COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case Number: 49/CR/Apr00

In the matter between:

American Natural Soda Ash Corp	First Applicant
CHC Global (Pty) Ltd	Second Applicant

and

The Competition Commission	First respondent
Botswana Ash (Pty) Ltd	Second respondent (Intervening)
Chemserve Technical Products (Pty) Ltd	Third Respondent (Intervening)

In the Referral:

The Competition Commission	First Applicant
Botswana Ash (Pty) Ltd	Second Applicant (Intervening)
Chemserve Technical Products (Pty) Ltd	Third Applicant (Intervening)

and

American Natural Soda Ash Corp	First respondent
CHC global (Pty) Ltd	Second respondent

Reasons and Order

BACKGROUND

This is an application brought by Ansac and CHC Global Pty Ltd ("Ansac") to dismiss a complaint referred to us by the Competition Commission (the "Commission") in April 2000 and an intervening claim brought by Botash and Chemserve ("Botash") in the same matter.

The Commission and Botash allege that Ansac has contravened the provisions of section

4(1)(b) of the Competition Act, (Act no 89 of 1998)[1]. The hearing into the application has not yet commenced and we have decided that it would be appropriate to hear this application prior to the commencement of the hearing.

The application is composed of two parts –

1. An objection to us hearing the referral on jurisdictional grounds; and
2. Various exceptions to the referral.

In addition we asked the parties to present argument on the interpretation of section 4(1)(b)(i) which we thought could be conveniently heard at the same time as this application.

A short history of the litigation in this matter is appropriate in order for us to place the application in its proper context.

HISTORY OF THE LITIGATION

In October 1999 Botash launched an application for interim relief in terms of section 59 of the Competition Act[2] against Ansac. Botash alleged that Ansac was operating in South Africa in contravention of section 4(1)(b)(i) and (4)(1)(b) (ii) of the Act and engaged in predatory behavior in contravention of section 8. Ansac opposed this application and also launched its own application for interim relief against Botash in December 1999, alleging that Botash was engaged in predatory pricing against it

On 10 February 2000 after deliberations between the Commission, Ansac and Botash, the parties agreed to withdraw their respective interim relief applications provided the Commission finalised its investigation into Botash's complaint by 22 March 2000 by which date it had to either refer the complaint or issue a notice of non-referral. If the Commission referred the complaint Botash would have the right to intervene and fully participate in the Tribunal's proceedings, including the right to file a separate statement of particulars of complaint. The conditions were set out in an agreement between the parties that was made an order of the Tribunal.

On 23 March 2000 the Commission filed its complaint referral with the Tribunal. Ansac, responded by filing an application to request further particulars to the referral. The Commission, subsequent to this, decided to withdraw its referral and filed a fresh referral on 14 April 2000. The Tribunal published a notice of this referral in terms of section 51(3) of the Act in Government Gazette No. 21145 on 12 May 2000.

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1 The Commission alleges a breach of section 4(1)(b)(i), Botash a breach of section 4(1)(b)(i) and (ii).
2 Although the Competition Second Amendment Act, No. 39 of 2000 and new Tribunal Rules came into affect on 1 February 2001 we will be referring to the Competition Act and Tribunal Rules, as they were immediately before that date unless otherwise indicated.

On 25 May Botash served intervening particulars of complaint on both Ansac and the Commission. However, the Competition Commission objected to this on grounds that neither the Act nor the Rules of the Tribunal permitted Botash to file such particulars. Ansac approached the Tribunal for an order seeking declaratory relief and the Tribunal granted Botash leave to intervene on 7 September 2000 after hearing the matter on 10 August 2000.

Ansac subsequently filed answering affidavits to both the Commission's complaint referral and to Botash's particulars of complaint. We then convened a pre-hearing conference on the 12 October 2000. At this hearing the Tribunal member presiding suggested that a number of preliminary legal issues referred to in the papers should be determined initially. It was further suggested that as these legal issues might not be susceptible to adjudication in vacuo the parties should try and reach agreement on a statement of facts.

During subsequent pre-hearing conferences on 31 October and 24 November 2000 it became apparent that the parties were not able to reach agreement on a statement of facts. At the same time the Commission and Botash were insisting on discovery of certain documents from Ansac, which Ansac resisted.

Matters came to a head at a pre-hearing conference held on 14 December 2000 when Ansac claimed that it did not know what case it had to meet and said that the scope and ambit of discovery needed to be more precisely defined before it was prepared to make discovery. It was then agreed that the Commission would have the opportunity to amend its complaint referral and Botash its particulars of complaint. The Tribunal incorporated this, as well as an agreed timetable, into an order issued on 14 December 2000.

The Commission and Botash filed their respective amended pleadings on 8 January 2001. Ansac however did not file its amended answer in accordance with our order , but instead brought the application which is presently before us, on 16 January 2001, asking for the complaint to be dismissed. As the application raised a number of preliminary issues that were not being resolved through the process to get an agreed statement of facts we decided to hear this application before commencing the hearing..

At the commencement of our hearing into this application the Commission disputed whether it is competent for us to hear an exception. We advised the parties that our rules allow us to identify any legal issue that may be disposed of conveniently as a preliminary issue to be heard before the commencement of a hearing[3]. Since this was an appropriate case to follow that procedure we decided to do so. It was therefore entirely academic for us to decide whether we have the power to entertain exceptions or for us to give such proceedings the label of either a special plea, in limine point or exception. The parties accepted this and we proceeded to hear argument on the remaining issues.

