**IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

CASE NUMBER: 93/CAC/Mar10

DATE: 13 SEPTEMBER 2012

In the matter between:

**THE COMPETITION COMMISSION**

Applicant

and

**YARA SOUTH AFRICA (PTY) LTD**

1st Respondent

**OMNIA FERTILIZER LIMITED**

2nd Respondent

**SASOL CHEMICAL INDUSTRIES LTD**

3rd Respondent

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**J U D G M E N T**

**(Application for Leave to Appeal)**

**DAVIS, JP**:

This is an application for leave to appeal against the judgment of this court on 14 March 2011. That, in itself, is reflective of a systemic problem. This Court delivered its judgment a year and a half ago.

Now the parties return in an application for leave to appeal to the Supreme Court of Appeal. In the interim, the case was heard on appeal by the Constitutional Court, which declined to decide the matter on the merits, but referred this application to this court to make a determination, whether on the test of special leave, the matter should proceed to the Supreme Court of Appeal.

Before I deal with the merits of this case, I should again reiterate what I said when the initial application for leave to appeal was brought before this court. The system of competition litigation has become unwieldy. It is presently at war with the objective of expeditious resolution of these disputes. Furthermore, this court is now uncertain as to which cases it must hear on application for leave to appeal. We are told by theConstitutional Court that we are a specialist court and, therefore, the matter should be heard before proceeding, if necessary, to the Supreme Court of Appeal.

However, this is not a case which requires specific competition expertise. It demands an engagement with the procedural provisions of the Act. By contrast, in a complicated merger case in which this court came to a decision recently the matter proceeded to the Supreme Court of Appeal without any recourse to this court's view as to whether there should be a further application for leave to appeal. The court can, therefore, be forgiven for being confused as to the correct position is with regard to appeals. Clarity is required.

Be that as it may, the essential core dispute in this case turned on facts which I do not intend to repeat. They are set out carefully in the meticulous judgment of my colleague, Dambuza, JA. The issue was that when the complainant, Nutri-Flow, complained to the Commission in this case, the form CC1 and the accompanying affidavit, which were carefully prepared by the complainant, together with its lawyers, stated, carefully and clearly, that three complaints relating to abuse of dominance against Sasol, were to be brought to the attention of the Commission. There were but three paragraphs in a 113 page affidavit, which made mention to allegations of the cartel and,

therefore, if read accordingly, referred to a contravention of section 4(1)(b)(i) of the Competition Act of 1998 ('the Act').

However, this court concluded that the complaint set out by Nutri-Flo, amounts to three complaints in relation to abuse of dominance. It held that it was not within the power of the Commission to add, what this court considered to be a further complaint, namely a cartel complaint pursuant to section 4(1)(b)(i) of the Act. It is against this finding that the applicant seeks to appeal to the Supreme Court of Appeal.

In order to determine the question of leave to appeal, it is perhaps useful to recapitulate the key sections which govern this case. In terms of section 49B(1):

> "A commissioner may initiate a complaint against an alleged prohibited practice."

Further, in terms of subsection (2), any person may:

> "(a) Submit information concerning an alleged prohibited practice to the Competition Commission in any manner of form; or
> (b) Submit a complaint against an alleged prohibited practice to the Competition Commission in prescribed form.
> (c) Upon initiating or receiving a complaint in terms of the section, the Commission must then direct an inspector to investigate the complaint as quickly as possible."

Accordingly, the complaint must be initiated against an alleged prohibited practice. The complaint relates to an alleged contravention of the Act, specifically, it appears, contemplated by a

complainant and based on an applicable provision of the Act. That certainly was the position as confirmed in Woodlands Dairy v Competition Commission 2010 (6) SA 108 (SCA) at para 19. In this paragraph, Harms DP appeared to uphold the approach of this court in Sappi Fine Paper (Pty) Ltd v Competition Commission & Another [2003] 2 CPLR 272 (CAC). En passant, what was cited here does not appear to follow precisely the dictum in the Sappi case.

Subsection 50(1) provides:

> "At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal."

In terms of subsection (2):

> "Within one year after the complaint was submitted to it, the Commission must:
> (a) Subject to subsection (3) as refer the complaint to the Competition Tribunal, if it determines that a prohibited practice as been established.
> (b) In any other case, issue a notice of non-referral to the complainant in prescribed form."

