COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 45/CR/May06

In the matter between:

Sasol Chemical Industries (Pty) Ltd	Applicant
And	
The Competition Commission	First Respondent
Yara (South Africa) (Pty) Ltd	Second Respondent
African Explosives and Chemical Industries Ltd	Third Respondent
Profert (Pty) Ltd	Fourth Respondent
In re	
The Competition Commission of South Africa	Applicant
And	
Sasol Chemical Industries (Pty) Ltd	First Respondent
Yara (South Africa) (Pty) Ltd	Second Respondent
African Explosives and Chemical Industries Ltd	Third Respondent

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and U Bhoola (Tribunal Member)

Heard on : 14 March 2008

Decided on : 28 March 2008

Reasons Issued: 02 June 2008

REASONS: DISMISSAL APPLICATION

1. On 6 March 2008 Sasol Chemical Industries (Pty) Ltd ("Sasol") filed an application in terms of which it requested the Tribunal to dismiss a complaint that had been referred to it by the Competition Commission ("Commission").

2. On 3 August 2004, Profert (Pty) Ltd ("Profert") filed a complaint with the Commission alleging that Sasol had engaged in price discrimination in violation of section 9 of the Competition Act, which discrimination had led to financial losses for it.[1] The Commission conducted an investigation in terms of section 49B of the Competition Act 89 of 1998 ("Competition Act") and referred the complaint to the Tribunal on 25 May 2006. In the referral, known as the Profert complaint, the Commission alleged that Sasol, Yara (Kynoch) and AECI had engaged in anti-competitive conduct. The Commission alleged violations of sections 4, 8 and 9 of the Competition Act. Profert, while having lodged a complaint with the Commission which formed the basis of the referral, is not a party to complaint referred to the Commission ("the main matter").

3. In its application Sasol sought the following relief–

   3.1. In the first instance it sought a dismissal of the complaint. If the Tribunal was minded to grant such a dismissal then Sasol sought an order of costs against Profert alternatively the Commission.

   3.2. In the alternative, and if the tribunal was not minded to grant a dismissal of the complaint then Sasol sought an order of costs occasioned by the postponement of the matter, against Profert.[2]

4. The application was held on 14 March 2008. On 28 March 2008 the Tribunal dismissed Sasol's application in its entirety, granting none of the relief sought by it. These are the reasons for that decision.

Background to the application

5. In order to fully understand the source of this application we need to traverse the long and complicated sequence of events leading up to it. The Profert complaint was set down for hearing by the Tribunal at a pre-hearing held on 2 August 2007. At that pre-hearing a timetable was agreed to by the parties which inter alia provided for dates on which discovery affidavits and witness statements would be filed. The matter was set down for hearing from

1 See the Profert complaint in general and para 5.11 specifically, the complaint is annexed as annexure AN1 to Sasol's founding affidavit in this application.
2 See founding affidavit paragraphs 13.1 and 13.2.

3 to 17 March 2008. Of relevance to this application are the dates agreed to by the parties for the filing of discovery affidavits and witness statements. It was envisaged that the Commission would file its discovery affidavit on 28 September 2007 and Sasol on 19 October 2007. The parties could then request further discovery on 2 November 2007 and respond thereto by 16 November 2007. The timetable also envisaged that any interlocutory applications between the parties would be heard by the Tribunal on 26 November 2007. At that time, upon enquiry from the Tribunal, the respondents indicated that they had no issues for determination by the Tribunal.[3] By all accounts preparations for trial were on track and the parties had substantially complied with the timetable. However the Commission only filed its request for further and better discovery on 26 November 2007 and Sasol on 17 January 2008.