3 See Rule 23(2)(a). (Now Rule 21(2)(a))

JURISDICTIONAL POINT

Ansac contends that the complaint referral fails to satisfy the jurisdictional preconditions set out in section 50 of the Act.
That section states:

> *"(50). After completing its investigation, the Competition Commission must-*
> *a) refer the matter 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."*

Ansac identifies two jurisdictional preconditions in this section. The first is the Commission must have completed its investigation. The second is that the Commission must have determined that a prohibited practice has been established. Ansac argues that neither of these preconditions has been fulfilled.

Ansac firstly relies for these propositions on a statement made by the Commission's counsel, Mr. Pretorius, at a pre-hearing conference on 14 December 2000 during which it alleges he had stated that the Commission had been unable to complete its investigation due to the time constraint imposed by this Tribunal on the referral of the complaint[4]. Ansac says that it thought nothing of this statement at the time considering that it had been made in the heat of the moment. Its attitude changed when on receipt of the Commission's answering affidavit in these objection proceedings Ms Singh[5], according to Ansac's reading of her affidavit, effectively reiterated that the matter had been referred before the investigation was complete and before the Commission had established a prohibited practice.

The chronology is important here. At the time of the last pre-hearing on the 14th of December 2000 Ansac had not yet filed its founding papers in this objection application and when it subsequently did this point was not taken. Nor was any contemporaneous comment made at the time of the pre-hearing on 14 December on the supposedly surprising admission of Mr. Pretorius. Presumably Ansac would say this was because at the time it was not alert to the fact. The first time this issue was raised by Ansac as a ground for objection was in its replying affidavit in this application. Thus when Ms Singh is deposing to her answering affidavit in these objection proceedings, the one on which Ansac places such reliance, she is not alive to this point indeed she is responding apparently to a complaint about discovery. Not surprisingly having seen the replying

4 As appears from the history set out above in terms of its order in February 2000 the Tribunal required the Commission to make its decision whether to refer the complaint by 22 March 2000. Ordinarily the Commission would have had a longer period to investigate the complaint.
5 Ms Singh is the Commission's investigator in the present complaint and the official who has deposed to the Commission's affidavit in both the Referral and the current application.

affidavit from the respondents in which this point is first raised the Commission filed a second affidavit from Ms Singh dealing with this aspect. In paragraph 3 of this affidavit Ms Singh states:

> *"The Commission at the time of the Referral, was in possession of sufficient evidence to determine that a prohibited practice had occurred. The Commission, however, would have preferred further time for investigation in order to put before the Tribunal the full extent of the effects of the alleged ANSAC cartel in the Republic of South Africa."*

Ansac uses Mr. Pretorius's alleged concession to establish its contention that the Commission had not completed its investigation. Whilst conceding that Ms Singh has never herself said so, they say the necessary implication of her failure to rebut Mr. Pretorius amounts to an admission of the correctness of his remarks at the pre-hearing. In the elegant phrase of Ansac's counsel "Ms Singh's silence on this point was clamant"[6]. Thus Ansac says the first jurisdictional prerequisite viz. a completed investigation has been shown to be absent. This prerequisite they submit is objectively reviewable.

> They then argue that they have established the second leg as well, notwithstanding Ms Singh's supplementary affidavit. Their reading of the affidavit is that Ms Singh concedes that the prohibited practice determination was based on an invalid assumption. By this we understand Ansac to be referring to her statement that she did not expect Ansac to put in issue that it had:
>
> "*entered into no agreements with any customer in South Africa during the relevant period". (See Singh answering affidavit 4.2 Record C 71).*
>
> This failure they say makes the decision irrational and hence notwithstanding the subjective nature of this discretion renders it a nullity. (See Transcript pg 118 lines 5 – 20)
>
> To arrive at this conclusion Ansac needed to do some extraordinary reading of the record and to place the most subjective gloss on the history of this litigation.

Let us consider what Ms Singh says and see if it offers a basis for attack on either of the two grounds mentioned above. What Ms Singh is explaining in paragraphs 4 and 5 of her answering affidavit is why the Commission had not anticipated the defence being mounted by Ansac and secondly the background to the dispute between the parties over discovery of Ansac's customer contracts. Ansac's reluctance to make discovery was frustrating the Commission who perceived that they could no longer rely on their investigative powers to compel the production of documents, but had to rely on an

6 Mr. Pretorius who appeared for the Commission in these proceedings did not concede that these remarks were correctly attributed to him and declined to be drawn into the debate.(See Transcript pg 156)

application to the Tribunal to effect discovery.

The fact that the Commission did not anticipate the present defence at the time it referred the dispute does not justify a conclusion of irrationality. A glance at Ansac's answer in the erstwhile interim relief application[7] *indicates that Ansac did not rely on the current objections, which relate to the post –enactment nature of the transactions alleged, for its defence. Its principal defence and the one that Ms Singh anticipates relates to the issue of the extra- territorial application of this Act. Interestingly this point has not been pursued in this application. This shift in defensive posture, which Ansac is perfectly within its rights to assert, illustrates the fundamental problem of this review. Is the Commission supposed to anticipate every line of defence before referring a case? The answer is no. This proposition is followed in criminal law as the English case of Herniman v Smith illustrates:*

> *"It is not the duty of the prosecutor to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution".*[8]

The Commission, having at the time and on an examination of the pleadings in the interim relief application assessed the likely issues in dispute, concluded its investigation and considered it had established a prohibitive practice existed. This Ms Singh states in paragraph 4.7 of her affidavit (Record page C 72) where she states:

> *"The Applicant (i.e. the Commission) was and remain convinced that a proper discovery of these documents will show that the respondents did enter into agreements during the relevant period, in addition to giving effect to the agreements referred to above…."*

She goes on at paragraph 5 of the same affidavit to say:

> *"The Applicant verily believes that proper discovery will show that other agreements were entered into between the commencement of the Act and the filing of referral"*

These paragraphs clearly indicate that the Commission believes it has established the existence of a prohibited practice and that discovery of the documents will provide evidence to supplement the correctness of its belief as opposed to evidence required to establish the existence of its belief.