Significantly, for the purposes of this dispute, in terms of subparagraph (3), when the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2), it may:

> "(a) Refer all the particulars to the complaint as submitted by the complainant.
> (ii) Refer only some of the particulars of the complaint as submitted by the complainant.
> (iii) Add particulars to the complaint as submitted by the complainant.

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

In Woodlands, supra, which dealt with two summonses issued in terms of section 49A, in terms of which the parties were required to submit to interrogation and produce documents, Harms, DP, after a description of the structure of the Act, noted that ,during the investigation which follows the complaint, the Commissioner may issue a summons for the purpose of interrogation of production of documents. He then said the following:

> "The initiation and subsequent investigation must relate to the information available or the complaint filed by the complainant. There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility. There are reasons for this. The first is that any interrogation or discovery summons depends on the terms of the initiation statement. The scope of the summons may not be wider than the initiation. Furthermore, the Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated, will be referred to the Tribunal. It could hardly be argued that the Commission could have referred an investigation for anti-competitive behaviour in the milk industry at all levels to the Tribunal." paras 34-35.

Where certain members of the cartel were mentioned, then, notwithstanding that there is suspicion against others, this cannot be used as a springboard to investigate 'all and sundry'. At para 36, Harms DP said:

> "This does not mean that the Commission may not during the course of a properly initiated investigation, obtain information about other transgressions. If it does, it is

fully entitled to use information so obtained for amending the complaint of initiation of another complaint in a further investigation."

It is this jurisprudence that confronted this court in the present dispute. Mr Marcus, who appeared together with Ms Goodman on behalf of the applicants, sought to read Woodlands, supra, to deal only with the summons. The problem with his argument is that Harms, DP, with respect, went far further in order to determine what the initiation statement was required to contain .The learned Deputy President held, in effect, that the initiation statement was akin to the issuing of a summons. It was on these principles that much of the findings of the Court in Yara , supra, were predicated. In Yara, as I have noted, Nutri-Flo submitted the complaint to the Commission against Sasol. Both companies were involved in the production and supply of fertilizer. Pursuant thereto, it also brought an application in terms of section 49C for an interim order to the effect that Sasol be interdicted from implementing price increases and raw materials and/or products required by Nutri-Flow. In this case, Yara and Omnia were cited as respondents.

When the matter was referred by the Commission to the Tribunal, the complaint against Sasol referred to contraventions of section 8(c), 8(a) and 9(1), but against all the three respondents an additional allegation was now made, that is a contravention of section 4(1)(b). Before the Tribunal an application was brought to amend the referral. The amendment which was brought was designed to incorporate the complaint details relating to the contravention of section 4(1)(b)(i) by Sasol, Yara and Omnia. The question arose as to whether the Commission had now sought to introduce a new matter, which had not been covered in the Nutri-Flo complaint and in terms of which the only case made out in the Nutri-Flo's papers, was a contravention by Sasol of abuse of dominance provisions.

In Yara, this court referred to the description of the complaint by Nutri-Flo in the CC1, and the amplification thereof in an affidavit which served to extend the complaint and which constituted the

founding affidavit for the interim order so sought. Although mention was made of a cartel, Mr Lyle disposed to an affidavit and made it clear that Sasol committed the following prohibitory practices, namely:

1. Exclusionary pricing practices.
2. Excessive pricing practices.
3. Discriminatory pricing practices.

The court found that, to the extent that any cartel activity had been mentioned, this allegation fell to be classified as 'information submitted' in terms of section 49B(2)(a) of the Act. As noted in my description of the architecture of the Act, there is a distinction to be drawn between a complaint and information submitted to the Commission. That distinction must be given concrete meaning. Accordingly, the court held that only the particulars of the complaint as submitted by Nutri-Flow, could be referred to the Tribunal. Further information, which was provided by the Tribunal, could then have formed the subject matter of a further, fresh complaint initiated by the Commission.

Although not strictly necessary for this application, it is useful to cast a jurisprudential eye on the illumination of the position as provided by Wallis, AJA(as he then was) in Lounge Foam (Pty) Ltd v Competition Commission [2011] 1 CPLR 19 (CAC). The learned judge of appeal made the observation that where the Commission has discovered evidence that implicates a party as a participant in a cartel, and wishes to add to the existing charge that the party faces before the Tribunal, the Commission may amend the original complaint initiative, institute an investigation, however cursory, and then refer the complaint against that party to the Tribunal. Wallis, AJA noted that this was hardly an avenue which would sacrifice the importance of the functions of the Commission on the alter of formalism.