6. The Commission filed three factual witness statements on 14 December 2007 which indicated that the Commission's witnesses would be three directors of Profert. In its founding affidavit Sasol seems to suggest that it was these factual witness statements which led it to seek discovery of further documentation.[4] Sasol sought discovery from the Commission of relevant documents on 17 January 2008[5] but was met with the response, on 31 January 2008 that the Commission was not in possession thereof.[6] In the meantime, at the instance of Sasol, the Tribunal had issued a subpoena duces tecum ("the subpoena") on Profert, requiring Profert to deliver a number of documents listed therein.[7] The subpoena was issued on 16 January 2008, and was served on Profert on 17 January 2008 and not after the Commission had indicated that it was not in possession of those documents.[8] The list of documents requested from the Commission in Sasol's request were identical to those requested from Profert in the subpoena. The subpoena was addressed to Mr Abraham van der Walt, the chairman of the Profert Board and required him to deliver to WWB[9] the documents listed therein by no later than 31 January 2008. The subpoena also stated that if

3 See correspondence from Sasol dated 23 November 2007 addressed to Mr Ngobeni at the Tribunal.
4 See founding affidavit 17.2.
5 See date of Sasol's Request for further and better discovery.
6 See Commission's response dated 31 January 2008.
7 Annexure A of the subpoena
8 See paragraph 3.2 of Sasol's answering affidavit to Profert's challenge of the Tribunal summons/subpoena of 13 February 2008.
9 Webber Wentzel Bowens, legal representatives for Sasol.

Van der Walt wished to challenge the subpoena he ought to do so by 24 January 2008. Profert indicated that it would challenge the Tribunal's subpoena and filed an application to this effect on 13 February 2008.[10]

7. On 14 February 2008, the parties to the Profert complaint appeared before the Tribunal in order to address a number of other interlocutory matters. Profert's challenge to the subpoena was set down on the same day.[11] Prior to the commencement of the hearing WWB and Lampen Attorneys came to an agreement in order to pare down the issues to be determined by the Tribunal.

8. Mr Puckrin SC, appearing on behalf of Profert, explained that Profert's primary concern with the subpoena was that it was overbroad and that the documents requested amounted to a discovery type application, rather than a request for a witness to produce specified documents, and would run into some hundreds of thousands of pages. Profert nevertheless sought not to be obstructive and confirmed that an agreement between the parties, some of the details of which still required to be finalized, had been concluded, and asked the Tribunal to make a decision only in respect of those items on which the parties had not reached agreement. He listed the disputed matters, with reference to annexure A of the subpoena, which required a decision from the Tribunal.[12] Mr Puckrin offered to submit the list of agreed items to the Tribunal. When asked whether Profert still intended to pursue its challenge of the subpoena Mr Puckrin's response suggested that this was no longer the case.[13] No list was filed and the Tribunal issued its order in relation to those items it had been asked to determine.[14]

9. Profert then refused to comply with the Tribunal's order and filed an application in the Competition Appeal Court ("CAC") in which it sought to review the order. Sasol on the other hand, had approached the Competition Appeal Court to declare Profert in contempt of the Tribunal's order which prompted Profert to file an application for a stay of the Tribunal's

10 It appears that the parties engaged in correspondence over this period. Sasol alleges that Profert had agreed to comply with the terms of the subpoena. Profert disputes this. Founding affidavit para 18.7. See Profert's affidavit, paragraph 21.

11 Which are not relevant for purposes of these reasons.

12 See transcript pages to 110-125.

13 See transcript page 125.

14 See Tribunal Order dated 15 February 2008 and transcript page 125.

order.[15] On 28 February 2008, Profert withdrew its application at the CAC and the parties came to an agreement in terms of which Profert handed over a DVD-ROM containing further information that was sought by Sasol.

10. Sasol's legal representatives then approached the Tribunal seeking a postponement of the hearing on the basis that they had been given a large amount of documentation by Profert at the last minute and required additional time to look through these. The Tribunal granted the postponement and convened a pre-hearing on 3 March 2008. At that pre-hearing Sasol's legal advisors indicated that they intended to seek costs of the postponement against Profert and might lodge such an application with the Tribunal. Profert was present at that hearing. There was also a suggestion by Sasol that it was considering an application to dismiss the Profert complaint. The Tribunal issued its directions stating that Sasol's application for costs against Profert, if filed, would be heard on 14 March 2008, together with a number of other interlocutory matters.

11. Instead of filing an application for costs against Profert, Sasol filed this application seeking relief against both Profert and the Commission. The Tribunal directed that this application be heard on 14 March 2008. The Commission was able to respond promptly to Sasol's papers. Profert however challenged the basis for hearing it as a matter of urgency and did not deal with the merits in its answering affidavit.

12. At the hearing of the matter, Mr Puckrin, on behalf of Profert argued that Sasol had not made out a case for urgency and for dispensing with the Tribunal's normal time frames. Accordingly, he was entitled to argue the issue of urgency and to seek additional time to respond to the merits of the dismissal application. After considering Mr Puckrin's submission, the Tribunal decided that as far as the issue of costs was concerned Profert was well aware of the fact that the matter would be heard on 14 February 2008 and should have been ready to argue the matter. As far as the application for dismissal was concerned the Tribunal decided that it would hear the parties on that day but that if it was of the view that its decision could prejudice Profert in any way, the Tribunal would reconvene a hearing

15 Lodging an appeal in the CAC does not automatically suspend the operation of a Tribunal order. At this point in time the Tribunal had agreed, at Sasol's request, to commence the hearing on 6 and not 3 March 2008, in order to afford Sasol an opportunity to look through a first batch of documents that Profert had delivered to it on the basis of the agreement reached on 14 February 2008.

to afford Profert an opportunity to deal with the merits. The matter proceeded with Profert reserving its rights.

13. While the application had been served on Profert, Profert was not cited as a party in any of the papers, with good reason. Profert after all is not a party to the proceedings before the Tribunal.

14. Having sketched the background to this application, we turn now to consider the remedy that is sought by Sasol.

Grounds for application

15. Sasol sought a dismissal of the complaint on three broad grounds namely the conduct of Profert, the conduct of the Commission and the public interest.

16. In relation to Profert Sasol argued that Profert had abused the Tribunal's proceedings and on this basis the complaint should be dismissed. It was argued that Profert's decision to challenge the Tribunal's subpoena and subsequently the Tribunal's order amounted to bad faith. Its opposition and reluctance showed that it had not lodged the complaint out of a genuine desire to stop anti-competitive practices in the industry but merely as a ploy to obtain more favourable pricing from Sasol. Furthermore Profert's late compliance with the subpoena and the Tribunal order compelled Sasol to seek a postponement of the trial. Sasol had been prejudiced by this. On this basis the complaint referral should be dismissed and Profert should be mulcted with costs either for the referral or for the postponement.

17. As far as the Commission's culpability was concerned Sasol alleged *inter alia* that the Commission had a duty to obtain all evidence from a complainant that was relevant to whether or not the alleged conduct had an exclusionary effect, even if this included evidence that was favourable to Sasol, and not only a duty to seek documents that were important for it to mount its case. Sasol argued that the Commission had failed in this duty. Furthermore the Commission had abrogated its statutory obligation of impartiality by not seeking extensive discovery from Profert while having sought this from Sasol and by not pressing Profert to comply with the subpoena and the Tribunal order. The Commission's abstentious posture had resulted in administrative inefficiency and a poorly planned litigation strategy

and Sasol's rights had been infringed.[16]

18. Sasol argued further that the merits of the matter were weak as evidenced by documents obtained under the subpoena. The Commission should never have referred it. In support of this argument, Sasol relied on two documents obtained from Profert and which it had attached to its founding affidavit.[17]

19. As far as the public interest is concerned, the core of the argument seems to be that the public interest would not be harmed if this matter, given the litany of problems surrounding it and listed above, was dismissed.

