not a question of jurisdiction. He argued that the question should be whether the Commission has pleaded with sufficient particularity to enable Paramount to plead to the complaint referral. He submitted that in the present case, the Commission pleaded with sufficient particularity to enable Paramount to understand the allegations against it and to plead thereto.

[63] I agree with Mr **Unterhalter**. If Paramount felt that it was in any disadvantaged by reason of the manner in which the complaint referral was formulated it was open to it to raise an objection or request further particulars before filing its answering affidavit. The cause of complaint could have been removed by means of a request for further particulars.

[64] In any event, the suggestion by Ms **Le Roux** that the witness statements cannot cure deficiencies in the affidavits in the complaint referral proceedings, is not correct. The answer to her submission is to be found in the decision of the Tribunal in *Pioneer Foods (Pty) Ltd v The Competition Commissioner* 50/CR/MAY08 where at

in *Pioneer Foods (Pty) Ltd v The Competition Commissioner* 50/CR/MAY08 where at para 49 it had this to say regarding the role of witness statements in the referral proceedings:

> "*In this matter no case has been made out. Firstly, the pleadings have given Pioneer more than sufficient detail on meetings that its representatives were alleged to have attended. But most importantly Pioneer will receive all the Commission's witness statements on an agreed date, prior to the commencement of the hearing. It will thus, as the Commission points out, have more information about the hearing than parties would ordinarily enjoy in Court proceedings*".

[65] It is clear from this *dictum* that, contrary to Ms **Le Roux's** contention, witness statements have an important supplementary role to play in the complaint referral proceedings before the Tribunal. Besides playing this supplementary role, in my view, they also have an important purpose to serve, namely, to give the other party such information about a party's evidence as will remove the element of surprise.

Order

[66] I accordingly make the following order:-

The appeal by Paramount is dismissed with costs, such costs to include the costs of two counsel, where two counsel were employed.

ZONDI JA

I agree

DAMBUZA JA

I agree

DAVIS JP