REPORTABLE

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO.102/CAC/Jun 10

In the matter between

LOUNGEFOAM (PTY) LIMITED AND OTHERS First Appellant

GOMMAGOMMA (PTY) LIMITED Second Appellant

STEINHOFF INTERNATIONAL HOLDINGS LIMITED Third Appellant

STEINHOFF AFRICA HOLDINGS (PTY) LIMITED Fourth Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA First Respondent

VITAFOAM SA (PTY) LIMITED Second Respondent

FELTEX HOLDINGS (PTY) LIMITED Third Respondent

KAP INTERNATIONAL HOLDINGS LIMITED Fourth Respondent

And in the matter between

FELTEX HOLDINGS (PTY) LIMITED Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA First Respondent

LOUNGEFOAM (PTY) LIMITED Second Respondent

VITAFOAM SA (PTY) LIMITED Third Respondent

STEINHOFF INTERNATIONAL HOLDINGS LTD Fourth Respondent

KAP INTERNATIONAL HOLDINGS LIMITED Fifth Respondent

GOMMAGOMMA (PTY) LIMITED Sixth Respondent

STEINHOFF AFRICA HOLDINGS (PTY) LIMITED Seventh Respondent

and two related review applications

J U D G M E N T

Del. 6 May 2011

WALLIS J (DAVIS JP and NDITA AJA concurring)

INTRODUCTION

[1] There are before us two appeals from the Competition Tribunal. I will refer to the first as the Feltex appeal after the sole appellant and to the second as the Steinhoff appeal after the group of companies of which all four appellants are said to be members. In order to cater for the eventuality that this court holds that the impugned decisions by the Tribunal, or any of them, are not appealable, both Feltex and the Steinhoff appellants have brought review proceedings against the Tribunal, citing the respondents in their appeals and seeking to have the Tribunal's decisions set aside on essentially the same grounds as are raised in the appeals.

[2] Arising out of an investigation in the flexible polyurethane market the Competition Commission referred two complaints to the Competition Tribunal in terms of s 50(2)(a) of the Competition Act. The first complaint is that Loungefoam,[1] Vitafoam[2] and/or Gommagomma[3] agreed to fix the selling price

1 First appellant in the Steinhoff appeal.
2 Second respondent in the Steinhoff appeal and, according to the Commission, no longer trading.
3 Second appellant in the Steinhoff appeal. Gommagomma owns 100% of the shares in Vitafoam and, by the use of the expression 'and/or', the two are treated as identical and interchangeable in the record. Accordingly references to Vitafoam in the judgment are to be taken as comprehending Gommagomma.

of the foam they produce and also jointly set the purchase price they would pay to suppliers of certain chemicals used in the production of polyurethane foam. The latter is referred to in the affidavits and argument as 'the chemical cartel' and I adopt, without comment, that description. It is said to constitute a horizontal restrictive practice in terms of s 4(1)(b)(i) of the Act. The second complaint is that Loungefoam and Vitafoam, on the one hand, and Feltex, on the other, had an understanding to divide markets in terms of which Feltex would supply polyurethane foam to the automotive industry and Loungefoam and Vitafoam would focus on the furniture manufacturing industry. This is said to constitute a horizontal restrictive practice in terms of s 4(1)(b)(ii) of the Act.

[3] Whilst preparing for the proceedings before the Tribunal the Commission obtained information that it believes indicates that Feltex is also a party to the chemical cartel. It accordingly applied to the Tribunal for leave to amend its founding affidavit in the chemical cartel complaint in order 'to connect Feltex to the allegations regarding the joint purchasing of chemicals, or similar conduct, which have so far only been made against Loungefoam and Vitafoam'. The Tribunal granted leave to amend the affidavit to introduce the relevant allegations. That decision gives rise to the Feltex appeal and review. The Steinhoff appellants also challenge this decision in the Steinhoff appeal and review.

[4] In their defence to the complaints against the two of them alone Loungefoam and Vitafoam contend that they were at all relevant times part of a single economic entity and therefore could not have been parties to horizontal restrictive practices with one another. They rely on the provisions of s 4(5)(b) of the Act. The Commission does not accept this defence and sought to amend its founding affidavit to introduce far-ranging allegations directed at showing that:

'… any sole control that Steinhoff might have enjoyed over Loungefoam (which is not

conceded) was as a consequence of a wider co-operation or collusion between firms in the Steinhoff group of companies and those controlled by Daun or in which Daun had a significant interest and influence (which for convenience I refer to as the KAP group of companies). Loungefoam and Vitafoam were a manifestation of this wider co-operation or collusion. Whilst in strict formalism, which is also not conceded, it may appear that Steinhoff controlled Loungefoam sufficiently for purposes of section 4(5)(b) – because of this wider co-operation or collusion – any such control was rooted in a stratagem to achieve what section 4(1)(b) prohibits and cannot be permitted to benefit the Steinhoff group of companies and/or the KAP group of companies.'

There followed forty paragraphs, largely consisting of factual allegations, intended to support this approach. This will be referred to as 'the collusion claim'.

[5] In the event of the Tribunal finding that Loungefoam and Vitafoam were at all material times part of a single economic entity, the Commission contends that Steinhoff International[4] and Steinhoff Africa[5] 'should be held liable for any administrative penalty that is imposed by the Tribunal in respect of the prohibited conduct involving Feltex'. It does so on the basis that this is the effect of s 4(5)(b) of the Act ('the s 4(5)(b) claim'). Accordingly the Commission sought an amendment to paragraph 35 of the founding affidavit to include this further allegation in regard to liability for the administrative penalty. It also sought an order for the joinder of Steinhoff Africa and an amendment to the relief claimed in the notice of motion to reflect its revised approach to the referrals.

[6] The precise form of the amendment sought underwent some variation in the course of argument before the Tribunal. It granted the amendments to the affidavit referred to above and the amendment to the prayers for relief in its Notice of Motion. In addition it granted an order for the joinder of Steinhoff

4 The third appellant in the Steinhoff appeal.
5 The fourth appellant in the Steinhoff appeal.

Africa. The correctness of that decision depends upon whether the amendment to paragraph 35 of the founding affidavit should have been granted. The Steinhoff appeal is directed at challenging all of these decisions.

[7] The following questions fall for consideration by this court in the appeals:

(a) Are the decisions taken by the Tribunal, or any of them, appealable?

(b) If not, are the applicants entitled to challenge them by way of review proceedings?

Assuming that the decisions are capable of being challenged either by way of appeal or by way of review:

(c) Was the Tribunal correct in permitting the chemical cartel complaint to be extended to include Feltex?

(d) Was the Tribunal correct to permit the Commission to allege co-operation or collusion between the Steinhoff group of companies and the KAP group of companies directed at enabling Loungefoam and Vitafoam to take advantage of the provisions of s 4(5)(b) of the Act?

(e) Can s 4(5)(b) of the Act be invoked so as to render Steinhoff International and Steinhoff Africa liable for any administrative penalty imposed by the Tribunal in respect of conduct involving Loungefoam, Vitafoam and Feltex?

Before addressing these questions it is necessary to say something about the procedure adopted by the Commission in seeking to raise these issues before the Tribunal.

THE AMENDMENT APPLICATION

[8] The Commission's application purported to be an application in terms of Rule 18(1) of the Tribunal Rules. The Commission asked for the following relief:

'1. Granting the applicant leave to amend the Notice of Motion, the founding, supplementary and replying affidavits in the complaint referral in the respects set out in the founding affidavit which is attached to this Notice of Motion;

2. Permitting and directing the applicant to file the Amended Notice of Motion, the founding, supplementary and replying affidavits within a time period stipulated by the Tribunal;

3. Directing the respondents to file such additional documents as they are advised to file consequential to the amendments, within a time period stipulated by the Tribunal.'

[9] Rule 18(1) of the Tribunal's Rules reads as follows:

'1. The person who filed a Complaint Referral may apply to the Tribunal by Notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed.'

The reference to the three different types of form arises from the different ways in which a complaint may be referred to the Tribunal. In terms of Rule 15:

'(1) A complaint proceeding may be initiated only by filing a Complaint Referral in Form CT 1(1), CT 1(2) or CT 1(3), as required by Rule 14.

(2) Subject to Rule 24(1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs:-

(a) a concise statement of the grounds of the complaints; and

(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be.

(3) A Complaint Referral may allege alternative prohibited practices based on the same facts.'

[10] The prescribed Form CT 1(1), which is the form used by the Commission in referring a complaint to the Tribunal, is relatively simple. It requires the Commission to state the name of the respondent; the complainant's name and the Commission's file number; the sections of the Act that are said to have been contravened and to provide a concise statement of the alleged prohibited practice as well as a concise statement of the relief sought. In completing the

form in this case instead of providing a concise statement of the alleged prohibited practice the Commission said:

'See attached referral affidavit of Nompucuko Nontambana'

Ms Nontambana is an investigator in the employ of the Commission. In regard to the relief claimed the Commission referred to a document entitled 'Notice of Motion' that it attached to the referral form.

[11] Rule 18(1) of the Tribunal's Rules refers only to an amendment to the Form CT 1(1). It is a power equivalent to the power of a court to permit the amendment of a summons or notice of motion or a pleading. The fact that the Commission chose, instead of setting out a concise statement of the complaint, to refer to the supporting affidavit does not have the effect of rendering the affidavit a part of the form susceptible of amendment in the same way that the form can be amended. Ms Nontambana contended otherwise in her replying affidavit in the application to amend, saying that:

'The notice of motion and founding affidavit are part of the Form CT 1. The objection to amendment 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.'

[12] Assuming this reflects the general stance of the Commission it is labouring under a fundamental misconception as to the nature of the affidavit required by Rule 15(2). It treats it as if it is a type of pleading, subject to amendment from time to time as the case develops. That is incorrect. 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.[6]

[13] It was suggested in argument before us that the affidavit delivered in support of a referral to the Tribunal is *sui generis* and does not stand on the same footing as a conventional affidavit. Counsel made the point that the deponent to the affidavit is usually an investigator in the employ of the Commission and much of the contents thereof constitute hearsay. It is unusual for the investigator to be a witness in the proceedings before the Tribunal and in practice the Tribunal determines the cases that come before it on the basis of oral and documentary evidence.

[14] Whilst this may accurately describe what happens in practice it is unclear why it is thought to alter the fundamental nature of an affidavit. There is no legal prohibition against an affidavit containing hearsay evidence. In certain circumstances and before certain tribunals such evidence is inadmissible, but that does not mean that an affidavit in support of a referral to the Tribunal cannot contain hearsay. It may be convenient for the Commission to cause the affidavit to be deposed to by the investigator who investigated the complaint. That is likely to be a sensible course, as the investigator will have the relevant facts and documents at her or his fingertips. However, it is inevitable in those circumstances that the affidavit will largely be an affidavit of information and belief rather than direct evidence. That is immaterial bearing in mind the practice of the Tribunal to conduct a hearing at which witnesses with direct knowledge of the facts testify under oath and are cross-examined. No doubt if it sought to rely only on the investigator's affidavit that would provoke protest from other parties but that is a different matter.

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6 *Hart v Pinetown Drive-In Cinema (Pty) Limited* 1972 (1) SA 464 (D) at 469 F.

[15] The Commission appears to have overlooked the importance that is attached to an affidavit in South African law. Whilst an affidavit in support of a referral is not to be used in the course of judicial proceedings, so that the deponent is not potentially liable to a charge of perjury,[7] our law has been extended to include what is commonly referred to as statutory perjury. This offence is embodied in s 319(3) of the Criminal Procedure Act 56 of 1955 which provides that:

'If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath, makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.'[8]

No doubt an awareness of this provision underlies the provisions of Tribunal Rule 15(3) that says that alternative prohibited practices may be alleged provided they are based on the same facts. This recognises that it is impermissible in an affidavit to depose to mutually inconsistent facts.[9]

[16] The proper procedure for the Commission to follow when it wishes to amplify or widen the scope of a referral to the Tribunal is to apply under Rule 18(1) to amend the referral form CT 1(1) and simultaneously to seek leave to deliver a supplementary affidavit in support of the amended allegations. Where that involves a retraction of previous factual statements an explanation should be given for the change in stance. Usually one would expect this to flow from the Commission having discovered additional information. Where the

7 C R Snyman, *Criminal Law*, (4th Ed) 343.

8 If the deponent to an affidavit knows that a statement in the affidavit is untrue that is an offence in terms of s 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.

9 Unfortunately this too is something of which the Commission appears to have been unaware as Ms Nontambana elsewhere claimed that allegations in an affidavit 'cannot be contradictory and mutually destructive when they are made expressly in the alternative.'

Commission is uncertain what conclusion should be drawn from the facts at its disposal it may draw attention to different possible inferences to be drawn from the known facts, but that is different from deposing to mutually inconsistent facts.

[17] What must be done about this manifest irregularity? Both Feltex and the Steinhoff appellants pointed out, in their opposing affidavits in the application, that it is not competent in law for a deponent to amend an affidavit. However, they also opposed the amendments on their merits. In argument before us it was common cause that it is desirable for this court, if it is empowered to do so, to deal with the issues raised by the appeals on their merits, as it will cause inconvenience and unnecessary expense simply to set aside the decisions of the Tribunal as irregular, leaving the Commission to pursue the same course on the same grounds in accordance with a proper procedure. In addition the amendments to the referral affidavits are reflected in the amendments to the notice of motion, which were not infected with any procedural irregularity, as well as in the joinder of Steinhoff Africa. In those circumstances it seems to me proper that we should accede to the request of the parties and deal with the issues on their merits.[10] In the view that I take of the substantive merits of the Commission's application this will assist all parties in clarifying the issues in this referral to the Tribunal.

APPEAL OR REVIEW?

[18] The right to appeal against a decision of the Tribunal is conferred by s 61(1) of the Act which provides that:

'A person affected by a decision of the Competition Tribunal may appeal against, or apply to

10 C/f *Paola v Jeeva NO and others* 2004 (1) SA 396 (SCA) para [17].

the Competition Appeal Court to review that decision in accordance with Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.'

Accordingly the right to appeal against or review a decision by the Tribunal depends upon whether this court has jurisdiction under s 37 to hear such appeal or review.

[19] Section 37(1) provides that:

'The Competition Appeal Court may:

(a) Review any decision of the Competition Tribunal; or

(b) Consider an appeal arising from the Competition Tribunal in respect of –

(i) any of its final decisions, other than a consent order made in terms of section 63; or

(ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.'

As the decision by the Tribunal to grant the amendments is not subject to any special provision of the Act entitling the appellants to appeal against it the question is whether that decision was a final decision in terms of s 37(1)(b)(i).

[20] In *Telkom SA Limited v Orion Cellular (Pty) Limited and Others*[11] this court adopted the jurisprudence of the Supreme Court of Appeal on what constitutes a final decision that is susceptible of appeal. The court looks to see whether the decision in question:

(a) Is final in effect and not susceptible of alteration by the Tribunal;

(b) Is definitive of the rights of the parties; and

(c) Has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[12]

These principles are neither cast in stone nor exhaustive.[13] In considering

11 [2004] ZACAC 4; [2005] 1 CPLR 113 (CAC) at 9.

12 *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536 B.

13 *Moch v Nedtravel (Pty) Limited t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-11C.

whether an order is final one must have regard primarily to its effect.[14]

[21] In contending that the order is not appealable counsel for the Commission said in his heads of argument:

'The grant of an amendment … is a procedural decision which is inextricably linked with the manner in which, and the ambit of, the dispute between the parties to be litigated before the Tribunal. The Tribunal may still change its findings underlying the grant of the amendments, or even dismiss the case sought to be advanced by way of the amendment. This is the key reason why the grant of an amendment is generally not immediately appealable.'

[22] Whilst in general the grant or refusal of an amendment is procedural in nature there are clear instances where its effect is to dispose of the substantive rights of the parties. In such circumstances the grant or refusal of the amendment is a final order that is appealable. Thus in *Jacobs and Others v Baumann NO and Others*[15] it was argued that leave to amend a pleading is interlocutory and does not dispose of any substantial portion of the relief claimed in the action. In that case proceedings had been commenced *inter alia* in the name of one Wirz in his capacity as the representative of the heirs in a deceased estate appointed as such by a Swiss court. After the commencement of the action Mr Wirz's appointment was set aside and thereafter Mr Baumann was appointed as the representative of the heirs. The remaining plaintiffs in the South African action then sought to amend the summons and particulars of claim by substituting Baumann for Wirz. That amendment was granted. On appeal it was argued that the order substituting Baumann for Wirz was not appealable. This contention was rejected because the substitution was crucial for determining whether the initial summons was valid and that in turn would obviously impact on any defence of prescription. Accordingly it was held that the order amending the summons was appealable. That case was concerned with whether the

14 *South African Motor Industry Employers' Association v South African Bank of Athens Limited* 1980 (3) SA 91 (A) 96H.
15 2009 (5) SA 432 (SCA) para[9]

representative of the heirs was properly before the court. A similar issue arose in *Highveld Steel & Vanadium Corporation Limited v Oosthuizen.*[16] Mr Oosthuizen, a former employee of the appellant, dismissed for bribery, fraud, theft and other transgressions involving dishonesty, instituted proceedings to recover his pension benefits from the company pension fund. The application was not defended. The appellant sought leave to intervene in order to preserve the pension benefits under s 37(D) of the Pension Funds Act 24 of 1956 pending an action to recover the money from Mr Oosthuizen. Leave to intervene having been refused it was contended on appeal that the ruling was purely procedural and therefore not appealable. That contention was rejected on the grounds that the refusal of leave to intervene would deprive the appellant of its right to preserve the pension benefits pending the outcome of its action.

[23] These cases show that orders in relation to procedural steps that have a final effect on a litigant's rights are final orders and subject to appeal. It is for that reason that the grant of an amendment to particulars of claim in the face of an objection that the claim as amended has prescribed[17] as well as the refusal of an amendment on the grounds of a similar objection[18] are appealable.

[24] The objection by the appellants to the amendments in this case are largely based on the contention that the new matter sought to be raised by the Commission has never been the subject of a complaint initiated in terms of s 49B of the Act and accordingly these are not matters that can be referred to the Competition Tribunal for its determination. In other words they say that if these matters are considered by the Tribunal in the course of the present proceedings it will be considering matters that are outside its jurisdiction and on which it is not entitled to rule. The objections go to the jurisdiction of the Tribunal. The terms

16 2009 (4) SA 1 SCA.
17 *CGU Insurance Limited v Rumdel Construction (Pty) Limited* 2004 (2) SA 622 (SCA).
18 *Associated Paint & Chemical Industries (Pty) Limited t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA).

of the three different complaints initiated by the Commissioner in this case were before the Tribunal when it made its decision. That it was making a final decision on the jurisdictional issue is clear from its determination, the relevant paragraph of which reads:

'[66] In conclusion we find that the chemical cartel as well as the complaint of collusion between Steinhoff and KAP were initiated by the Commission and the jurisdictional requirement for a referral against Feltex and Steinhoff and KAP respectively, has been satisfied.'

That decision served to dispose of the jurisdictional question. It stands on the same footing as the dismissal of a special plea to the jurisdiction;[19] or a decision upholding a special plea to the jurisdiction;[20] or either the upholding or the dismissal of an exception on the grounds that the court does not have jurisdiction to hear the matter.[21] It constitutes a final decision by the Tribunal intended to dispose finally of this issue.

[25] Accordingly I hold that the Tribunal's decision to allow the amendment to introduce Feltex in the chemical cartel complaint is appealable. So is the amendment relating to the Steinhoff appellants insofar as it was directed at attaching liability to Steinhoff International and Steinhoff Africa for the actions of Loungefoam and Vitafoam. The entitlement to appeal encompasses not only the amendments to the founding affidavit but also the consequential amendments to the relief sought in the notice of motion.

[26] That leaves only the appeal by the Steinhoff appellants in relation to the grant of an amendment to the founding affidavit and the notice of motion to give effect to the s 4(5)(b) claim. This does not raise an issue of jurisdiction. The argument by the Steinhoff appellants is that such relief is impermissible on a

19 *Steytler NO v Fitzgerald* 1911 AD 295 at 305.
20 *Ndlovu v Santam Limited* 2006 (2) SA 239 (SCA) at para [9].
21 *Maize Board v Tiger Oats Limited and Others* 2002 (5) SA 365 (SCA) paras [9] and [14]. This is an exception to the general principle that the dismissal of an exception is not final.

proper construction of the Act. For its part the Commission contends that this is a permissible order in respect of the complaint that has already been referred to the Tribunal and in respect of which the Tribunal's jurisdiction is not in question.