20. Before turning to consider the merits of these arguments, let us consider the nature of the remedy that Sasol seeks.

The dismissal remedy

21. The remedy that Sasol seeks is akin to a permanent bar of prosecution in the criminal context or permanently barring a civil action by a plaintiff against a defendant. It is usually sought by a defendant prior to the merits of the matter being heard by a court and often on the basis of an abuse of proceedings or an infringement of some or other trial related right. Such a remedy is very seldom granted by courts and when granted is done so in the most exceptional circumstances.

22. In the civil law context, our courts have held that such a remedy is a draconian order and will not be lightly made. In *Sanford v Haley NO*[18] the High Court held that the court "will exercise such power sparingly and only in the most exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial."[19]

23. In considering the possible circumstances in which such a remedy would be granted, our courts have consistently required the conduct of a plaintiff to cross a very high threshold

16 This was not expanded upon. But we assume that Sasol at least meant its rights to a fair administrative action and a fair trial.
17 Annexure "AN22" and "AN23".
18 2004(3) SA 296 (C).
19 at paragraph 8.

before granting such an order. In *Sanford*, the court summarized the test as follows: "The *test is a stringent one. It is understandable that the relief will not be easily granted. It will depend on the facts and circumstances of each case and on the basis of fairness to both parties*." [20]

24. This approach is echoed in English law. In the leading case of *Allen v Sir Alfred Mc Alpine & Sons Ltd* [1968] 1 All ER 543 (CA), the court held that in order to succeed with an application to have an action dismissed, the defendant was required to show that there was an inordinate delay which was inexcusable and that the defendants are likely to be *seriously prejudiced* by the delay" (Our emphasis). Furthermore the defendant's previous conduct in the action is always relevant. In that case, the court held that in any event such a power should not be exercised without giving the plaintiff an opportunity to remedy his default." [21]

25. A similar approach can be found in the criminal context in which accused persons face the prospect of losing their personal liberty, a far more serious matter than the prospect of a mere monetary fine. In *Sanderson v A-G, Eastern Cape*,[22] the Constitutional Court held that a permanent stay of prosecution was a radical remedy, both philosophically and socio-politically and that barring the prosecution before the trial begins will seldom be warranted in the absence of *significant prejudice* to the accused.[23] That matter concerned an allegation by the accused that his constitutional right to a fair trial had been infringed. The Court identified the three most important factors to take into account when considering whether a dismissal is an appropriate remedy, namely the nature of the prejudice suffered by the accused, the nature of the case and so-called systemic delays. In considering these factors, the court held that ordinarily and particularly where the prejudice alleged is not trial related a court should have recourse to a range of appropriate remedies less radical than barring prosecution, such as issuing a mandamus requiring the prosecution to commence the case or a refusal to grant the prosecution a remand. Central to the court's enquiry was whether the accused had suffered actual and significant prejudice which could not be cured by any other appropriate remedy.

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20 at paragraph 9.
21 At 555 in fine-556D.
22 1998 (2) SA 39 (CC).
23 See paragraph 38.

26. In *Zanner v Director of Public Prosecutions, Johannesburg*[24] the SCA states that this is a drastic remedy which is granted sparingly and only for very compelling reasons. In that case the appellant had alleged that his right to a fair trial had been infringed by a delay of ten years on the part of the DPP in bringing murder charges against him. In the court's view "*the fact of a long delay cannot per se be regarded as an infringement of the right to a fair trial*". Whether there was unreasonable delay must be determined in the context of the particular circumstances of each case, taking into account factors such as the length of delay, the reason for the delay, whether the accused has suffered or is likely to suffer prejudice by reason thereof.[25] Furthermore, the accused must show definite and not speculative prejudice. Vague and conclusory allegations of prejudice resulting from the passage of time and the absence of witnesses are insufficient to constitute a showing of actual prejudice.[26] In this case, despite the delay of ten years, the court dismissed the appeal on the basis that the appellant had not shown any significant or actual trial related prejudice.[27]