Do the suggestions made then in paragraph 6 of her affidavit coupled with Mr. Pretorius's remarks suggest that the Commission's investigation was incomplete? In this paragraph Ms Singh goes on to state:

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7 Case no 07/IR/0ct99

8 1938 AC 305 at 319 referred to in Beckenstrater v Rottcher and Theunissen 1955(1) SA 319 at 317.

"In the circumstances the Applicant would have preferred withdrawing the matter in toto in order to restore its investigative powers in terms of the Act. The Applicant is, however concerned that the provision of Section 67(2) may render the Respondents immune from further action should they do so. The Respondents were requested by the Commission to waive any rights in terms of Section 67(2), but they refused to do so. In the Commission's view the issue relating to the exception is an opportunistic attempt to render themselves immune from the provisions of the Act."

What the Commission is saying is this. We concluded our investigation. We did not anticipate a new defence made out by Ansac until we received their plea. At that stage we considered our investigative powers were terminated. Ansac refuses to provide us with the relevant documentation because they say no case to impugn them has been pleaded. Had we known all this before we filed the complaint referral we might have used our investigative powers to require their production. At most this is an expression of regret with the benefit of hindsight. It is not an admission that their investigation was not completed.

The structure of Ms Singh's affidavit attached to the April complaint referral suggests that the Commission after receipt of a complaint (paragraph 5) undertook an investigation in terms of which they made "findings". Ms Singh in paragraph 6.1 for instance uses the language:

"The Applicant investigated the complaint and found that…" (Our emphasis)

She goes on in paragraph 9 to identify their legal conclusions in a paragraph headed contraventions of the Act. [9]

On a proper reading of this affidavit one comes to the conclusion that the Commission has prima facie -

1. Conducted an investigation;
2. Come to a finding, which suggests that the investigation has been concluded for the purposes of section 50; and
3. Established the existence of a prohibited practice.

Section 50 must be read as a whole. The purpose of the Commission's investigation is to determine whether a prohibited practice has been established in which case they must refer the matter to the Tribunal or if not to issue a notice of non-referral in terms of section 50(b). Thus the completion of the investigation must be read conjunctively with these two subsequent steps - it informs a decision to refer or not to refer. Completion of the investigation does not mean that the Commission must be ready to go to trial with

9 See Record pages A 31 –33.

every document in its docket at the moment of referral. Nor does it mean that it must exhaustively investigate each anticipated line of defence. Indeed at the time of referral the respondent will not have been required to indicate its defence and the Commission may be in the dark. While the Commission has powers to elicit information[10] *it cannot compel a party to reveal its defence. The first time it is confronted with that defence as a matter of procedure, unless a respondent voluntarily indicates it earlier, is when the respondent files its answering affidavit to the complaint referral – a post section 50 event. Placed in its proper context completion of the investigation means completion for the purposes of a decision to refer or not to refer.*

> Ansac concedes that the prohibited practice determination entails a subjective discretion. Although they contend that the completion of the investigation is an objective fact they do concede its subjective aspect.
>
> Despite the language of the section a proper analysis of section 50 suggests that the determination of whether an investigation is complete is more subjective than objective in character. The completion of an investigation is inextricably bound up with the consideration of the existence of a prohibited practice. As many investigators would have as many different views as to completeness. Part of this assessment depends on the individual predilections of investigators, part on consideration of what one needs to establish as a matter of law in a given case. Indeed this case is illustrative of the latter. On Botash and the Commission's argument far less extensive evidence of post enactment activity would be necessary to establish a violation. Following such an approach this investigator would come to the conclusion that an investigation had been completed while an investigator who would share Ansac's view of the law would not.

This illustrates the dangers of this type of review of the Commission's powers under section 50. One would be second-guessing the Commission's exercise of its discretion before a matter even came to a hearing before the Tribunal. Setting the standard for what constitutes a completed investigation too high would mean that investigations would take an enormous amount of time to conclude which cannot be in the interests of either complainants or respondents who have a defence. Perversely it is only the respondent likely to be found to have contravened the Act who would benefit by a protracted investigation as they would enjoy the fruits of their market power that much longer. It would also serve as an inducement to opportunistic respondents to force the Commission into a preliminary enquiry into their case prior to the commencement of a hearing.[11]

Our courts have recognised these dangers in reviewing the power of the Attorney

10 See Part E of Chapter 5.

11 We do not want to overstate the policy concerns as the Act from 1 February 2001 has been amended so that section 50 (1) of the Competition Second Amendment Act, No. 39 of 2000 now reads: " At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal." The amended section has removed both the prerequisites at issue in the present matter.

General to prosecute in criminal cases.

As the authors of the Commentary on the Criminal Procedure Act observe:

> *"Courts accept the prerogative of the Attorney General to institute criminal proceedings on charges he deems proper, and are reluctant to interfere. This is no doubt desirable, since the Attorney General is vested with the power and discretion in this regard. He has in front of him facts and material which are not available to the court, or the defence."*[12]

The authors go on to cite authority for the proposition that without proof of mala fides or gross unreasonableness a court of law will not interfere with the discretion of the Attorney General.[13] *Even if this approach is subject to criticism of being overly deferent to officialdom when viewed in the context of our more heightened sensitivity to administrative review since the adoption of the Constitution, the facts of this case do not suggest that even a court more animated by an expansive view of administrative rights than its forebears would come to the conclusion that this decision is reviewable.*

> This does not lead to unfairness for Ansac. The Commission's decisions to complete an investigation and to refer a complaint are merely acts preparatory to a hearing before the Tribunal. The respondent retains its rights to defend itself including through the filing of pleadings, the right to raise preliminary objections on points of law and a full right of audience before the Tribunal during its proceedings. In a fair contest if the Commission is unprepared or has a flawed case it will lose, but we cannot stop it from entering the contest because we are asked a priori to form an opinion that it is not ready to win.

Botash argued that we do not have powers to review the Commission in these circumstances because our powers are confined to our statute. In terms of section 27(1)(c)[14] *the Tribunal may "….review any decision of the Competition Commission that may in terms of this Act be referred to it." The Act they point out makes no provision for us to review a decision of the Commission in terms of section 50. Ansac has relied on cases, which suggest that an administrative tribunal has a general power to consider issues of jurisdiction. We do not need to decide this point as we have approached the issue by first making the assumption that we have the review powers Ansac contends we have and then asking whether the Commission's decision is reviewable. Since our answer to that question is in the negative we do not need to go on to decide whether we have such powers.*

The objection to our jurisdiction to hear this complaint on the basis that the prerequisites

12 See Du Toit, De Jager, Paizes, Skeen and Van der Merwe, "*Commentary on the Criminal Procedure Act"*(Juta 1996) 1-4.

13 The case relied upon is Gillingham v Attorney General 1909 TS 572.

14 Section 27(1)(c) of the Competition Act as amended by the Competition Second Amendment Act, No 39 of 2000.

of section 50 have not been established is accordingly dismissed.

EXCEPTIONS

We must now consider the various exceptions raised by Ansac.

Ansac argues that the case made out against it cannot extend beyond the ambit of the Commission's complaint referral. With this as its premise it goes on to argue that in the referral the Commission has based its case on the Ansac membership agreement and its agency agreement with CHC and since both these agreements predate the Act, which cannot be interpreted retrospectively to unsettle vested rights, the Commission's case must fail and cannot be resurrected by amendment.[15] Ansac describes the interveners' claim as being "parasitic" upon the complaint referral and if the latter is bad in law, the same fate must befall the interveners, even if a different construction is placed on the interveners' pleadings.

Ansac concede that if we find that the Commission, and of course by extension the interveners, are not bound by the parameters of the complaint referral and that some post enactment discretionary transactions other than the membership agreement and agency agreement could be inferred these would not be immunised by the presumption against retrospectivity. But here they add another bow to their quiver, for they argue as their fall back position that if such agreements are impugnable, they are not impugnable under section 4(1)(b). This is because section 4(1)(b) only impugns price fixing agreements not agreements between buyers and sellers. Ansac declines to identify the section of the Act under which they could be impugned, but since only section 4(1)(b) is relied on it does not need to traverse this.

Finally as the third leg to its objections it states that if post enactment transactions may be relied on then these transactions must be juristic acts and they must be pleaded with proper particularity. This it asserts the Commission and Botash have failed to do and the amendments have not cured this problem.

The Commission and Botash vehemently opposed all these criticisms. Whilst both concede the Act cannot be interpreted retroactively (in the sense that term has been understood in the case of National Director of Public Prosecutions v Carolus & Others 2000 (1) SA 1127 SCA) the ambit of retrospectivity is contested as well as the nature of the post enactment conduct required to establish a contravention of section 4(1)(b) and the Ansac reading of what section 4(1)(b) impugns. They further assert that Ansac has been provided with sufficient particularity to enable it to plead.

At the risk of over simplifying the respective approaches of the parties we would say that

15 This argument is premised on paragraphs 6.1.1 , 7, 8 and 9 of Pearline Singh's affidavit attached to the Complaint Referral.

the Ansac analysis is premised on formal notions of contract and vested rights – that of the Commission and Botash on performance and effects.

We have decided that these issues would be more usefully decided after we have heard the evidence. The rationale for this conclusion is illustrated by the nature of the debate between the parties over the exception. For example on the retrospectivity point the parties have widely divergent views of what post enactment evidence suffices to establish a contravention. On this point as between Ansac and the Commission we have a continuum that ranges from the conclusion of a juristic act of price fixing, to the solicitation of an order. Absent proof of the nature of the act that took place post enactment and indeed whether any are proved at all we see no useful purpose in making a determination now that can lead to imprecision and misinterpretation.

Similarly some of the other issues raised in the exception are also in our view more appropriately resolved once we have heard the evidence. Fundamental to all is the nature of the post enactment activity. We feel we need clarity on what these transactions are i.e. to consider the evidence before we can determine their legal significance. Important issues of law are involved here and we are reluctant to make a decision on the law prematurely based on speculation of what facts may finally be established at the hearing.[16]

Courts of law retain the discretion to order an exception to stand over to trial on the basis of convenience. In Herbstein and Van Winsen, two instances of when a court may exercise such a discretion are described.[17] One is where the exception raises a point of law that may not arise at trial and thus proves academic and the second when a proper decision on the exception is bound up in the merits of the dispute. Both these features characterise aspects of the present exception and we therefore leave the following objections of Ansac to stand over for a decision at the hearing of this matter viz:

1. Whether the transactions sought to be impugned pre-date the enactment of the statute – the retrospectivity argument
2. If post enactment transactions are impugnable they are nevertheless not covered by section 4(1)(b), because they are not acts of price fixing
3. If post enactment transaction are impugnable they must be juristic acts

Exception Issues to be determined

The remaining issues in the exception may conveniently be decided at this stage and we

16 This has been our approach to this litigation from the outset and the reason for us at the first pre-hearing trying to get the parties to reach an agreement on the facts, so that points of law were not argued in abstraction.

17 See Herbstein and Van Winsen , "The Civil Practice of the Supreme Court of South Africa", 4th Edition (Juta 1997) by L.Van Winsen , A.Cilliers and C.Loots and edited by M.Dendy , pg 489.

proceed to deal with them below.

1. <u>The Commission and Botash are bound by the terms of the referral</u>

Ansac argues that the terms of the referral determine the content and ambit of the complaint upon which the Tribunal may pronounce. These terms are those to be found in the affidavit of Ms Singh annexed to the complaint referral dated 14 April 2000. Ansac argues that Section 52(4) of the Act empowers the Tribunal to make, at the conclusion of the hearing, any order permitted in terms of Chapter 6. In Chapter 6 we find section 60 that sets out the orders the Tribunal may make in relation to a prohibited practice. Ansac then argues that the prohibited practice referred to in section 60 can only be the prohibited practice that is the subject of a referral in terms of section 50. It concludes:

> *"It follows, it is submitted, that the Tribunal can only make a decision upon the complaint referred to it and within the compass of the terms of that referral."*

There is nothing in the language of any of the sections cited that supports this proposition. The linkage between section 60 and section 50 which Ansac suggests is not stated expressly nor is there anything to suggest it should be inferred. The fact that both refer to the concept of prohibited practice is hardly remarkable.

> Ansac next seek to place reliance on the fact that the Tribunal is obliged to publish the fact of the referral in the Government Gazette in terms of section 51(4). It is common cause that the purpose of this provision is to alert third parties to the impending proceedings. Ansac states that it is crucial that the Tribunal pronounce only on the complaint of which notice is given to the world.
>
> Once again neither the logic nor language of the Act justifies such a conclusion. The purpose of the notice is to alert third parties to the broad parameters of a dispute so they can make further enquires if they so wish. The choice of language in the section is itself instructive. The notice must give details as to the "nature" not the "specifics" of the complaint. The notion that this notice defines the parameters of the dispute is absurd and it does not warrant much further elucidation to see how the approach that Ansac commends can lead to artificial objections being taken by opportunistic respondents on behalf of unnamed and supposedly disenfranchised third parties leading to the unhealthy elevation of form over substance.

We do not understand Ansac to be saying a complaint referral can never be amended (indeed this would mean that the Tribunal Rule that permits amendments is ultra vires the Act) but rather that the extent of the amendment may make it impermissible. Yet the amendments in this case seek to provide specificity and despite the passionate protests of Ansac, neither the Commission nor Botash have re-invented their original case. The foundations remain the same viz. the Ansac members' agreement and the agency agreement - it is further specificity about the post enactment transactions, which have

now been supplied. The case has always been premised on the post enactment period. In the CC1 attached to the Commission's complaint referral the period during which the respondent is alleged to have contravened the Competition Act is stated as being from 1/ 09/99 to 14 April 1999.[18]

The amendments occasion no prejudice to Ansac as the hearing has not commenced and it is entitled to file an amended answer if it chooses to. The suggestion that the process should commence de novo is absurd.

2. Have the transactions been pleaded with sufficient particularity

Ansac complains that the issues in this case have been framed:

> "so loosely that the respondents have been unable to determine what case they have to meet. …The applicants for their part have exploited the porous state of the pleadings to shift their ground and fish for information and the result has been uncertainty on the issues and an attempt at stating a case that has proved wholly abortive." [19]

They go on to complain that the amendments have done nothing to cure the situation. Ansac argued that the kind of particularity required of the Complaint referral and, by analogy, the interveners' particulars is one that meets the requirements for a founding affidavit in application proceedings in the High Court. In several High Court cases to which we were referred the point is made that, in application proceedings, since the affidavit replaces essential evidence which would otherwise be led at trial, it must make out this evidence. [20] At the other end of the spectrum are particulars of claim in High Court trial proceedings where pleadings are not accompanied by affidavits and are characteristically sparse and terse. Thus High Court Rule 18(4), which provides for these particulars of claim states:

> *"Every pleading shall contain a clear and concise statement of the material facts on which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto." (Our emphasis)*

In contrast Rule 6 of the High Court rules which regulates the requirements for applications omits the word material and states in Rule 6(1):

> *"…every application shall be brought on notice of motion supported by an "affidavit as to the facts upon which the Ansac relies for relief." (Our emphasis)*

18 See Record page A 27.
19 Heads of Argument paragraph 25.2.3
20 See for instance Radebe v Eastern Transvaal Development Board, 1988 (2) SA 785, Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279

Our Tribunal rule 28(1) which regulates interim relief proceedings echoes this language and states:

> *"28(1) A claimant may initiate an interim relief proceeding in terms of section 59 by filing a Notice of Motion in Form CT6, and supporting affidavit setting out the facts on which the application is based."*

In this context we can view Tribunal Rule 17 which provides for the form of a complaint referral . It states:

> *"17(2) Subject to Rule 26(1), a Complaint Referral must be supported by an affidavit setting out –*
>
> *a) a detailed statement of the particulars of the complaint; and*
> *b) the material facts relevant to the complaint and relied on by the person making the referral."*
>
> In one respect Rule 17 is similar to High Court Rule 18 (the particulars of claim rule) in that it requires that only "material" facts be set out, but it differs in another in that more analogous to application proceedings it requires an affidavit. The fact that this is more than an accidental choice of language is borne out by reference to the Tribunal's interim relief rule where as we saw the word 'material' does not appear and the language follows that of Rule 6 of the High Court Rules(the application rule). Thus while interim relief applications mirror the requirements for a High Court application, Rule 17 does not. It might be argued that Ansac is still correct because in contrast to the "material facts" of 17(2)(b), Rule 17(2)(a) requires a "detailed statement" of the particulars of the complaint.

However, reading Rule 17(2) as a whole suggests that what is required is that the prohibited practice be described with precision, but that its factual matrix can be averred with less specificity. Thus I need to know in detail what I am being "charged" with but I am not entitled to know in the referral all the facts which may be led at the hearing. Granted at times these distinctions may blur, but this problem is not pertinent to this case, because as we set out below, the amendments have provided sufficient precision to the complaint referral and particulars of claim to enable Ansac to appreciate the case against it.

Apart from the language of rule 17 the complaint referral's function must be understood in the context of the Rules and the Act. A complaint referral eventually becomes the subject of a hearing before the Tribunal. It is here where the Tribunal has unique procedural powers, which differ vastly from those of a civil court in adversarial civil proceedings. The problem for Ansac is that it has relied on civil court decisions in application proceedings as authority for its criticism of the present pleadings ignoring not only the institutional differences between High Courts and the Tribunal but also the

different status that pleadings enjoy in each. We consider these differences below.

Some of the institutional differences between a civil court in adversarial proceedings and the Tribunal are-

The Tribunal is entitled to:

1. Conduct its proceedings inquisitorially (Section 52(2)(b))[21]
2. Call witnesses itself and require documents to be produced (Section 54)
3. At a pre-hearing to require the Commission to investigate specific issues or obtain certain evidence. (Rule 24(1)(b))

This leads us on immediately to the second consideration, for if the Tribunal is entitled to enter the fray in this way, unlike its civil court counterpart, it suggests that the function of pleadings to determine the parameters of a dispute, as we understand them in civil actions is diminished. The policy rationale behind this is that prohibited practices do not just have private effects but also affect the broader public. The Tribunal as the guardian of the purposes of the Act cannot be constrained by the ambit of pleadings to the extent would a civil court in adversarial proceedings. The legislature did not intend to make the Tribunal a prisoner confined by the walls of opposing lawyers' pleadings. We must bear in mind that the primary purpose of pleadings is to define the issues between the parties so that each knows what case it must be prepared to meet and secondly so that the court is in a position to identify the issues on which it must make its decision.[22] In the Tribunal's proceedings pleadings serve this function as well, but their status is less elevated given the inquisitorial nature of the Tribunal and the public character of complaint procedures we alluded to above. Consequently our approach to pleadings will be more flexible than a civil court's. Furthermore in our proceedings the defining of issues is not the sole preserve of the pleadings and this function can be supplemented by a pre-hearing conference. In terms of Rule 22(1)(c)[23] one of the functions of the assigned member who presides at a pre-hearing conference is to:

"Give directions in respect of –
(iii) clarifying and simplifying issues;
(iv) obtaining admissions of particular facts or documents."

On the other hand the Tribunal must ensure fairness and compliance with the requirements of natural justice. This is an obligation that does not extend merely to the stage of pleadings but infects the entire process before the Tribunal. This means that the Tribunal must control its proceedings in such a manner to ensure that a respondent can rebut prejudicial allegations to it. To the extent that a respondent wants issues further

21 Section 52(2)(b) of the Competition Act as amended by the Competition Second Amendment Act, No 39 of 2000, previously section 52(2)(a).
22 See L.T.C.Harms, "Civil Procedure in the Supreme Court", (Butterworths, September 2000) pg 263
23 Tribunal Rules published on 1 February 2001 in terms of the Competition Act as amended by the Competition Second Amendment Act.

clarified before a hearing it too can rely on this procedure and it need not have to resort to the procedural formalities that one would utilize in a High Court.

We must now apply this analysis to the facts of this case. We were sympathetic to Ansac's complaint that the Commission's complaint referral and the interveners' particulars of claim lacked particularity about the effects or performance that was being alleged post enactment. However in our view the parties' respective amendments have now cured this.

In the Commission's case these amendments:

- elaborate on the respective relationships of Ansac and CHC; and
- in an alternative formulation, to be found in the new paragraph 9.2, list the customers with whom it is alleged that Ansac has framework agreements and detail the manner in which these agreements were given effect to (See paragraphs 9.2.1.2 and 9.2.2 – 9.2.5)

Botash in its amended particulars also:

- Clarifies the respective roles of Ansac and CHC (See paragraph 13); and
- Has inserted a new section in its particulars under the heading "Ansac's economic activities in South Africa" listing Ansac's customers in South Africa and specifying the acts that it alleges took place or alternatively had an economic effect within South Africa during the relevant period viz. 1 September 1999- April 2000.

In conclusion on this issue we find that:

- Rule 17 must be understood in the context of the procedural framework of the Act, which requires less formality in relation to pleadings than in adversarial civil proceedings because of the unique powers of the Tribunal and the fact that there are other procedural mechanisms that co-exist with pleadings in our Rules to achieve the objectives of defining the issues. On a textual analysis Rule 17 does not require the same elaboration in pleadings as one would expect of an application in the High Court.

- In the light of this analysis the Commission's amended referral and the interveners' amended particulars of claim contain sufficient particularity for the purpose of Rule 17.

per N. Manoim
concurring: D. Terblanche and D Lewis

DOES SECTION 4(1)(B) ALLOW FOR AN EFFICIENCY DEFENCE?

At the pre-hearing on the 24 January 2001 we asked the parties to prepare legal argument on this point, as the conclusion would determine whether this evidence could be led at the hearing. Although the issue did not form part of the application we deemed it convenient to consider the matter now since we were considering the other preliminary legal points.

Section 4 provides

> *(4)(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if*
>
> *a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or*
>
> *b) it involves any of the following restrictive horizontal practices:*
>
> *(i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
>
> *(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
>
> (iii) *collusive tendering.*[24]

ANSAC contends that even if a transgression of Section 4(1)(b) were to be established, it is entitled to raise an efficiency defence, it is entitled, in other words, to show, in the phrase ubiquitously present in the statute, that the offending agreement produces 'technological, efficiency, or other pro-competitive gain resulting from it that outweighs that effect'. The Commission and BOTASH argue that Section 4(1)(b) permits of no such defense – in the language of US anti-trust, offences specified in Section 4(1)(b) are prohibited *per se.*

We have decided to hear this matter now, because although distinct in character from the *in limine* points otherwise under consideration in the present hearings, the Tribunal's finding on the nature of Section 4(1)(b) will, like the other points at issue here, have an important bearing on the nature of the future hearings in this matter. A finding in favour of the Commission and the interveners presupposes that if, indeed, we conclude that their opponents have engaged in the conduct specified in 4(1)(b) – that is, if they have fixed prices or any other trading condition, divided markets or tendered collusively – then the contravention is established and evidence concerned to demonstrate any pro-competitive

24 Note that the recent Competition Amendment Act clears up an obvious area of ambiguity in this section by amending 4(1) to read 'An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-' thus clarifying that both sub-clauses (a) and (b) refer to agreements between parties in a horizontal relationship.

gains said to accrue as a result of the transgression will not be relevant. If, on the other hand, we accept the view contended for by ANSAC, then, even in the event that we find a price fixing and/or market sharing arrangement as alleged by the Commission and BOTASH, ANSAC will still be entitled to put up evidence purporting to show that the consequences of the anti-competitive practice are countervailed by efficiency gains for which it is responsible.

ANSAC has set itself a considerable task. Section 4 of the Act identifies two classes of agreement between firms both of which it prohibits. The first class of 'horizontal restrictive practice' is identified in Section 4(1)(a). This section does not detail the content of the agreements that it proscribes – any agreement between parties in a horizontal relationship, without regard to its specific content, is put at risk by this section. However, it places an onus on those who would seek to impugn such an agreement to demonstrate that it 'has the effect of substantially preventing or lessening competition in a market' and, then, even if this onus is successfully discharged, the parties to the agreement are entitled to invoke, in their defence, 'any technological, efficiency or other pro-competitive gain ' that outweighs the agreement's negative impact on competition.

Section 4(1)(b), on the other hand, specifically details the very content of the agreements that it seeks to proscribe these being agreements to fix price or any other trading condition, agreements to divide markets, and collusive tendering. But this is all that is specified. In plain contrast with the requirements of Section 4(1)(a), those who set themselves the task of impugning agreements thus described in Section 4(1)(b) do not have to establish any deleterious impact on competition. All that has to be established is the existence of an agreement embodying the features detailed in Section 4(1)(b) (i)-(iii). Quite plainly the Act requires no showing other than that the agreement in question conforms to the content specified in Section 4(1)(b)(i)-(iii).

In other words, Sections 4(1)(a) and 4(1)(b) are distinguished from one another by the requirement contained in the former to undertake an assessment of the balance between the anti- and pro-competitive consequences of the agreement. By arguing that 4(1)(b) allows an efficiency defense – which of course implies a requirement to show the anti-competitive consequences without which there would be nothing against which to balance the pro-competitive gains – ANSAC effectively argues for obliterating the distinction between the two sections of the Act.

ANSAC contends for a 'purposive' interpretation of the Act. Firstly, even if we were, in this instance, to concede the necessity for a 'purposive' interpretation, it is by no means clear that an outright prohibition of price fixing and market allocation by competitors conflicts with the purpose of the Act. These practices are condemned in unusually uncompromising terms precisely because legions of legal scholars and economists as well as ordinary consumers have found them to be egregious attacks on competition which, as a glance at the head note to Section 2 will reveal, the Act purports to 'promote and maintain'.

Secondly, Mr. Unterhalter for Botash, following Schutz JA in Standard Bank and Melunsky AJA in SA Raisins, both judgments with direct reference to the Competition Act, argues that, while our courts have indeed endorsed a purposive approach to statutory interpretation, it is an approach manifestly reserved for circumstances in which the statute under question is ambiguous – where a reading of the legislation imparts a clear and unambiguous meaning it is not for the Tribunal or, for that other matter, any other court, to construct an alternative meaning, one putatively designed to better accommodate the statute's purpose. Section 4(1)(b) of the Competition Act unambiguously purports to prohibit, without recourse to further investigation, three categories of horizontal agreement. All other species of horizontal agreement only fall to be prohibited on a showing by the claimant that the agreement in question lessens or prevents competition and, then, only provided that the parties to the agreement cannot adduce evidence of pro-competitive gains that outweigh the demonstrated diminution of competition. There is no ambiguity and, whether or not we deem this wise policy, it is not within our power to re-make the law.[25]

We are content to let the matter rest there. However, Mr. Brassey, for ANSAC, insists, in effect, that this would sanction an absurdity, that '(Section 4(1)(b)) plainly cannot hit every transaction that might conceivably fall within its ambit. If it did every sale would be prohibited, since sales always fix a price; so would every distributorship agreement, since they always create sales turfs and thus allocate markets; likewise every company created by several shareholders, every partnership and every joint venture; and so, indeed, would every other contract, since every contract regulates trading conditions'. (Heads of Argument Para 31.1). But these are, of course, proverbial straw men: a price fixed in a 'sale' is done as part of a vertical agreement and is not within the ambit of 4(1)(b); a distributorship, too, is a vertical arrangement between the producer of a good and service and the (downstream)'on-seller' or the (upstream) provider of distribution services.[26] We repeat: only horizontal agreements conforming to specified characteristics are hit by Section 4(1)(b). Indeed Mr. Brassey's straw men serve to emphasise the narrowness of Section 4(1)(b)'s focus, rather than, as he clearly intended, the broad sweep of its ambit.

ANSAC argues that US and EU courts have found it necessary to place a flexible

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25 With due respect to the learned authorities upon which Mr. Unterhalter relies, the statute is, in this instance, so devoid of ambiguity that he may have rested his case on Alice's celebrated rejoinder to Humpty Dumpty:

> "When I use a word", Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less.'
> "The question is", said Alice, "whether you can make words mean so many different things."
> (Lewis Carroll 'Through the Looking Glass' Macmillan, 1980, p113)

26 A vertical agreement may of course be used to consolidate a horizontal arrangement. However, in that case it is the horizontal dimension, if it includes price fixing or market allocation, that falls foul of Section 4(1)(b) and not the vertical dimension.

interpretation on what, from a literal reading of their respective statutes, may 'hit' an inappropriately broad range of horizontal agreements. But, even were we to accept this interpretation of US and European experience, it is not clear how this avails ANSAC. This authority does not enable us, in the face of legislative clarity, to indulge gratuitously in an effective redrafting of the statute. Nor do we accept the implicit analogy drawn between the South African statute and those of the US and EU. Certainly, Section 1 of the Sherman Act is both terse and immensely broad ranging, accounting for Judge Brandeis' oft-cited concern that, on a literal interpretation, legitimate commerce may find itself impugned by the anti-trust statute. However, similar concerns do not extend to the Competition Act that is elaborately detailed and that, at least on this matter of horizontal agreements, admits of no ambiguity.

Nor, even if we were empowered to do so, would we lightly tread the path chosen by the US courts in this area. Our reading of the rather complex standard applied by the US courts is that where the 'quick look' contended for by ANSAC reveals the existence of a price fixing or market allocating restraint then this would be condemned as *per se* illegal, that is, the complainant would not have to establish a diminution of competition and the perpetrators of the restraint would not be entitled to invoke an efficiency defense. It appears, we agree, that the US courts have permitted occasional departures from this standard. This degree of judicial intervention in law making may be the legitimate and inevitable consequence of a statute that is at once extremely broad in its language and that admits of no formal exemptions. It does not, however, with all its attendant uncertainties, commend itself to a setting where the law is both focused in its concerns and where it is permits, again on clearly elaborated criteria, application for exemption. It is indeed conceivable that, in those few cases where the US courts appear to have relaxed their hostility to price fixing and market allocation agreements, the parties to the agreement in question would have found ground for exemption in the South African legislation.

Mr. Unterhalter has described Ansac's various constructions around the interpretation of Section 4(1)(b) as 'torturous'. We concur but conclude that the victim has not revealed any deeply hidden secrets. There are none to be revealed – in the language of US anti-trust jurisprudence, a 'quick look' at the 'facial' expression of Section 4(1)(b) reveals all.

per D. Lewis
concurring: N. Manoim and D. Terblanche

CONCLUSION

We find that the objection to the referral based on section 50 of the Act fails. The exception to the Complaint referral and the particulars of the intervener on the basis that they provide insufficient particularity also fails. We further find that the Commission is entitled to amend its complaint referral and Botash its particulars of complaint. We find that the objection that the Commission and Botash are confined to the terms of the original complaint referral are unfounded on the facts of the present case.

The remaining issues raised in the exception have not been decided and are left to the hearing for determination. For the sake of clarity we set out these issues again below:

1. Whether the transactions sought to be impugned pre-date the enactment of the statute – the retrospectivity argument
2. If post enactment transactions are impugnable they are nevertheless not covered by section 4(1)(b)
3. If post enactment transaction are impugnable they must be juristic acts

Ansac is required to file its answer, if any to the Complaint referral as amended, and the interveners' amended particulars of claim, within 10 business days of this decision. Ansac's failure to file its answer within the time period originally determined in our order dated 14 December 2000 is condoned.

On the argument we requested on section 4(1)(b) we find that evidence concerning any technological, efficiency, or other pro-competitive gain that might be admissible in terms of section 4(1)(a) is inadmissible in terms of section 4(1)(b).

Although the objection has been unsuccessful on the issues we have decided thus far, the prospect remains that the Ansac may be successful on the outstanding issues of the exception and accordingly the costs of this application as between Ansac and Botash are reserved for the hearing.

27 March 2001

N. Manoim **Date**

Concurring: D. Lewis and D. Terblanche.