[27] The Steinhoff appellants contend that there is no legal foundation for the Commission to seek or the Tribunal to make an order in these terms. Clearly it was permissible for them to oppose the amendment on the ground that it was bad in law. Had they succeeded in such opposition the refusal of the amendment would have been appealable at the instance of the Commission. The reason is that it would have disposed finally of the Commission's entitlement to that relief. Unfortunately the Tribunal did not deal separately with this amendment. Its approach was that if the other amendments to the founding affidavit were to be granted this one should also be granted. It appears from the Tribunal's determination that it was under the impression that if the earlier amendments were granted this should also be granted as a consequential amendment. It appears to have gained that impression from the manner in which the amendments were argued before it. That approach was incorrect as the amendment in question to introduce a new paragraph 35 to the founding affidavit stood on a different legal footing to the other amendment.

[28] The contention raised by the s 4(5)(b) claim is not an alternative claim based on the same facts as the main claim but adding nothing to the factual material that the Tribunal will have to consider at the hearing.[22] It is a separate and distinct claim on a novel legal ground seeking to attach liability to parties who have not hitherto been regarded as liable in respect of the particular complaints that are at present before the Tribunal for determination. In order to pursue this claim it will be necessary for the Commission to show that Steinhoff

22 C/f *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A)

International and Steinhoff Africa are, together with Loungefoam and Vitafoam, an economic unit. That will require a consideration of the corporate structures of the group, the manner of its management and the relationship between the different companies in the group. In order to deal with it the Steinhoff appellants will be required to lead evidence of the operation of the different entities within the group. This goes beyond merely the relationship between Loungefoam and Vitafoam. In my view therefore permitting this amendment introduced a new cause of complaint, or different claim, that will materially affect the proceedings before the Tribunal. Its introduction was permitted in the face of an objection that it is bad in law. The Tribunal has, by allowing it, rejected that argument. In those circumstances the decision to permit the amendment has in my view final effect and is properly the subject of an appeal.

[29] That conclusion renders it unnecessary to consider an alternative argument advanced on behalf of Feltex that s 62(2) of the Act confers an appellate jurisdiction upon this court going beyond the jurisdiction established by s 61(1) read with s 37(1)(b) of the Act. It is by no means clear that any such additional jurisdiction exists and the point can best be left for an occasion where it properly arises. It is also unnecessary in the light of that conclusion to deal at any length with the power of this court to review decisions of the Competition Tribunal. Such power is analogous to the power that the High Court, in its current and former form, has and always had to review the decisions of inferior tribunals. As a general proposition, however, that court was and is reluctant to exercise that power save in relation to completed proceedings. It only exercises that power prior to the completion of the proceedings in the court or tribunal concerned in circumstances where the exercise of the power is necessary to prevent grave injustice.[23] In general it is undesirable that proceedings, whether before a court or a tribunal, should be determined piecemeal. Accordingly, in my view, there is

23 *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) 119G; *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A) 5H - 6A

much to be said for this court adopting a similar approach to that which the High Court has always adopted to the exercise of its power to review the actions of lower courts or tribunals before the completion of proceedings in those courts or tribunals. However, like the proper construction of s 62(2) that question can await determination on a more suitable occasion.

THE FELTEX APPEAL

[30] The stated purpose of the chemical cartel amendments was 'to connect Feltex to the allegations regarding the joint purchasing of chemicals … which have so far only been made against Loungefoam and Vitafoam'. Both Feltex and the Steinhoff appellants objected to the amendment on the grounds that the Commission had at no stage initiated a complaint against Feltex in respect of the chemical cartel. The deponents to the affidavits on behalf of the appellants drew attention to the various complaint initiation statements and submitted that they did not refer to Feltex as a party to the chemical cartel.

[31] The Commission's response to these contentions was vigorous[24] and it was said by its deponent that:

'There must, even to the third respondent, be a limit to which meritless technical points can be relied upon.'

Insofar as substance was concerned, however, the response was ambiguous. The Commission said that it had initiated an investigation into the flexible polyurethane market against Vitafoam, Loungefoam, Feltex and certain other entities in relation to allegations of price fixing and dividing markets in contravention of section 4(1)(b)(i) and (ii) of the Competition Act. It said that 'these allegations are sufficiently wide to colour the particulars of the complaint under consideration'. It amplified that statement with the contention that:

'There is no requirement that an initiating statement should detail allegations against a potential respondent in the manner in which the third respondent seems to expect.'

24 It described the contentions by Feltex as 'devoid of any merit'

In a supplementary affidavit it said that the document in which a complaint had been initiated against Feltex was a complaint initiation form CC 1 dated 27 November 2007. That was not the document initially referred to which was a subsequent complaint initiation dated 26 May 2008.

[32] The Tribunal's approach is set out in the following extracts from its decision:

'[39] The language of section 49B(1) is clear and unambiguous. The Commission must initiate an investigation into an alleged prohibited practice ie any conduct that is prohibited under Chapter 2. There is no stipulation that the prohibited practice be alleged against specific respondents or all possible entities that the Commission may wish to later prosecute at the time of initiation …

[40] Section 49B(2)(b) provides that any person may submit a complaint against – and once again we see the same wording – an alleged prohibited practice to the Commission. There is no requirement that the prohibited conduct be alleged against a specific respondent or a group of respondents.

[46] … There is no need for the Commission at the moment of initiation to provide precise details of the parties involved or even all the product markets that could potentially be involved. Nor is it required to know with a degree of precision which particular entities in a group of companies was involved in the alleged prohibited practice.'

[33] Subsequent to the Tribunal's decision the Supreme Court of Appeal in *Woodlands Dairy (Pty) Limited v Competition Commission*[25] held that its approach to the construction of the Act is incorrect.[26] In the light of that Mr Maenetje, on behalf of the Commission, did not attempt to support the reasoning of the Tribunal. Instead he contended that on a proper construction of the complaint initiation documents the initiation of the chemical cartel complaint had included Feltex. However, this impales the Commission firmly on the horns of a dilemma. If no complaint has been initiated in respect of Feltex and the

25 2010 (6) SA 108 (SCA)

26 See also *Netstar (Pty) Limited and Others v Competition Commission of South Africa and Others* [2011] ZACAC 1

chemical cartel then such a complaint cannot be introduced by way of amendment, because the accepted requirements for a lawful referral are not satisfied. If a complaint was made against Feltex in respect of the chemical cartel then it was not referred to the Tribunal within one year of the initiation. It would follow that in terms of s 50(5) there has been a deemed non-referral of this complaint and it is not open to the Commission to resuscitate it. However as that point was not argued I will address this contention on its merits.

[34] The first complaint initiation involving Feltex is dated 27 November 2007. It refers, *inter alia,* to Vitafoam, Loungefoam and Feltex and say that the subject of the complaint is:

'Price fixing and dividing markets by allocating customers in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii).'

Annexed to the initiation is a Statement of Conduct. It reads as follows:

'1. The Commission initiated an investigation in the flexible polyurethane market against Vitafoam and Loungefoam (case number: 2007 Sep3164) for alleged contraventions of sections 4(1)(b)(i), 4(1)(b)(ii), 8(c), 8(d)(i), 8(d)(iv) and 8(d)(v) of the Competition Act, 89 of 1998, as amended.

2. The documents summonsed from Vitafoam and Loungefoam show evidence that implicates other firms, Feltex Ltd, Unimattress, Strandfoam and Feel-o-foam, which were not identified when the case was initiated, as being likely involved in conduct which contravenes the Competition Act.

3. The evidence available shows that in 1999 Feltex Ltd ("Feltex") entered into an agreement with Loungefoam in terms of which Feltex sold its foam manufacturing division for the bedding and furniture industry to Loungefoam.. In terms of the agreement Feltex retained its foam manufacturing business for automotive and industrial applications.

Clause 16 of the agreement restrained Feltex from conducting business which would be in competition to the business division sold to Loungefoam. Loungefoam would also not compete with Feltex in those business divisions retained by Feltex. This restraint applied to both firms for a period of 5 years and in South Africa, Botswana, Lesotho, Swaziland, Namibia and Zimbabwe.

In 1999 agreement would have expired in 2004 but remains in force (evidence attached) and

establishes reason to believe that Feltex, Loungefoam and Vitafoam are dividing markets in contravention of section 4(1)(b)(ii) of the Competition Act.

4. Correspondence by email, memorandum and minutes of a foam forum also shows evidence that Vitafoam and Loungefoam may have colluded with competitors Unimattress, Strandfoam and Feel-o-foam to divide markets and/or fix prices in contravention of section 4(1)(b)(i) and/or 4(1)(b)(ii) of the Competition Act.

In order to fully investigate this case, it is necessary for the Commission to expand the investigation initiated against Vitafoam and Loungefoam to include Feltex Ltd, Unimattress, Strandfoam and Feel-o-foam, in terms of section 49B(1) of the Competition Act.'

[35] Paragraphs 1 and 2 of the statement of conduct provide background to this further complaint initiation. Paragraph 3 charges Feltex, Loungefoam and Vitafoam with dividing markets. That is the complaint that was referred to the Tribunal from the outset. Its relevance for present purposes is that paragraph 3 is the only paragraph suggesting that the Commission has any evidence that Feltex is involved in possible contraventions of the Act.

[36] Paragraph 4 of the statement of conduct is the only paragraph that could potentially encompass the price fixing constituting the chemical cartel. Significantly it makes no reference whatever to Feltex. Instead it refers to the other three parties whose affairs were to be the subject of the complaint and the consequent investigation.

[37] A fair reading of this document is that the Commission had information suggesting that Feltex, together with Loungefoam and Vitafoam, might have been and be involved in an understanding to divide markets. That is reinforced by the reference to s 4(1)(b)(ii) of the Act, which deals with the division of markets. Paragraph 4 does not refer to Feltex. That it does not involve Feltex is clear from the statement that Vitafoam and Loungefoam may have colluded with the three other named parties to fix prices. It is only in that paragraph that there

is a reference to s 4(1)(b)(i) of the Act dealing with fixing prices.

[38] Mr Maenetje endeavoured to suggest that the closing paragraph commencing with the words 'in order to fully investigate this case' extended the referral in respect of the chemical cartel to Feltex. That is not a tenable reading of this paragraph. All that it says is that the investigation will extend to encompass the conduct set out in paragraphs 3 and 4. Insofar as Feltex was concerned that did not include conduct forming part of the chemical cartel.

[39] As a last string to his bow Mr Maenetje sought to rely upon a later complaint initiation dated 26 May 2008. That attempt must however fail. First it is contrary to his client's case that the relevant complaint initiation is embodied in the document of 27 November 2007. Second there is nothing in the document of 26 May 2008 to suggest that it is concerned with the chemical cartel. Third, and decisively, it says that 'it is necessary for the Commission to expand the investigation initiated against Vitafoam and Loungefoam to include Steinhoff International Holdings Limited'. Once it is accepted that the earlier document had not initiated a complaint against Feltex in respect of the chemical cartel, the later document cannot overcome the difficulty.

[40] Throughout the argument on behalf of the Commission the refrain was sounded that to uphold the objection by Feltex involves an unduly technical approach to the construction of the Act and renders the task of the Commission and the Tribunal more difficult or even impossible. Implicit in this is a suggestion that this court and the SCA are being unduly technical in contrast to the informality of the approach of the Commission and the Tribunal. That is an unfortunate and incorrect view of matters. The Commission, the Tribunal, this Court and the SCA are all engaged in applying the same statute – the Competition Act. In common parlance we sing from the same song sheet. The

language of the statute and the architecture of the complaints system it establishes is set out in the Act and was determined by the legislature. If it suffers from defects the remedy is in the hands of the legislature.

[41] There are certain basic principles arising from the terms of the Competition Act that bear repeating. First the Commission has no general powers of investigation into anti-competitive conduct. Second the Act does not in general terms prohibit anti-competitive conduct. Third anti-competitive conduct under the Act consists of horizontal and vertical restrictive practices and the abuse of dominance. Fourth these are not terms of generality but terms that are defined and circumscribed by the Act itself in ss 4,5 and 8 respectively. Unless conduct falls within the definitions it is not prohibited even if its effects are perceived as anti-competitive. Fifth anti-competitive conduct in any of these forms is conduct involving a firm[27] or firms. In other words it cannot exist apart from the conduct of a firm or firms. Neither the Commission nor the Tribunal question any of this.

[42] Instead of vesting the Commission with general powers of investigation, the Act provides that the Commission's powers of investigation are triggered either by the initiation of a complaint by the Commissioner, or by the receipt of a complaint from a third party under s 49B. We need only address the first of these possibilities. In *Woodlands* the SCA held that, in the case of the Commissioner, this requires that the Commissioner be in possession of information that gives rise to a reasonable suspicion that anti-competitive conduct, as defined in the Act, has been committed.[28] As anti-competitive conduct must involve a firm or firms it held that the firm or firms involved must be identified as being party to that conduct.[29]

27 A firm includes a person, partnership or trust.
28 *Woodlands* para [13].
29 *Woodlands* para [35].

[43] The application of those conclusions and the implications if they are not a correct view of the law is instructive. The complaint initiation in *Woodlands* referred to an investigation into the 'milk industry'. The Commissioner had no information that suggested wrongdoing by Woodlands. Nonetheless representatives of Woodlands were summoned and interrogated, and it was compelled to produce documents, purely with a view to ascertaining whether it had been guilty of any anti-competitive conduct falling within the Act. The conduct by others that had originally given rise to the investigation was not the subject of the interrogation or the demand for documents. Its representatives were obliged, over their protests, to answer the questions put to them unless they incriminated them in criminal conduct.[30] A failure to do so would have constituted a criminal offence under s 72. They were obliged to produce the required documents because a failure to do so was also a criminal offence under s 71. In the light of the breadth of the summons and the absence of any grounds to suggest that Woodlands had been guilty of anti-competitive conduct the summons was nothing more than an invitation to engage in what the SCA described as a fishing expedition. This court set aside the summons and the Commission did not challenge that decision. The SCA set aside the complaints subsequently initiated against Woodlands because they were based on the information the Commission had illegally obtained.