The court found, in terms of section 49B(3), that the Commissioner must direct an inspector to investigate a complaint, irrespective of whether the complaint is initiated by the Commission or made by a third party. This enables the Commissioner to exercise wide powers conferred by the Act. It also affords the firm, which is the target of the investigation, an opportunity to engage with the Commission and, if possible, dispel its concerns regarding the complaint. Furthermore, the court held, with reference to section 67(1), which provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased, that the date of initiation of the complaint is thus vital for the purposes of this section. Hence, the importance that in every instance of every complaint against a firm, the complaint must be based on a proper initiation in terms of section 49B. Reference was again made to the Woodlands decision, supra, in order to determine the contours of a proper initiation.

In dealing with the question of an amendment or a fleshing out of a complaint, which had been engaged with in the Yara case, the court in Lounge Foam suggested that this may contemplate two possibilities:

> "1. The information obtained in the course of investigation may relate to and fortify the existing complaint and justify an amendment to the particulars of the complaint as initiated without altering its fundamental nature.
> 2. Where the information discloses a different transgression or participation by a party, which is not the subject of the complaint, either the original complaint must be amended to encompass the additional complaint or party or a fresh initiation of the complaints required." Paragraph 55.

What was not contemplated and is not part of the Act, according to the Lounge Foam judgment, is the situation of an amendment of the complaint that has been referred to the Tribunal, by including

new transgressions or new parties to existing transgressions without following the requirements of the Act.

So much for the existing jurisprudence. It is clear that a series of issues are now raised which are of considerable importance to the future of competition enforcement in South Africa. These include:

1. To what extent is the intention of the complainant determinative of the ambit of the complaint lodged in terms of section 49B(2)(b). If, as in Yara, the complainant only intends to complain about excessive pricing and related abuse of dominance contraventions on the part of one party, that is Sasol, but not about cartel activity which includes other parties, can the ambit of the complaint be read to include a reference to other parties, which then transmogrifies into a full blown component of the complaint after the investigation which takes place, pursuant to the initiation of a precisely worded complaint in terms of section 49B(3)?

   The Yara case illustrates the problem. To recapitulate: the Commission receives a complaint about price increases in respect of raw materials provided by Sasol. In it, the essential complaint is described expressly as constituting a range of exclusionary price practices, excessive pricing and discriminatory pricing, practised by one company, namely Sasol. Assuming further that the paragraphs in the founding affidavit refer to Yara and Omnia by way of further information supplied to the Commission relating to cartel activities, as opposed to an express complaint which was made, can the Commission after investigation of this aspect of the complaint, refer it to the Tribunal; that is the cartel activity? In other words, can the latter aspect, the allegation about the constitution of a cartel, which has been the product of the investigation be so included as part of the initial complaint and hence the referral? The investigation could have found that the very reason for the excessive and discriminatory pricing practices, was the existence of a cartel. It is this problem which

caused this court to answer the question in the negative, because of the specific and precise nature of this complaint, However, the question remains: does the Act bear the weight of the second meaning which I have posed in the question set out above?

2. In Yara, the court found, notwithstanding paragraph 36 in Woodlands, supra, that there was no provision in the Act for an amendment to the complaint. In a section of the Competition Tribunals' decision in South African Breweries (unreported 2012), there was a discussion with regard to this particular point. Notwithstanding the voluminous nature of this part of the judgment, no reference was made to suggest that there is a provision in the Act which permits amendment to the complaint, nor that the jurisprudence, set out in Yara was incorrect. Accordingly, on the basis of a careful reading of the Act and the regulations, the court in Yara concluded that the legislature did not permit such amendments. Hence a complaint can only be initiated and submitted as provided for in section 49B(1) and 49B(2)(b). The question, however, arises, given the dictum in Woodlands, to which I have already made mention and which refers to an 'amendment or fleshing out', whether it could have been the intention of the Supreme Court of Appeal to read section 50(3) to mean that particulars of a complaint include an amendment to the complaint? There appears to be no other source in the Act to justify this kind of amendment to the complaint. For this reason, it may be that paragraph 36 of Woodlands has to be construed, and was intended to be construed, to read section 50(3) in a different fashion to the court in Yara. That interpretation would support the applicants in this particular application for leave to appeal.