27. In summary, the remedy of dismissal is considered by our courts and courts elsewhere in the world as draconian and far –reaching and one which could potentially deprive an applicant of its right of access to courts. It is not merely an incidental remedy. It is not easily granted by our courts, even in circumstances where accused persons face losing their liberty or considerable delays in charges being brought against them or in the prosecution thereof. Moreover the determination of whether there has been an abuse of proceedings or infringements of fundamental rights of accused persons depends on the facts of each case, but the test is a stringent one and a court will not easily arrive at a conclusion that its proceedings have been abused without looking closely at the conduct complained of and whether the defendant or accused as the case may be has suffered significant prejudice. Furthermore the prejudice must be trial related and must be actual. Even if a court has determined abuse or prejudice it must still exercise restraint in reaching for an order of dismissal and must first look for other appropriate remedies.

Jurisdictional bar

24 [2006]SCA 56 RSA.
25 Paragraph 14.
26 See *Zanner* at para 16.
27 See paragraph 16 et seq.

28. The Competition Act does not expressly empower the Tribunal to grant an order of dismissal. Sasol argues that such a power can be found in section 27(1)(d) of the Competition Act[28] and that this Tribunal had previously conceived that it enjoyed such powers in *Schering (Pty) Ltd Others v New United Pharmaceutical Distributors (Pty) Ltd ("Schering").*[29] The Commission argues that the Tribunal is a creature of statute and unlike the High Court does not enjoy inherent jurisdiction to grant such a draconian remedy.

29. In *Schering* the Tribunal left open the jurisdictional question of whether it could grant such an order. It accepted for purposes of that matter that there may be circumstances in which an abuse of the Tribunal's procedures may justify refusing a complainant access to the Tribunal but that it would reserve this remedy for abuses of an extraordinarily egregious nature.[30] We do not know whether the parties in that matter relied upon s27 (1) (d) as Sasol does in this case as an enabling provision for granting this order.

30. In our view an initial reading of section 27(1) (d), read in its proper context does not confer on the Tribunal such a power. We arrive at this conclusion by considering a textual analysis of the relevant provisions of the Act, bearing in mind that this Tribunal is a creature of statute.

31. Section 27(1) (d) provides: "*The Competition Tribunal may-(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act*."

32. The language of sections 27(1)(a) and (b), while describing the Tribunal's functions, is at pains to limit the Tribunal's powers only to those remedies provided for in the Act. The powers contemplated in section 27(1) (d) are even further circumscribed and limited only to powers incidental or necessary to the Tribunal performing any of its functions which are described in the preceding sub-sections.

33. While the Tribunal has a wide discretion to conduct its own proceedings – and the exercise of this discretion would certainly fall under the incidental powers granted by Section 27(1)(d)

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28 Section 27(1) (d) states that the Competition Tribunal may make any ruling or order necessary or incidental to the performance of its functions in terms of this Act.
29 05/IR/A/JUL01.
30 See paragraph 37. In that case the Tribunal did not grant an order of dismissal.

[31] it does not follow that it has unlimited substantive powers. As a creature of statute, the Tribunal does not enjoy inherent jurisdiction. Nor is it entitled to extend any of its substantive powers beyond the four corners of the statute. Where powers incidental and necessary are required for it to perform its functions, it must read such powers into its statute only by necessary implication.[32] The power to permanently bar an applicant from approaching the Tribunal is far-reaching and draconian. It may affect an applicant's right of access to this Tribunal. It cannot be read into s27 (1) (d) which clearly deals only with incidental and necessary powers.

34. The manner in which the Act deals with the Tribunal's powers also suggests that the legislature did not intend this Tribunal to enjoy such draconian powers. The Tribunal's powers and the orders that it can make are expressly set out in section 58. However the Act does not merely list the orders that the Tribunal can make but goes further and outlines the circumstances and the manner in which the Tribunal should exercise some of those powers. Notably sections 59 and 60 provide guidelines to the Tribunal as to how and when it should exercise its powers to impose administrative penalties and divestiture orders. Imposing administrative penalties can hardly be seen as more draconian than an order of dismissal. Yet the Act is at pains to provide for it expressly and then to provide guidelines for its exercise. An order of divestiture could be considered to be far-reaching but arguably far less draconian than a dismissal. Again the Act stipulates when and how this Tribunal should impose it. If the legislature had intended that the Tribunal enjoy the power to grant a draconian remedy such as dismissal, we would have expected the legislature to have provided for it, expressly in the Act, and to deal with it at least in the same manner as it has dealt with administrative penalties and orders of divestiture in sections 59 and 60.

35. In our view the matter falls to be dismissed on this basis alone. Section 27(1)(d), a section which permits this Tribunal to make orders, only incidental and necessary, to the performance of its functions, cannot be read to confer upon us the power to grant a far-reaching and draconian remedy, which if granted, will permanently bar the Commission or a complainant from access to this Tribunal. Such a power is not incidental or to be read in by

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31 See Sections 52 - 55 and the rule 55 of the Tribunal

32 See Devenish in *Interpretation of Statutes* Juta 1992 at 113 para 8 and *Moodley v Minister of Education and Culture, House of Delegates* 1989 (3) SA 221 (A) 233E

necessary implication but is dispositive of a matter,[33] and may affect a litigant's constitutional right to access to this Tribunal and to fair administrative justice. Nor does section 58 and the sections following it, which deal with this Tribunal's powers and the orders it can make in some detail, provide for such a remedy.

36. But let us assume for purposes of argument that we do enjoy such powers and consider whether the circumstances of this case warrant such a drastic remedy as dismissal bearing in mind that the test is a stringent one.

Profert's and Commission's Conduct

37. In this case, while Profert is a complainant and had 'invoked' the provisions of the Competition Act by lodging a complaint with the Commission,[34] it is not a party to the proceedings before us either as an intervenor or an applicant in terms of section 51(1).

38. The mere lodging of a complaint with the Commission by a person does not make that person a party to the proceedings before the Tribunal. Once a complaint has been lodged, the Commission, after conducting an investigation, may exercise its discretion to either refer the matter to the Tribunal or to issue a certificate of non-referral. When it refers a complaint to the Tribunal, it is the Commission, not the complainant that becomes a party to the proceedings before the Tribunal. The Commission acts in the public interest and not in the narrow interests of a complainant.[35] Complainants do not enjoy an automatic right to participate in such proceedings. They may be permitted, at the discretion of the Tribunal, to intervene in a matter,[36] or may participate as witnesses in a matter.

39. Profert has not referred the matter to the Tribunal and nor has it been granted intervention. There is no principle in law that permits this Tribunal to have regard to the conduct of Profert, a non-party to the proceedings before us. There may be exceptional circumstances

33 In other words it 'decides' the main matter in favour of the respondent on grounds other than the merits. Another difference between this case and *Schering* is that an order of dismissal in that case would not have resulted in the complainant being permanently barred from prosecuting the main matter.
34 As described in applicant's founding affidavit para 26.1.
35 *Simelane and Others NNO v Seven Eleven Corporation SA (Pty) Ltd and Another* 2003 (3) SA 64 ("Simelane").
36 See s53 of the Act.

in which the conduct of a non- party could be attributed to a party, such as in a case where a court pierces the corporate veil and looks at the conduct of the shareholder of the party before it. But this is not such a case. The Commission acts independently and in the public interest and not as a representative or agent of the complainant.

40. Even if we are to assume, for arguments sake, that such a principle exists, in our view Profert's conduct, while worthy of criticism from this Tribunal, does not warrant a dismissal of the complaint.

41. In general a witness does not enjoy the same duties as a party to the proceedings before the Tribunal. Nor is a witness for the Commission or a complainant duty bound to assist a respondent in advancing its case. However, a witness is required to co-operate with the Tribunal as contemplated in section 56 and to comply with a summons and the orders of the Tribunal. He or she is further required to tell the truth and to answer to the best of their ability. A failure to do any of the above could constitute an offence in terms of the Act and for which he or she could be prosecuted and could be fined to a maximum of R500 000 or imprisonment for a period not exceeding 10 years.[37]

42. Apart from complying with their statutory duties described above, one would have expected Mr Van der Walt and the directors of Profert, given that they are officers of the complainant, to actively promote their company's interests and assist the Tribunal in its truth seeking function. Quite unpredictably, they instead chose to put all their efforts –probably at considerable cost to Profert[38]- into resisting the subpoena. Profert's decision to review the Tribunal order after agreeing to drop its initial challenge to the subpoena also remains opaque.[39] While we cannot ascertain Profert's real motives for putting up this desperate fight we do take into account that it ultimately did comply with both the provisions of the subpoena and the Tribunal order, even if only after it faced contempt proceedings against it.

43. Sasol's arguments in relation to the culpability of the Commission are without any merit.

37 See sections 69-75.
38 In the form of legal fees and management time spent on preparing the applications.
39 See transcript 14 February 2008 page 125 where Mr Puckrin is asked by the Chair whether they persist with their challenge to the subpoena.

When the Commission investigates a complaint in terms of section 21(1)(c), it is required to determine whether a prohibited practice has been committed on the basis of the evidence gathered by it, and having done that, to refer the matter to the Tribunal. Once the Commission has exercised its discretion to refer a complaint to the Tribunal the role of the Commission is akin to that of a prosecutor in a criminal matter. It is under no duty to seek evidence from complainants or witnesses to advance the *respondent's* case. All it is required to do is to provide a respondent with the "gist" of the matter, to comply with the rules for trial and to lead evidence in support of its own case before this Tribunal.[40] If in the course of its investigations it comes across evidence that goes against its case it would be obliged to disclose this to the respondents and to the Tribunal in the course of discovery. The Commission is an independent agent acting in the public interest. The Tribunal will not easily interfere with the Commission's exercise of its discretion to investigate complaints or to plan its legal strategy. However, if the Commission's strategy, its preparation for trial and evidence-gathering is poor, it runs the risk of losing its case before the Tribunal.

44. Moreover, while some suggestions were made through innuendo and argument, no evidence was led by Sasol to suggest that the Commission had acted in bad faith and not independently of the complainant.[41] However one would certainly have expected the Commission to show more enthusiasm[42] in ensuring that Profert complied with the subpoena and the Tribunal order. The Commission after all, as the custodian of the Act, has a greater interest in ensuring compliance with its provisions by all concerned. However, a mere lack of enthusiasm does not constitute abuse or bad faith.

45. As far as the weak merits are concerned, we cannot determine this issue on the basis of a handful of documents placed before us, the context of which is unknown and which have not been subjected to examination and cross-examination by witnesses. If the case against Sasol is weak, the Commission runs the risk of losing it. While Sasol may be put to the inconvenience of defending the allegations made against it by the Commission, it is not

40 See *Simelane* paragraph 22
41 See transcript page 47 where Mr Unterhalter, on behalf of Sasol states that they are not alleging bad faith on the part of the Commission.
42 Rather than a mere shrugging of its shoulders and telling Profert to provide all relevant documentation.

prejudiced in any way, by the mere referral of a weak case against it.[43] The appropriate remedy, in this instance, is not to permanently bar the Commission from prosecuting this matter but to allow the matter to go to trial.

46. As far as the issue of prejudice goes, the only prejudice, if at all that Sasol may have suffered by Profert's reluctance and late compliance, is a postponement of the matter. We deal with this issue later.

47. The application for dismissal is therefore not granted.

48. Since costs against the Commission and Profert for the referral were sought only if the dismissal was granted, there is no need for us to deal with that issue. We turn now to deal with the application for the wasted costs of the postponement against Profert.

Costs against Profert for postponement

49. The applicant states that the reasons why this Tribunal should order Profert to pay the costs of the postponement are "*the same as the reasons that have been set out above in the context of the dismissal relief*".[44] In other words, the same conduct of Profert, as we have briefly outlined above, is good enough to justify either a dismissal of the complaint or a mere award of costs.

50. The general principle in our law is that courts do not impose costs on persons who are not party to a suit. The policy underlying this principle is self-evident. If a court for example mulcted witnesses with costs incurred by parties to a suit, no witness will ever come forward to assist in the court in its administration of justice, nor will persons who have been harmed by the unlawful conduct of others seek the protection of our legal system.

51. Where costs are awarded in a matter, they usually follow the suit and are awarded on a party-party scale.[45] The Competition Act deviates from this common law principle in

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43 See *Sanderson v Attorney- General, Eastern Cape* at paragraph 41 where the court said: "One is therefore not so much concerned with the prejudice flowing from the charges and the publicity they initially generated, but with the aggravation of that prejudice ascribable to the delay. (i.e. the conduct forming the basis of the dismissal application)"

44 Heads of Argument, paragraph 61.

45 There are times when a court may impose costs on a more punitive scale such as attorney-client costs or costs *de bonis propis*. But this is done as an exception. See AC Cillers, Law *of Cost*s Third Edition 1997.

respect of proceedings before this Tribunal. Section 57(1) provides that each party participating in a hearing must bear its own costs. This principle is qualified by section 57(2) which provides that where a complaint has been referred to it in terms of section 51(1), the Tribunal may award costs against the complainant and the respondent in either of the situations contemplated in 57(2) (a) and (b). These are the only two circumstances in which the Tribunal is empowered to impose costs.

52. Sasol submits that the Tribunal enjoys a residual power to impose costs against Profert for the postponement of the matter and such residual power can be found in the self-same s27(1)(d). We disagree with this. The matter of costs is expressly provided for in section 57 of the Act, both at the general and the specific level.

53. But even if were to assume that s27(1)(d) does indeed confer upon us the power to impose costs beyond the circumstances contemplated in s57(2), it can never grant us the power to impose costs on an entity that is not a party to our proceedings and is at best a prospective witness to the proceedings. As Mr Puckrin observes, Sasol asks this Tribunal to do what even the High Court, with inherent jurisdiction, cannot do.[46]

54. Nonetheless, Sasol has not persuaded us, jurisdictional bar aside, that the facts of this case warrant a costs order against Profert. Sasol was aware as early as 28 September 2007 and as late as 16 November 2007, through the exchange of discovery affidavits, the nature and extent of the documents in the Commission's possession. Having already obtained a sense of what the Commission had in its possession, it waited until 16 January 2008 to issue a subpoena on Profert and a request for further discovery on the Commission. In that subpoena Sasol sought documents that possibly ran into hundreds of thousands of pages. Even if Profert had chosen not to challenge the Tribunal's subpoena and had delivered the vast majority of documents within a reasonable time of the subpoena, it is highly likely, given the large number of documents, that Sasol and/or the Commission would have required time to sift through these and to possibly file amended witness statements. The likelihood of Sasol seeking a postponement of the matter was very high, irrespective of Profert's late compliance. So even if we assume that Profert's reluctance played some part in the postponement of the matter, Sasol's own conduct, in serving the subpoena and discovery

46 See transcript page 78.

request of such a large volume of documents late in the day, contributed to the matter being postponed. Indeed, the postponement seems to have granted Sasol with an opportunity to better prepare for trial on the basis of the documents obtained under subpoena, which, on Sasol's own version, advance its case and weakens the Commission's. The application for costs against Profert is accordingly dismissed.

_____ **02 June 2008**

Y Carrim **Date**

Concurring: D Lewis and U Bhoola

Tribunal Researcher **:** J Ngobeni

For the Commission : Adv MSM Brassey SC with Adv MJ Engelbrecht instructed by Cheadle Thompson & Haysom Inc

For the Applicant : Adv DN Unterhalter SC with Adv A Cockrell instructed by Webber Wentzel Bowens