[44] It is helpful in the light of the suggestion that the approach in *Woodlands* hampers the Commission in uncovering anti-competitive conduct to compare the position under the Act with an investigation by the police. Their power to enter premises or seize documents is expressed in similar terms to the powers of an investigator under the Competition Act and the powers of the latter are clearly modelled on the powers of the former. However, the police have only a limited power, with judicial approval, to compel witnesses – but never accused persons

30 Sections 49A(2) and (3).

– to submit to interrogation.[31] In order to exercise any of their investigative powers they are required – and must usually satisfy a judicial officer of this – to have both information giving rise to a reasonable suspicion that a crime has been committed and information as to the likely perpetrator or perpetrators of that crime. By contrast the Commission's investigator has such powers whenever the Commissioner decides to initiate a complaint. The Commissioner is therefore both the gamekeeper striving to catch the perpetrators of anti-competitive conduct and the gatekeeper to the exercise by inspectors on the Commissioner's staff of the power of interrogation and some powers of entry, search and seizure. The investigator's powers are exercised without judicial oversight, other than judicial review, and are capable of being abused by the Commissioner as past experience has regrettably demonstrated.[32] *Woodlands* itself was also an example of such abuse. Had the police engaged in the same type of conduct as the Commission in *Woodlands* it would unequivocally have been unlawful and the courts would have constrained them from pursuing such an investigation. They would have failed in their duty to protect the targets of the investigation against a misuse of police powers had they not done so.

[45] The reason for circumscribing powers of investigation, whether by the police or the Commission, is to protect the rights of those subjected to investigation. That is a central pillar of our constitutional democracy. Quite rightly the Commission does not suggest in argument that these safeguards should be absent. It is for precisely that reason that the SCA held that the Commissioner must be in possession of information on which a reasonable suspicion of the commission of unlawful anti-competitive conduct by a firm or firms can be based before initiating a complaint. In the same way the police are required to be in possession of information on the basis of which they suspect

31 Section 205 of the Criminal Procedure Act 51 of 1977.
32 *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA)

that a crime has been committed in order to exercise their powers of investigation. Any other approach is inimical to the protection of the rights guaranteed in the Bill of Rights.

[46] The Commission's powers of investigation are inextricably linked to the Act's referral system in respect of complaints of anti-competitive conduct. As already mentioned either the Commissioner initiates a complaint or some other person submits a complaint.[33] Upon initiation or receipt of a complaint the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.[34] Once an investigation has commenced the Commission's inspector is vested with powers similar to a police officer investigating a crime and in regard to the interrogation of persons more extensive than those. The outcome of the investigation may be a referral to the Tribunal and the imposition of substantial administrative penalties.[35] The Commission itself describes its activities in enforcing the Act as prosecutions.

[47] I do not understand the Commission to suggest that the statutory scheme requiring the initiation or referral of a complaint followed by an investigation and then a reference to the Tribunal is in principle deficient or should be altered. In other words the Commission accepts that a complaint initiation, followed by an investigation, before a referral is necessary and desirable. According to the Commission's own report it seems effective in winnowing out unmeritorious cases, resolving many on a consent basis and referring only those that require a decision, primarily one suspects those where the allegations of anti-competitive conduct are disputed or their scope is in issue, for a hearing before the Tribunal. According to the 2009/2010 Report of the Commission it achieved the following

33 Sections 49B(1) and (2).
34 Section 49B(3).
35 The Commission appears routinely to ask for the maximum penalty of 10% of the turnover of the firm to be imposed. This can amount to many millions of Rand. According to the Commission's Annual report for 2009/2010 the total figure collected by way of penalties in that year was slightly less than R500 million.

results during that year:

'Of the 289 cases under investigation during the reporting period, 27 complaints were included in the 13 referrals to the Tribunal for adjudication, 102 cases were closed at screening, 15 cases were closed after further investigation, 6 cases were withdrawn and consent agreements were concluded in 5 cases.' [48] Where then does the perceived problem lie? It appears to be with situations where there has been a proper initiation of a complaint, an investigation and then a referral, where either the referral relates to some anti-competitive conduct other than that referred to in the original complaint or it is sought to add another party to the alleged anti-competitive conduct. Taking the present case as an example it is said that the Commission has discovered evidence that implicates Feltex as a participant in the chemical cartel and accordingly it wishes to add that charge to the others that Feltex already faces before the Tribunal. To require the Commissioner to amend the original complaint initiation, institute an investigation (however cursory) and then refer this complaint against Feltex to the Tribunal is said to involve an excess of formalism.

[49] That approach misses two fundamentally important points about the process prescribed by the Act. The first is the reason for it providing in s 49B(3) that the Commissioner *must* direct an inspector to investigate a complaint irrespective of whether the complaint is initiated by the Commissioner or is made by a third party. Whilst that enables the inspector to exercise the powers conferred by the Act in relation to an investigation it also affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act. The consequences of a public charge that a firm is guilty of anti-competitive conduct are potentially far-reaching. Considerable reputational damage may flow from being charged with anti-competitive conduct. The ability of the public, via the lens of the media, to distinguish between an allegation of anti-competitive

conduct and proof that anti-competitive conduct has occurred is by no means clear.[36] If nothing else the firm so charged must devote resources that would otherwise be directed elsewhere to defending itself including, in many instances, fighting a public relations battle in trying to clear itself of these charges. As the Commission's own statistics quoted in paragraph [47] show many charges of anti-competitive conduct prove on investigation to be unfounded. In addition the investigative phase enables the target firm and the Commission to arrive at a suitable consent order in terms of s 49D that largely obviates the need for a protracted hearing before the Tribunal.

[50] The second important point that is overlooked is that s 67(1) of the Act provides that:

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

The date of initiation of a complaint is accordingly of vital importance in applying s 67(1) of the Act. That is so whether the section is construed as the Tribunal has done as one akin to prescription[37] or whether it is construed as going to the jurisdiction of the Commissioner to initiate and the Tribunal to entertain a complaint of anti-competitive conduct. In either case the critical date for determining the three year period is the date of initiation of the complaint. In the absence of the initiation of a complaint, because the matter has been referred directly to the Tribunal without the complaint or the target firm having been the subject of a complaint initiation, the foundation for invoking s 67(1) is absent. In view of its importance in the application of the Act that cannot be correct. This illustrates the importance in every instance of every complaint against any firm of a proper initiation of that complaint in terms of s 49B.

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36 The Supreme Court of Canada has recently drawn attention to the problem that an accused person may face if they are unable to ensure that 'the public will not be influenced by untested, one-sided and stigmatising information bearing on issues that are often irrelevant to guilt.' *Toronto Star Newspapers Ltd and others v R (in right of Canada) and others; Canadian Broadcasting Corporation and others v R and another* [2010] SCC 21; [2010] 1 SCR 721; 2011 (1) CLR 1 (SCC) para [51].

37 *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9, paras [84] and [86].

[51] The charge of formalism is therefore unfounded. The Commission would not dream of referring a case to the Tribunal unless there had been a complaint initiation and the Tribunal would not accept jurisdiction if it did so. That situation is not altered by saying that because a matter is already before the Tribunal in respect of firm A or conduct X there should be no problem in adding firm B or conduct Y without following the statutory route. If one takes away the existing referral the Commission would not adopt that approach. There is accordingly no justification for it doing so merely because there is an existing referral encompassing different parties or different conduct to that which it now wishes to pursue.

[52] The Tribunal has itself recognised the need to follow the sequence of initiation, investigation and referral. It said:

'While initiation, investigation and referral could conceivably all happen within the space of 24 hours, the act of referral (or non-referral) is always preceded by an act of initiation and the two are distinct from each other."[38]

There is no difference between that approach and the approach of this Court and the SCA. It is plainly the correct approach to the Act in its present form. The Act requires that the sequence of complaint initiation, investigation and referral be followed. It provides no alternative route, no shortcut. Where the evidence is clear or the conduct egregious no doubt, as the Tribunal points out in the above-cited passage, that process will not take very long. Nor will it in such cases hamper the Commission in discharging its mandate. In circumstances where the required steps are largely of a technical nature it is difficult to conceive of any problems in taking them.

[53] The reality is that in the cases where it has encountered difficulties over

38 *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9, para [85].

these issues the Commission has not been following the requirements of the Act.[39] Why this is so is unclear as the statutory scheme is reasonably clear and the decisions of both the Tribunal and this Court have set them out in a number of cases. This Court has also stressed that the focus of the complaint should be the conduct that is said to be anti-competitive.[40] We have also recently emphasised that all that is required is that the conduct said to contravene the Act be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is and be able to prepare to meet and rebut it,[41] bearing in mind that the competition issues upon which the Tribunal is called to adjudicate may be broader, more general and less clear-cut than those that arise in a conventional civil case in the High Court.[42] This gives a broad scope to the Commissioner in formulating the terms of a complaint initiation. In a cartel case, where new participants may be discovered as an investigation progresses, the Commissioner may be justified in couching a complaint initiation in fairly broad terms covering a number of market participants, on the basis of circumstantial evidence to be construed in the light of the pattern that cartel activity takes, even if the Commissioner lacks information directly implicating a particular firm, but that is not what has happened here.

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39 The only cases where these issues of the proper procedure to be followed have resulted in the Commission being unable to proceed are *Woodlands* and the recent decision of this Court in *Yara South Africa (Pty) Ltd v Competition Commission and Others, Competition Commission v Sasol Chemical Industries Ltd and Others, Omnia Fertilizers v Competition Commission* [2011] ZACAC 2. We have noted newspaper reports of the Tribunal upholding a similar procedural point in a matter involving South African Breweries but no reasons for that decision have been published at this stage.

40 *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers* [2002] ZACAC 3, paras [15] to [19].

41 The essential question is whether the issue was raised with sufficient clarity not whether it was described by a term understood in the area of competition law. See *Senwes Ltd v Competition Commission of South Africa* [2009] ZACAC 4, paras [27] to [43].

42 *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another* [2011] ZACAC 1, para [27].

[54] The Commission, as a statutory body exercising statutory powers in terms of the Act, is obliged to comply with it. That is a central requirement of the rule of law. Had it done so in relation to Feltex and the chemical cartel it would not be facing its present difficulties. It was not suggested in argument that any problem would have arisen had it done so and if it had one can only speculate about the outcome.

[55] Before leaving this topic I should deal briefly with a *dictum* in the judgment in *Woodlands* that, although not relied on in argument before us, might be thought to have some bearing on the matters discussed above. In paragraph [35] Harms DP said:

'Furthermore, the Act presupposes that the complaint (subject to possible amendment and fleshing-out) as initiated will be referred to the tribunal.'

Further at para [36] he said, and this is particularly pertinent to this case:

'A 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 complaint and fuller investigation.'

In referring to the possibility of both an amendment and the initiation of another complaint the learned judge contemplated two possibilities. The first is that the information obtained in the course of an investigation may relate to and fortify the existing complaint and justify an amendment of the particulars of that complaint as initiated without altering its fundamental nature. The second is where the information discloses a quite different transgression or participation by a party not hitherto the subject of a complaint. In those circumstances either the original initiation must be amended to encompass the additional complaint or party or a fresh initiation of a complaint is required. In view of the careful analysis of the requirements of the Act that preceded these statements they cannot be taken as sanctioning an amendment of a 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.

[56] For those reasons the Feltex appeal must succeed. The precise order flowing from this depends upon the outcome of the Steinhoff appeal to which I now turn.

THE STEINHOFF APPEAL

[57] The contention on behalf of the Steinhoff appellants in relation to the collusion claim is in substance the same as that of Feltex in regard to the chemical cartel. In the affidavit on behalf of the Steinhoff appellants opposing the application for amendment the deponent put the objection on two grounds depending upon the proper construction of the complaint. She first said:

'… assuming that the Commission intends to refer a complaint against either Steinhoff [International] or its subsidiary, Steinhoff Africa, the Commission has never initiated a complaint regarding alleged price fixing, customer allocation and joint purchasing of chemicals against either of those firms.'

In the alternative she submitted that:

'… it is not possible to raise a complaint that the actions of Loungefoam and Vitafoam ought to be construed as the result of co-ordination between Steinhoff and KAP as an alternative to a complaint that Loungefoam and Vitafoam colluded as independent firms.'

[58] Which of these was the intended construction was clarified in a replying affidavit on behalf of the Commission. It disavowed any intention to refer a new complaint of collusion against the Steinhoff group of companies. Instead the Commission contended that it was permissible for it to raise a complaint that the actions of Loungefoam and Vitafoam ought to be construed as the result of co-ordination between Steinhoff and KAP, as an alternative to a complaint that Loungefoam and Vitafoam colluded as independent firms. It averred that this

was encompassed by the terms of the complaint initiation of 26 May 2008.

[59] In advancing the collusion claim therefore the Commission nailed its colours to the mast of the second construction of its amendment identified by the Steinhoff appellants. It is noteworthy that in the founding affidavit in the review application by the Steinhoff appellants it was said:

'The Commission confirmed in its replying affidavit and heads of argument in the amendment application that what it intended by this amendment was to refer a complaint against Steinhoff [International] (or its subsidiary Steinhoff Africa) and KAP that the two firms engaged in collusive behaviour in relation to the activities of Loungefoam and Vitafoam, namely price fixing, customer allocation and joint purchasing of chemicals through the Foam Forum.'

The Commission did not dispute this description of the basis for the amendment.

[60] In argument before us the Commission shifted its stance. No doubt it did so in the face of two insuperable obstacles to the contentions advanced on its behalf in the affidavits. The first is that the complaint initiation document dated 26 May 2008 does not allege collusive conduct in breach of the Act by Steinhoff International and KAP International. It merely alleges that Feltex, Vitafoam and Loungefoam may have engaged in collusive conduct and that:

'The relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of.'

Whatever that sentence was intended to mean it does not embody a separate charge of conduct in breach of the Act on the part of Steinhoff International and KAP or Steinhoff Africa and KAP. The second insuperable problem is that the application to amend and introduce this further complaint was only made on 16 February 2010. That was substantially outside the one year period for referring a complaint to the Tribunal prescribed in s 50(2) of the Act. Accordingly, insofar as that complaint initiation document embodied this particular claim of a breach of the Act, the Commission must be regarded as

having issued a notice of non-referral in respect of it[43] and it was impermissible for it to refer that matter to the Tribunal at that stage.