3. Should the test not be whether the Commission is entitled, after investigation to refer any prohibited complaint that is rationally or cognisably linked to the conduct alleged to constitute a prohibited practice? This interpretation would be supported by a reading of section 50(3) of the Act, which refers to a notice of non-referral in respect of any particulars

of a complaint which are not in turn referred to the Tribunal. In this context, particulars may then not mean simply the details of the complaint, but further refer to a core allegation of a breach of the Act, which the Commissioner, in his discretion, determines should not form part of the referred complaint. In effect, this court adopted the contrary view, namely that the word complaint must constitute a competition law cause of action, that is a discrete competition law claim, which in itself is sourced in the idea that the complaint is legislatively linked to an alleged prohibited practice as provided for in the Act. This formulation appears to indicate that the complaint is grounded in a prohibited practice as contained in Chapter 2 of the Act. In turn, the word 'particulars' would then appear to sit uneasily with this notion.

4. In Woodlands, the foundational approach adopted by Harms, DP, which dictated the basis of his judgment, is encapsulated in paragraph 11. It read thus:

> "I accordingly disagree with the view of the CAC that because it is difficulty to establish the existence of prohibited practices, a generous interpretation of the commission's procedural rights would be justified. This approach would imply that the more difficult it is to prove a crime (such as corruption), the fewer procedural rights an accused would have."

There is no authority, and neither is any cited in Woodlands, which suggests that criminal penalties are expressly contained in the Act, that a criminal model should be employed to interpret the Act. Indeed, the effect of the judgment of the Constitutional Court in the Competition Commission of South Africa v Senwes Ltd 2012 (7) BCLR 667 (CC) (which reversed a decision of the Supreme Court of Appeal) appears to have established a more generous approach to the formulation of a complaint. Although the Constitutional Court

ruled that the concept of a margin squeeze be deleted from the complaint, the core of the complaint turned on whether the complainant could reasonably know the case it was required to meet. The Constitutional Court eschewed a rigid approach to the nature of a complaint in finding against the respondent.

The question arises, albeit in a different context, whether this approach will now be extended to the particular dispute before this court. Whatever the debate with regard to the exact nature of the Constitutional Court's formulation, the judgment of Jafta, J, adopted a generous interpretation to the construction of the complaint which, in turn, must throw some doubt on the fundamental premise adopted by Harms, DP in Woodlands, and which, to a large degree, was the source of the other judgments to which I have made reference, including Yara.

5. The ambit of this court's dicta in Glaxo Welcome (Pty) Ltd & Others v National Association of Pharmaceutical Wholesalers & Others (15/CAC/Feb02), concernin the concept of a rational and cognisable link between the conduct referred to or described in a submission by the complainant, and one or more of the prohibitions in the Act, has been debated. The question arises as to why this Glaxo test should apply where a complainant who, lodges a complaint, sets out a description of an alleged prohibited practice, and the parties alleged to have so perpetrated it which, on a reasonable interpretation, can justify the conclusion that this complaint is rationally or cognisably linked to other prohibitions in the Act.

If the various questions posed and which are an encapsulation of the difficulties which have followed after the Woodlands judgment and its application in Yara, are answered differently to the manner in which they were in Yara, then the decision in Yara may well have to be reversed.

It is important , however, to note that the facts of Yara, for the reasons I have already set out,

are unusual in the context of these kind of disputes ; that is , this is a case in which the complainant was specific about the complaint which it had lodged and, furthermore, it was clear that this was not simply a case of an ordinary member of the public complaining in circumstances without careful legal consideration having been taken as to the nature of the complaint.

That having been said, this is a dispute which raises a host of difficulties. It is profoundly in the public interest that the matter be determined. Because courts have to achieve the correct balance between affording the Commission sufficient latitude to perform its crucial functions and according parties, including those who are alleged to have been involved in a cartel, due procedural fairness, which is congruent with our constitutional ambitions, the case assume even greater importance for the future of the administration of the Act.

I am cognisant and have taken careful account of the extremely persuasive arguments which have been lodged by Mr Rogers on behalf of the second respondent. They are the arguments which this court accepted. However, the test is whether another court, for all of the reasons I have suggested, may well consider them to be incorrect on a different reading, particularly of the law as set out by the Constitutional Court in its Senwes judgment. For all these reasons, this matter deserves full consideration from the Supreme Court of Appeal. Accordingly, **leave is granted to the Supreme Court of Appeal. Costs to stand over**.

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DAVIS, JP

Mailula and Dambuza JJA agreed: