

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO.: 93/CAC/Mar10

CT CASE NO.: 31/CR/May05

Date heard: 22 November 2010

Date delivered: 14 March 2011

In the matter between:

YARA SOUTH AFRICA (PTY) LTD

Appellant

and

**THE COMPETITION COMMISSION
SASOL CHEMICAL INDUSTRIES LIMITED
OMNIA FERTILIZER LIMITED**

First Respondent
Second Respondent
Third Respondent

In re:

THE COMPETITION COMMISSION

Applicant

and

**SASOL CHEMICAL INDUSTRIES LIMITED
YARA SOUTH AFRICA (PTY) LIMITED
OMNIA FERTILIZER LIMITED**

First Respondent
Second Respondent
Third Respondent

AND

CAC CASE NO.: 94/CAC/Mar10

CT CASE NO.: 31/CR/May05

In the matter between:

OMNIA FERTILIZER LTD

Appellant

and

THE COMPETITION COMMISSION

Respondent

J U D G M E N T :14 March 2011

DAMBUZA, JA:

1]The two appellants in this appeal, (Yara South Africa (Pty) Ltd and Omnia Fertilizer Ltd) are South African companies which conduct business as producers, importers, distributors and suppliers of fertilizer. For the sake of convenience I shall refer to them in this judgment as Yara and Omnia. Yara used to be known as Kynoch Fertilizer (Pty) Ltd and conducted its business through a division of Africa Explosives and Chemicals Industries (AECI) which was later sold to Norsk Hydro ASA.

2]The appellants appeal against a decision of the Competition Tribunal (“the Tribunal”) allowing the Competition Commission (“the Commission”) to amend its referral of a complaint initiated by “Nutri-Flo” to the Tribunal, and dismissing a counter-application by Omnia to have the complaint and the referral set aside..

3]The matter dates as far back as 2003 when Nutri-Flo CC and Nurtri-Flo Fertilizer CC, both South African corporations collectively referred to in these proceedings as “Nutri-Flo”, which are also in the business of production and distribution of fertilizer, submitted a complaint to the Commission against Sasol Chemical Industries (Pty) Ltd (Sasol), another South African Company involved in the production and supply of fertilizer.¹ Simultaneously with the lodging of the complaint, Nutri-Flo brought an application in terms of section 49C of the Competition Act, Act 89 of 1998 (“the Act”) against Sasol, seeking

¹ Nutri-Flo had, in 2002 initiated a complaint with the Commission against Sasol, alleging contravention, by Sasol, of the provisions of the Competition Act. That complaint was never referred to the Tribunal; instead, the Commission, subsequent to its investigation thereof, issued a certificate of non-referral for lack of evidence.

an interim order that Sasol be interdicted from implementing price increases on raw materials and/or products required by Nutri-Flo and that Sasol reimburse Nutri-Flo moneys that the latter had paid as increases on products supplied to it by Sasol at that stage.² Yara and Omnia were also cited as respondents in the application for interim relief. Omnia was, however, not cited as such at the initial stage; its subsidiary, Nitrochem, which had conducted the business previously, was cited. Nitrichem, at some stage became dormant and its business was eventually conducted by Omnia.

4]The complaint, as it appears in the CC1 Form was that Sasol had *“imposed price increases in respect of raw material it supplied to (Nutri-Flo), to such an extent as to render its (Nutri-Flo’s) continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached”* to the complaint form.

5]The affidavit referred to in the complaint Form (CC1) also served as the founding affidavit in the application for interim relief, which arrangement, in my view, led to some confusion as to what Nutri-Flo intended to submit as a complaint, as will become more apparent later in this judgment.

6]After conducting investigations into the alleged prohibited conduct as required by the Act, the Commission, in May 2005, referred the complaint to the Tribunal. In the referral the Commission alleged that the complaint by Nutri-Flo was against Sasol, Omnia and Yara. As against Sasol, the complaint

2 The prices appear in a price list termed “Nutri-Flo price list 11 July – 10 August 2003.

referred to the Tribunal was that it had contravened sections 8(c),³ 8(a)⁴ and 9(1)⁵ of the Act and as against all three respondents the allegations in the referral were that they had contravened the provisions of section 4(1)(b)⁶ of the Act. Omnia and Sasol excepted to the portion of the referral relating to the section 4 contravention on the basis that it lacked sufficient particularity to enable them to know the case which they were required to meet. In response to the exception, the Commission, in November 2006, sought and was granted leave to amend the referral. In March 2008 the Commission amended the referral once more. Presently the referral sets out the complaint relating to a contravention of section 4(1)(b) as:

“8. In its complaint Nutri-Flo alleged that the respondents have divided the market for LAN that it identifies, and that they have colluded to keep the price at artificially high levels. In addition, Nutri-Flo alleged that the respondents have in similar manner colluded over the prices of certain other fertilizers, namely Urea, Potassium Chloride (known as Potash, but also known as KCL and MOP), Di-Ammonium Phosphate (known as DAP) and Mono-Ammonium Phosphate (known as MAP).

9. Moreover, in its complaint, Nutri-Flo contended that Sasol, while dominant in the market for the supply of LAN and ANS, has committed an abuse of its dominant position by charging excessive prices for LAN and ANS.”

7]It is the referral as it stands subsequent to the 2008 amendment that the Commission now wishes to amend and it is the proposed amendment which

3 Charging such high prices for LAN and ANS that Nutri-Flo's continued viability was placed in jeopardy.

4 Charging excessive prices for LAN, ANS and ammonia, which conduct placed Nutri-Flo's viability in jeopardy.

5 Imposing on Nutri-Flo disproportionately higher prices for ANS and LAN than the retail price increases effected by Sasol at the time.

6 Colluding to control the price at which fertilizers KCL and urea were sold in South Africa and that Sasol charging excessive prices for ammonia.

is the subject of the judgment of the Tribunal and against which Yara and Omnia now appeal.

8]The proposed amendment comes against the background of negotiations and a consequent settlement reached between Sasol and the Commission on 18 May 2009 regarding the Nutri-Flo complaint. As a result of the settlement, the complaint against Sasol fell away. In the settlement agreement Sasol made certain admissions regarding contraventions of section 4(1)(b)(i) of the Act by itself, together with Yara and Omnia. The application to amend the referral was brought in October 2009 and was aimed at incorporating into the complaint, details relating to the contravention of section 4(1)(b)(i) by Sasol, Omnia and Yara as contained in the settlement agreement. In particular, the Commission sought to introduce allegations pertaining to meetings (allegedly) held between 2001 and 2006, facilitated by committees set by Sasol, Yara and Omnia to monitor and/or facilitate implementation of a pricing agreement concluded by the three of them in 2001.

9]The following is the content of the proposed amendment:

"A: By the insertion after paragraph 29 of the complaint referral affidavit of paragraph 29A as follows:

'29A Conduct consequent to the IPC and NBC exchanges

29A.1 On 3 July 2001 the respondents met at the Sandton Holiday Inn. Among those present at the meeting were the following representatives of the parties who, at that time, were incumbents of

the posts here specified:

29A1.1 *For Sasol, specifically its Fertilizer Division:*

29A1.1.1 *De Wet Deetlefs, the Managing Director;*

29A1.1.2 *Jaco van Zyl, the Retail Manager;*

29A1.1.3 *Johan Coetzee, the General Manager: Marketing;*

29A1.1.4 *Danie Roode, the Manager: Wholesale and Industrial Marketing;*

29A1.1.5 *Wayne Degnan, the Supply Chain Manager; and*

29A1.1.6 *Hennie de Kock, an official in the Supply Chain Department;*

29A1.2 *For Omnia:*

29A1.2.1 *Derrick van Zyl; and*

29A1.2.2 *Werner Amsel;*

29A1.3 *For Kynoch:*

29A1.3.1 *Uli Reese, Managing Director;*

29A1.3.2. *Willem Struwig; and*

29A1.3.3 *Alan Clegg.*

29A.2 *In the course of the meeting the participants came to an agreement, arrangement or understanding that they would employ a common pricing model, an exemplar of which is annexed marked NM12A, the salient features being the following –*

29A2.1 *the list of the fertilizer products supplied by them would be*

standardised so as to reflect –

- 29A2.1.1 *in the case of LAN, the import parity price of urea and the Norsk Hydro Paris price for LAN;*
- 29A2.1.2 *in the case of the remaining products, the import parity price of the product;*
- 29A2.2 *the import parity price would, where appropriate, be determined in the following manner –*
 - 29A2.2.1 *first, by taking the highest FOB price of the product from a designated geographical source as reflected in an identified publication relevant to the product;*
 - 29A2.2.2 *then, by adjusting the price to reflect costs likewise determined by reference to designated sources, including freight, insurance, losses, port costs, and demurrage;*
 - 29A2.2.3 *from which would be derived a factor for the costing of nitrogen, potassium and phosphate that would produce the governing price for a product comprising one or more of these elements;*
- 29A2.3 *the import parity price would be augmented by mark-ups, premiums, baggage charges and sales commission agreed for each respondent separately;*
- 29A2.4 *each of the respondents would be entitled to offer discounts on the list price, but not higher than the ceiling agreed for each respondent separately.*
- 29A.3 *From time to time from early 2001 to late 2006, Van Zyl, Amsel and Clegg, representing the respondents as aforesaid, came to agreements, arrangements or understandings over the price of the product, the fine-tuned formulation of the model and, after the July meeting referred to above, the implementation of the model and the*

policing of its application –

- 29A.3.1 *in meetings at the Randpark Golf Club;*
- 29A.3.2 *otherwise in telephonic exchanges between them.*
- 29A.4 *Within the regional divisions of the respondents, representatives of the respondents reached agreements, arrangements and understandings on the implementation of the standardised prices and/or the allocation of the customers inter alia as follows: –*
 - 29A.4.1 *at regular intervals within the KZN region, in meetings between Mark Hawksworth (on behalf of Sasol), Bruce de Gersigny and Douglas Stubbs (on behalf of Omnia's division known as Nitrochem) and Dudley Davis (on behalf of Kynoch);*
 - 29A.4.2 *in 2001 or 2002 at the Riviera Hotel, Vereeniging, in a meeting between Arnold Otto and Koos Leonard (on behalf of Sasol), Ruben Eales and Abel Rudman (on behalf of Omnia), and representative of Kynoch whose name is unknown;*
 - 29A.4.3 *In 2001, 2002 and 2003 at the golf club in Vereeniging, in meetings between Johnny de Klerk (on behalf of Sasol), Reuben Eales and Martin van Jaarsveld (on behalf of Omnia) and Sakkie Cronje and Hennie Gouws (on behalf of Kynoch).*
- 29A.5 *The meetings, communications and exchanges referred to above were directly or indirectly facilitated by the IPC and NBC meetings pleaded above and directly or indirectly gave effect to those meetings.'*

B: By the insertion after paragraph 33.2 of paragraph 33.3 as follows:

'33.3 In addition, and from time to time, the respondent rigged the bids to be made by them individually by coming to an agreement, arrangement or understanding on the price that each would bid and the quantity of product that they would tender to supply. Such agreements,

arrangements or understandings are recorded inter alia in the internal Omnia e-mail dated 21 May 2003 and annexed hereto marked NM12B.”

10]Before the Tribunal the application was opposed by both Omnia and Yara, mainly on the basis that the Commission sought, through the proposed amendment, to introduce matter which was not covered by the Nutri-Flo complaint and that in fact the only complaint initiated by Nutri-Flo, and the case made out in Nutri-Flo's papers, was for the contravention, by Sasol, of the provisions of sections 8 and 9 of the Act. Contravention of section 4(1)(b) (i), so the argument was, both before the Tribunal and before us on appeal, was never part of the complaint by Nutri-Flo. Omnia further contended that the amendment was brought at an unacceptably late stage in the proceedings; that the application was brought *mala fide*; that the inclusion of allegations of collusion is time barred and that the proposed amendments are unacceptably vague and should not be accepted in their current form.

11]Further to opposing the application for amendment, Omnia brought a counter-application for dismissal of the complaint initiated by Nutri-Flo (insofar as, subsequent to the settlement, only Yara and Omnia remained as the respondents in the complaint as referred by the Commission to the Tribunal).

12]Regarding the counter-application, Omnia sought that allegations of contravention of section 4 of the Act in the referral be held to be incompetent. Again, the submission was that the Commission's referral was impermissible as Nutri-Flo's complaint was limited to abuse of dominance by Sasol, which

was the only complaint in respect of which Nutri-Flo had intended to be a complainant; more specifically, the three alleged abuses of dominance by Sasol, ie, exclusionary pricing, excessive pricing and discriminatory pricing.⁷ Nutri-Flo had never intended to be a complainant in respect of a conduct prohibited by section 4 of the Act, so it was submitted.

13]The Tribunal found that allegations of contravention of section 4 of the Act had been made against Yara and Omnia both in the CC1 Form and in the affidavit filed as both a further explanation of the complaint and a founding affidavit in the application for interim relief. It found that the Commission had properly investigated and referred to it, as a complaint by Nutri-Flo against Yara and Omnia, contravention of section 4(1)(b)(i) of the Act and would have, in any event, been entitled to refer to the Tribunal such a complaint even if no mention had been made, in the complaint form, of contravention of Section (4) of the Act because there was a “*clear link between the section 4 referral and the conduct described in Nutri-Flo’s CC1 form*”.

14]On appeal it was submitted that the interpretation brought to bear by the Tribunal on the content of Nutri-Flo’s CC1 Form and the accompanying affidavit, together with a conclusion by the Tribunal that the Commission is permitted to further investigate any collusion it might “*happen upon*” during the course of investigations, and to also refer section 4 contraventions as “*further particulars*” to the complaint, are incorrect.

15]The Commission, on the other hand, persisted in its case that the

⁷ See sections 8 and 9 of the Act.

complaint by Nutri-Flo has always included contraventions of Section 4(1)(b) (i) of the Act by Yara and Omnia and that insistence by Yara and Omnia that a distinct complaint of a section 4 contravention should have been initiated by the Commission, was only a matter of emphasis on form over substance.

16]Although the proposed amendment was attacked on several fronts, the real issue before us on appeal is whether the Tribunal was correct in its finding that the complaint and/or referral is capable of amendment in the manner that the Commission sought to have it amended. The enquiry, in my view, entails an examination of what it is that constitutes the Nutri-Flo complaint, or, as Mr **Rogers SC** put it on behalf of Omnia, what the ambit of that complaint was. The result of such an enquiry should, in my view, also answer to whether the particulars contained in the proposed amendment are particulars of the Nutri-Flo complaint and what causes of action could the Commission properly refer to the Tribunal as constituting the Nutri-Flo complaint. Before I consider these issues, something needs to be said of the general approach to applications for amendments by our courts.

17]In civil proceedings in the High Court, the power of the court to allow material amendments is limited to considerations of prejudice or injustice to the opponent. *“Prejudice in this context ‘embraces prejudice to the rights of a party in regard to the subject- matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party’s rights’.* ⁸

⁸ Erasmus; Superior Court Practice; B1-179

18] The convenience of incorporating fresh or additional causes of action in the original proceedings has been recognised and even encouraged by the courts, provided no prejudice is occasioned thereby which cannot be compensated by an order of costs. This is so even though the amendment may have the effect of changing the nature action and may necessitate the reopening of the case for fresh evidence to be led. The amendment must, however, be *bona fide*. If it is, the amendment will be granted, especially where the effect of refusing it will be to bring the same parties before the same court on the same issue.⁹

19] There may be cases where an amendment is not allowed where it is applied for at such a late stage in the proceedings and is not timeously raised to enable proper investigation and response thereto. I do not consider that the application in this case was made at such late stage. The hearing had not yet started and a postponement would afford Yara and Omnia time to investigate the allegations and to respond thereto. In any event, delay in bringing forward an amendment, is not, in itself, in the absence of prejudice, a ground for refusing an amendment.

20] The courts have drawn a distinction between an amendment introducing a new cause of action and one which merely introduces fresh and alternative facts supporting the original right of action as set out in the existing cause of action. *“An amendment which introduces a new claim will not be allowed if it would resuscitate a prescribed claim or defeat a statutory limitation as to*

⁹ Erasmus (*supra*) at B1-180

time.”¹⁰

21]Against this background I now consider the ambit of the Nutri-Flo complaint was. In 2006, this court, when considering an application by Sasol for a review and setting aside of the same complaint under consideration in these proceedings, held that:

“A ‘complaint’ is not defined in the Act but the Rules of conduct of Proceedings in the Competition Commission describe it as (i) a matter initiated by the Commissioner in terms of section 49B(1); or (ii) a matter that has been submitted to the Commission in terms of section 49B(2)(b).

Omnia Fertilizer Limited v The Competition Commission and Others Case No 51/CAC/ June05, delivered on 28 April 2006.

22]The procedure provided for in the Act for *initiating* or *submitting* a complaint is the following:

“Section 49B. Initiating a complaint

- (1) *The Commissioner may initiate a complaint against an alleged prohibited practice.*
- (2) *Any person may-*
 - (a) *submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or*
 - (b) *submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form.*
- (3) *Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*
- (4) *At any time during the investigation, the Commissioner may designate one or more persons to assist the inspector.*

¹⁰ Erasmus at B1-181.

50. Outcome of complaint

- (1) *At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.*
- (2) *Within one year after a complaint was submitted to it, the Commissioner must-*
 - (a) *subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or*
 - (b) *in any other case, issue a notice of non-referral to the complainant in the prescribed form.*
- (3) *When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2) (a), it-*
 - (a) *may-*
 - (i) *refer all the particulars of the complaint as submitted by the complainant;*
 - (ii) *refer only some of the particulars of the complaint as submitted by the complainant; or*
 - (iii) *add particulars to the complaint as submitted by the complainant; and*
 - b) *must issue a notice of non-referral as contemplated in subsection (2) (b) in respect of any particulars of the complaint not referred to the Competition Tribunal”*

23]In Glaxo Wellcome (PTY) (Ltd) and Others v National Association of Pharmaceutical Wholesalers Case No 15/ CAC/ Feb 02, this court held that:

“[14] ... The wording of section 49B is worth noting in that it is not prescriptive as to how a complaint may be initiated. This theme runs throughout the complaint procedures, the object being to enable complaints to be lodged without the need for procedures that are too technical and/or formalistic

[15] ...What is required is a statement or description of prohibited conduct. In this regard Form CC1, prescribed in terms of sections 21(4) and 49B of the Act,

*is instructive. The form requires a complainant to “provide a **concise statement of the conduct**” that is the subject of a complaint. A complaint need only identify the conduct of which it is complained...*

[16] ...While the complaint need not be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. There must be a rational or a recognisable link between the conduct referred to in a complaint and the prohibitions in the Act, otherwise it will not be possible to say what the complaint is about and what should be investigated ...

*[18] The particular wording of sections 50 and 51 is noteworthy. The sections consistently refer to “a complaint” followed by what the Commission may do with “the complaint”. What is intended is that the Commission consider and investigate **the particular conduct complained of by the complainant...***

*[19] When a complaint is referred to a Tribunal in terms of the Act, section 50(3) consistently provides that what must be referred are the particulars of the complaint “as submitted by the complainant”. Again a clear reference to the conduct referred to by the complainant and which amounts to the **facta probanda** necessary to establish a prohibited practice.” (my emphasis)*

24]Consequently, a matter comes before the Tribunal as a complaint:

- (a) submitted by a member of the public (section 49B(2) (b)); or
- (b) initiated by the Commission (section 49B (1)).

But it is not only for purposes of submitting a complaint that a member of the public may submit information to the Commission regarding conduct constituting a practice prohibited under the Act; he/she/it may do so for the purpose of merely informing the Commission of the conduct. Where a member of the public intends to submit a complaint, details thereof must be set out in the prescribed CC1 Form. On the other hand, a person who intends

to merely submit information concerning a prohibited conduct without the intention of submitting a complaint, may do so in any manner or form (for example, in writing or orally; as a sworn or unsworn statement).

25]As noted, the Nutri-Flo CC1 complaint form contains no mention of Yara and Omnia. The finding, by the Tribunal, that allegations of contravention of section 4 of the Act are made against Yara and Omnia in the CC1 Form and in the affidavit are incorrect. There is no statement of conduct by Yara or Omnia in the CC1 Form that can be linked to a section 4(1)(b)(i) prohibited practice. There is no such statement of conduct in the Form even as against Sasol. I can find no **complaint** therefore on the CC1 Form relating to collusion by the same respondents over the prices of fertilizers as set out in paragraph 8 of the referral.¹¹ The non appearance of the names of Yara and Omnia from the CC1 Form is, in my view, indicative of Nutri-Flo's intention not to submit a complaint against them. The complaint is set out in the CC1 Form as "*concerning Sasol*". The respondents are stated therein as "*Sasol*".

26]In the written Heads of Argument filed on behalf of the Commission, an admission is made that Nutri-Flo did not "*mention*" Yara and Omnia in its CC1 form. However, so it is submitted, the allegations relating to cartel activity and collusion are pivotal to the determination of the complaint. Mr Brassey SC, on behalf of first respondents put it this way:

"The formal Nutriflo complaint contained allegations of cartel behaviour by Omnia and Yara; the Commission proceeded to investigate these allegations and, in consequence, uncovered further instances of collusive activities

¹¹ See paragraph 6 *supra*.

between the respondents in those and related markets. It is this conduct that was referred to the Tribunal for adjudication.”

27]I do not agree. The allegations relating to cartel activity do not constitute *facta probanda* of the Nutri-Flo complaint. To repeat that which has already been noted in the part of the CCI Form headed “*Description of the Complaints*”, Nutri-Flo stated:

“The respondents (Sasol) have imposed price increases in respect of raw materials it supplies to the complainants, to such an extent as to render its continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached hereto.”

28]However, the CC1 Form is not the only document that may contain details of a complaint. The form provides for attachment to it, of:

“any other relevant document, as well as a typed statement describing the conduct that is the subject of the complaint including the names of each party involved in the conduct;

- *the dates on which the conduct occurred;*
- *a statement indicating when and how you became aware of the conduct, and*
- *any other information you consider relevant.”*

29]It is in this regard that the affidavit deposed to by **Bruce Lyle** becomes relevant. As I stated, this affidavit serves to amplify the complaint set out in the CC1 Form and as a founding affidavit for the interim order sought. It is in this affidavit that Yara and Omnia are cited. But even in the affidavit, **Lyle** states specifically that Nutri-Flo seeks no relief against Yara and Omnia and

that they have been joined *in the matter* because of their legal interest therein. Moreover, in **Lyle's** affidavit the only reference to Yara and Omnia in this affidavit is in three paragraphs in which the following is stated:

*"KCL and Urea are imported by a cartel ("the cartel"), of which **SASOL** is a member and which cartel collusively controls the price at which these products are sold in the local market. The other members of the cartel are the Third Respondent ("**KYNOCH**") and the Fourth Respondent ("**NITROCHEM**")*

...

*Although Urea and KCL are not produced locally, the importation of these products by the cartel, which exclusively controls the prices, collusively, of these products in South Africa, gives **SASOL** considerable market power in relation to these products*

....

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

30]My view is that clearly **Lyle** (and therefore Nutri-Flo) did intend to submit to the Commission information relating to cartel activity and collusion by Sasol, Yara and Omnia is apparent in the above paragraphs. But I do not agree that these allegations were intended to constitute a *distinct complaint* in the sense of a *separate cause of action* within the complaint; as opposed to further information concerning the initial complaint.

31]In **Woodlands Dairy (Pty) Ltd & Another v Competition Commission** 2010 (6) SA 108 (SCA), at para [19], the court referred with approval to **Sappi Fine Paper (Pty) Ltd v Competition Commission and Papercor CC** 23/CAC/SEP 02 in which it was held that the Commission is not empowered

to investigate conduct which it generally considers to constitute anti-competitive behaviour. A complaint, so the court held, can relate only to *an alleged contravention of the Act as specifically contemplated* by an applicable provision thereof *by that complainant*.

32] It seems to me that the allegations relating to cartel activity and collusion may have been made on behalf of Nutri-Flo in the course of demonstrating the level of dominance enjoyed by Sasol and the limitations on Nutri-Flo to avoid or limit the effect of the price increases on its business operations. But I do not consider it necessary to make a finding in this regard save to suggest that it is allegations of this nature, in my view, that the court envisaged in **Glaxo Wellcome** (*“A complaint need not only identify the conduct of which it is complained...”*).¹²

33] **Lyle’s** statement in the affidavit that:

*“**NUTRI-FLO** contends that the prima facie right relied upon for the relief claimed is based on **SASOL’s** anti-competitive conduct in relation, inter alia, to its September price increases resulting in **SASOL** committing the following prohibited practices:-*

- a) exclusionary pricing practices by **SASOL**;*
- b) excessive pricing practices;*
- c) discriminatory pricing practices”;*

is supportive of the contention that Nutri-Flo clearly viewed the above conduct on the part of Sasol as the cause of action which formed the basis of its

¹² *Supra* at paragraph 16.

complaint and intended to be a complainant only in respect of Sasol. It is significant that in an affidavit which is 113 pages long and consists of 241 paragraphs, the above (including those made in paragraph 28 above) are the only allegations relating to cartel activity and collusion, and none of the 23 headings therein refer to such conduct. Moreover, no allegations of conduct by any of the respondents in contravention of section 4 of the Act are made under the Heading “*Prohibited Practices*” (Headed “[I]” in the affidavit). The allegations of cartel activity are bald and are not supported by any detail. I can only conclude therefore that the allegations fall under information submitted under section 49B(2)(a) of the Act.

34] **Mr Brassey** that, even if the allegations merely constitute a submission of information to the Commission, because they were made “under *the “rubric of the Nutri-Flo complaint”* and were made to the very authority charged with the investigation of the prohibited conduct, that is sufficient indication of an intention to **complain** to the relevant authority regarding such conduct, even where such allegations may be secondary to another complaint lodged in the same process. I do not agree. The argument that a submission of information to the Commission, on its own, signals an indication of an intention to submit a complaint (in the same manner envisaged in section 49B (2)(b)) detracts from the distinction drawn in the Act between submitting a complaint and submitting information in sub-sections 49B(2)(a) and (b).¹³

35] Expressed differently information cannot be converted into a complaint

¹³ See also Woodlands (*supra*) at paragraphs [13] and [14].

when it is plain that the information is not part of the complaint of the submitting party. For example, information relevant to a s8 case against X may point to a s4 contravention by X, Y and Z. However, if the information is supplied by the complainant solely in support of the s8 case and, in circumstances where the private party did not signal an intention also to be a complaint in respect of a s4 case, the submission of the information does not constitute the initiation of a s4 complaint. In this case, it is not the absence of an express mention of s4(1) that is the relevant point but a clear absence of any intention on Nutri-Flo's part to be a complainant in respect of a price-fixing complaint.

36]In **Woodlands** (*supra*), the court was concerned with the propriety of an *industry wide* investigation initiated by the Commission into the milk industry following allegations made to it regarding certain prohibited practices by particular players in the industry. The Supreme Court of Appeal found that the correct procedure for the Commission to follow on obtaining information regarding a prohibited practice, was to initiate a complaint in respect of the alleged prohibited practice against the implicated entities and then to proceed and conduct investigations.¹⁴

37]At paragraph [36] of **Woodlands** (*supra*) the court held that:

"The problem is that there were no facts that could have given rise to any suspicion that others were involved [in the alleged prohibited conduct]. A

¹⁴ See also **SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another** (Case No 23/CAC/Sept02; delivered on 25 September 2003) [2003] 2 CPLR 272 (CAC)

suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complainant and fuller investigation." (my emphasis)

38]During argument, much was made of this passage. It was submitted on behalf of the Commission that a principle emanating therefrom is that amendments for the purpose of adding further transgressions to an existing complaint are quite permissible. This was compared to the addition of further causes of action in pending civil suits by way of an amendment. But it is a proviso in civil suits that the further causes of action must relate to the same parties as in the pending proceedings. In competition cases, the parties look to the CC1 Form for details of the complaint(s) against them. Therefore, if it appears in the CC1 Form together with accompanying statements, where relevant, that no complaint lies against a particular party, such a party may assume that it is not a true party to the proceedings. It is therefore improper to bring such a party within the ambit of the complaint by way of either a referral or an amendment thereto.

39]There is no provision in the Act for amendment of a complaint. Rule 18 of the Rules for conduct of proceedings in the Competition Tribunal only provides for amendment of the referral. I can only conclude that the Legislature intended that complaints be initiated or submitted as provided for in section 49 B(1) and 49 B (2)(b) of the Act. Further, the Legislature must

have intended that the Commission should only refer to the Tribunal such a complaint as initiated by or submitted to it. Consequently only the particulars of the complaint *as submitted by the Nutri-Flo* should have been referred to the Tribunal. The information relating to cartel activity and collusion was not intended by Nutri-Flo to be a complaint. And, as I have stated, the allegations relating thereto do not form *facta probanda* of the complaint. The Commission was not entitled to refer to the Tribunal any complaint or particulars of any complaint other than those relating to a complaint submitted to it by Nutri-Flo.¹⁵ The allegations in the referral affidavit relating to activities and potential use of committees set up by Sasol, Yara and Omnia (which included the Nitrogen Balance Committee (NBC) and the Import Planning Committee (IPC)) as a “*platform for price fixing*” do not constitute particulars of the complaint submitted by Nutri-Flo or any complaint properly submitted or initiated against Yara and Omnia. Therefore the contention by the Commission that in the referral it had pleaded a case founded on the existence of the Committees and that the proposed amendment would merely serve to incorporate particulars relating to allegations that had already been pleaded, takes the matter no further. The particulars of the proposed amendment purport to be details of the information relating to cartel activity and collusion. They do not relate to the complaint or contravention of the provisions of the Act *as specifically contemplated by Nutri-Flo*.¹⁶

40]The proper procedure where information relating to cartel activity and collusion had been submitted to the Commission in the course of submitting a

¹⁵ Section 50(2)(a)

¹⁶ See Woodlands, *supra*.

complaint or where the Commission had uncovered information relating to such conduct was initiation, by the Commission, of a complaint in respect of the information submitted to or uncovered by it.

41]It is, in my view, unnecessary to consider the remaining grounds on which the proposed amendment was opposed.

42]Ordinarily dismissal of proceedings against a party is sought at the end of the main hearing or where a point *in limine* disposes of the matter. However, it was Omnia's case before the Tribunal that in this matter it is desirable, convenient and necessary that the relief sought for dismissal of proceedings be adjudicated simultaneously with the application for amendment as many of the facts relevant in the application for amendment are relevant in the counter-application. I can only conclude from the order of the Tribunal that it found merit in that contention. I also agree. In any event it is my view that inherent in the finding that no complaint was submitted against Yara and Omnia is a finding that no complaint is pending against these entities before the Tribunal.

43]The following order is made:

1. The appeal is upheld with costs;
2. The order of the Competition Tribunal is set aside and is replaced with an order in the following terms:

(a) The application for amendment is dismissed with costs;
and

(b) It is declared that no complaint is pending
against Yara and Omnia in this matter.

DAVIS JP AND MAILULA JA AGREED

DAMBUZA JA

On behalf of Omnia: Adv Owen Rogers SC and Adv Paul Farlam instructed by Deneys Reitz Inc of Sandton.

On behalf of Yara: Adv Pretorius instructed by Gerrit Coetzee Inc of Potchefstroom.

On behalf of Competition Commission: Adv Brassey SC and Adv Mooki instructed by Cheadle Thompson & Haysom of Braamfontein.