[61] Mr Maenetje sought to place a narrower construction on the factual allegations contained in the collusion claim. He focussed on the following words in the preamble to the relevant paragraph:

'Whilst in strict formalism, which is also not conceded, it may appear that Steinhoff controlled Loungefoam sufficiently for purposes of section 4(5)(b) – because of this wider co-operation or collusion – any such control was rooted in a stratagem to achieve what section 4(1)(b) prohibits and cannot be permitted to benefit the Steinhoff group of companies and/or the KAP group of companies.'

In essence he contended that the purpose of the allegations was not to introduce a separate complaint of a restrictive horizontal practice between Steinhoff International and KAP, but to provide the factual basis for a contention by the Commission that, whatever the appearance might be of Loungefoam and Vitafoam being part of a single economic entity, it was in truth a charade created by collusion between the two groups and should be disregarded. He relied upon the well-known principle that a court will strip away the façade in which parties have chosen to cloak their transactions or relationship and look to the underlying reality of matters.

[62] I have no doubt that it is open to the Commission to meet a defence based on s 4(5)(b) of the Act by contending that the appearance of two firms being part of a single economic entity does not reflect the true situation. I equally have no doubt that many of the factual allegations embodied by the Commission in its proposed paragraph 32 to its founding affidavit could be invoked as evidence of the existence of such a stratagem. Indeed, and in fairness to the Steinhoff appellants, Mr Unterhalter SC, who appeared on their behalf, conceded that were that the sole purpose and intention of the proposed amendments there

43 Section 50(5).

could be no objection to them. Where I have difficulty lies in the proposition that this is indeed the purpose of the amendments. The history of the proposed amendment as traced above demonstrates that this was not the basis upon which the amendment was sought nor was it the basis upon which it was granted.

[63] Whilst it is permissible in appellate proceedings to argue a matter on an alternative legal basis to that on which it was argued in the tribunal from which the appeal lies, that is not this case. Here the Commission is seeking to place a construction on its amendment that wholly differs from the construction for which it contended in its affidavits and in argument before the Tribunal. In other words it wishes to say that the proposed amendment means something different from what it was said to mean before the Tribunal. That is not a new legal point in support of the same result. It is an attempt to change the meaning, basis and content of the amendment. In my view that is impermissible and it must be held to the construction on the basis of which it sought the amendment. If it wishes to raise these matters on the narrower basis indicated above it is free to apply to the Tribunal to deliver a supplementary affidavit having that purpose. On the basis on which it sought the amendments it was not in law entitled to them and the appeal must succeed.

[64] That leaves the amendment based on the Commission's s 4(5)(b) claim and the consequential relief of joinder and amendment of the prayer for relief. Section 4(5) reads as follows:

'The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by –

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).'

[65] The purpose of this section is to prevent companies operating within a group of companies, or firms operating within a single economic entity similar to a group of companies, from being accused of perpetrating restrictive horizontal practices in consequence of their interactions with one another as part of the group. The purpose of the section is exclusionary. It is not creative of obligations going beyond that exclusionary purpose. Its operation is restricted to s 4 of the Act and to relationships between members of the group, whether a group of companies or a group of firms. It permits companies or firms forming part of a group to engage in conventional corporate trading activities such as joint purchasing or co-ordinated price-setting. One can readily imagine a retail group operating under five different brands and five separate subsidiaries, consolidating its purchasing power to purchase goods collectively for the group. Equally it would be understandable if two or more subsidiaries traded in the same category of goods that the group might think it undesirable to engage in price competition with itself. The purpose of s 4(5) is to exclude such conduct from the ambit of restrictive horizontal practices.

[66] In this case, where complaints were originally levelled only against Loungefoam and Vitafoam, the provisions of s 4(5)(b) were invoked. What the Commission seeks to do by its s 4(5)(b) claim is to say that if the defence is justified then conduct involving Loungefoam, Vitafoam and Feltex must be taken to be conduct between Feltex and the group of companies constituted by Steinhoff International, Steinhoff Africa, Loungefoam and Vitafoam. That approach is not justified by s 4(5(b). If Loungefoam and Vitafoam together with Feltex have engaged in a restrictive horizontal practice then each of those firms is liable under the Act for its role in that practice. Loungefoam and Vitafoam cannot excuse their conduct by reliance on s 4(5)(b). Conversely the Commission cannot rely upon s 4(5)(b) to attach liability to Steinhoff

International and Steinhoff Africa. It follows that the amendments to permit the s 4(5)(b) claim should not have been granted and Steinhoff Africa should not have been joined in these proceedings.

CONCLUSION

[67] In the result both the Feltex appeal and the Steinhoff appeal must succeed in their entirety. That does not mean that the Commission may not seek leave to place before the Tribunal, by way of a supplementary affidavit at this stage and evidence in due course, material directed at showing that the appearance of a single economic entity between Loungefoam and Vitafoam is a charade. In saying that, however, it is not my intention to give any indication to the Tribunal whether to permit such a supplementary affidavit to be delivered at this stage of the proceedings. As for the reviews they have become academic and will be dismissed. However the applicants have succeeded on the points sought to be raised in the reviews and in those circumstances it seems to me fair that each party pay its own costs in the reviews. That can be achieved by making no order for costs.

[68] I accordingly make the following order.

1. The appeal by Feltex Holdings (Pty) Limited is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2. The appeal by the Steinhoff appellants is upheld with costs, such costs to include the costs of two counsel, where two counsel were employed.

3. Paragraphs [67.1] and [67.2] of the order of the Tribunal contained in paragraph 67 of its decision are set aside and replaced by the following:

‘[1] The Commission’s application for the amendments set out in Annexure “A” to its decision is granted subject to the following qualifications:

(a) The amendment to paragraph 3 of the order prayed in its notice

of motion dated 29 July 2009 is refused;

(b) The amendment of the founding affidavit in the respects set out in paragraphs 10, 11 and 12 of annexure A is refused.

[2] The application for the joinder of Steinhoff Africa Holdings (Pty) Limited is dismissed.'

4. The review applications brought by Feltex and the Steinhoff applicants are dismissed with no order as to costs.

M J D WALLIS
ACTING JUDGE OF APPEAL

DATE OF HEARING	18 MARCH 2011
DATE OF JUDGMENT	6 MAY 2011
APPELLANT'S COUNSEL (FELTEX)	M du P VAN DER NEST SC with him ALFRED COCKRELL SC
APPELLANT'S ATTORNEYS (FELTEX)	SHEPSTONE &WYLIE
APPELLANTS' COUNSEL (STEINHOFF APPELLANTS)	DAVID UNTERHALTER SC with him M A WESLEY
APPELLANTS' ATTORNEYS	DENEYS REITZ INC
RESPONDENT'S COUNSEL	N H MAENETJE
RESPONDENT'S ATTORNEYS	STATE ATTORNEY