IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)

Case No: 103/CR/Sep08

In the matter between:

THE COMPETITION COMMISSION	Applicant
and	
LOUNGEFOAM (PTY) LTD	First Respondent
VITAFOAM SA (PTY) LTD	Second Respondent
FELTEX HOLDINGS (PTY) LTD	Third Respondent
STEINHOFF INTERNATIONAL HOLDINGS LTD	Fourth Respondent
KAP INTERNATIONAL HOLDINGS LTD	Fifth Respondent
GOMMAGOMMA (PTY) LTD	Sixth Respondent
STEINHOFF AFRICA HOLDINGS (PTY) LTD	Seventh Respondent

In Re:

THE COMPETITION COMMISSION	Applicant
LOUNGEFOAM (PTY) LTD	First Respondent
VITAFOAM SA (PTY) LTD	Second Respondent

FELTEX HOLDINGS (PTY) LTD	Third Respondent
STEINHOFF INTERNATIONAL HOLDINGS LTD	Fourth Respondent
KAP INTERNATIONAL HOLDINGS LTD	Fifth Respondent
GOMMAGOMMA (PTY) LTD	Sixth Respondent

Panel : Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) Takalani Madima (Tribunal Member)

Heard on : 15 April 2010

Reasons issued on : 08 June 2010

Reasons and order

Introduction

[1] In this matter we were required to consider two applications filed by the Competition Commission namely an application to amend its complaint referral and an application for joinder. We have decided to grant the Commission's amendment and joinder applications and set out the reasons for our decision herein.

Background

[2] In order to fully understand the rationale for these applications we find it necessary to locate them in the context of the Commission's complaint referral.

[3] On 25 September 2008 the Competition Commission ("the Commission") referred to the Tribunal, a complaint against Loungefoam Pty) Ltd ("Loungefoam"), Vitafoam (Pty) Ltd ("Vitafoam")[1] and Feltex Automotive (Pty) Ltd ("Feltex"). [2] The complaint referral consists of four separate alleged contraventions of section 4(1) namely –

[3.1] Loungefoam and Vitafoam agreed to fix the selling price of foam that they produced and supplied to furniture manufacturers ("the selling price cartel"); [3]

[3.2] Loungefoam and Vitafoam had formed a cartel in relation to the procurement of certain chemicals which are primary inputs in the manufacture of polyurethane foam ("the chemical cartel"); [4]

[3.3] Loungefoam and Vitafoam agreed not to compete for each other's customers;[5] and

[3.4] Loungefoam and Vitafoam agreed to divide markets between themselves and the third respondent Feltex Limited by allocating customers, territories and specific types of goods and services ("the market division agreement").[6]

[1] Vitafoam subsequently became a division of GommaGomma. GommaGomma was joined as the sixth respondent in this matter on 21 July 2009. For ease of reference we refer to the entity as Vitafoam although the Commission seeks relief against GommaGomma.
[2] Feltex was initially cited as Feltex Limited or Feltex Automotive (Pty) Ltd but in subsequent amendments was cited as Feltex Holdings (Pty) Ltd.
[3] Paragraphs 29.2-3 of the referral.
[4] Paragraphs 29.5-6.
[5] Paragraph 29.8 – 9.
[6] Paragraph 30.

[4] The Commission requested the Tribunal to interdict the respondents and to impose a 10% administrative penalty against each respondent's annual turnover in the Republic including exports from the Republic during the preceding financial year.

[5] At the time of the referral the Commission had also cited Steinhoff International Holdings (Pty) Ltd ("Steinhoff") which owns Loungefoam, and Kap International Holdings Ltd ("Kap") which owns Feltex as the 4th and 5th respondents respectively, but did not seek relief against them.

[6] Loungefoam and Vitafoam have pleaded a common defence to the first three counts. They allege that they are both controlled by the fourth respondent Steinhoff and must therefore be regarded as a single economic entity for purposes of section 4(5) of the Act.

[7] During 2009, Loungefoam and Vitafoam filed an application for an order to determine the single economic entity issue separately from the remaining issues in the case ("separation application"). At that time the Commission had also filed amendment and joinder applications. The respondents did not oppose the Commission's applications and the Commission did not oppose the separation application. On 21 July 2009 the Tribunal granted the amendment and joinder applications as well as a separation order agreed to by the parties. The separated matter was set down for hearing on 26 November 2009. However in that hearing it became apparent that a disagreement had ensued between the parties. Given this dispute, the separation order was withdrawn by the Tribunal on 4 December 2009.[7]

[8] The Commission thereafter filed the amendment and joinder applications which are the subject matter of this decision.

[7] See Tribunal decision of 4 December 2009 in Case no 103/CR/Sep08.

[9] The joinder application is to be decided on the back of the amendment application, if the latter is granted the former must follow.[8]

[10] In its amendment application the Commission sought a range of amendments to which all the respondents had objected ("the proposed amendments"). By the time that the matter was heard, the Commission had abandoned some proposed amendments which dispensed with several grounds of opposition. However matters were complicated by the fact that in the course of the hearing the Commission sought to re-formulate some of the proposed amendments.

[11] Since then, at our request, the Commission has provided us with confirmation of the amendments it has abandoned, those that it still persists with and those that it has re-formulated. For ease of reference we have attached the Commission's proposed amendments as annexure A to these reasons.

[12] The proposed amendments refer to a series of documents that were filed by the Commission in its referral. These documents consist of a Notice of Motion, a founding affidavit (as amended previously), a supplementary affidavit and a replying affidavit. Amendments were sought to all four documents to varying degrees. In order to avoid confusion between those documents and affidavits and documents filed in these applications we refer to the Commission's referral documents as the referral Notice of Motion, the referral affidavit, the referral supplementary affidavit and the referral reply.

[8] The Commission had previously sought to amend its papers to join and substitute respondents during February and March 2009. These applications were unopposed and were granted by the Tribunal on 21 July 2009.

[13] In the hearings it also became apparent that a few "housekeeping" amendments needed to be made. For example Vitafoam ought to be replaced by GommaGomma as a second respondent; GommaGomma ought to be removed as sixth respondent and the citation of some entities had to be clarified. The Commission undertook to sort this out at a later stage.

[14] Because it had abandoned a number of proposed amendments pertaining to the conduct of a number of additional respondents,[9] the Commission's joinder application was limited to joining only Steinhoff Africa Holdings (Pty) Ltd as a seventh respondent.

[15] For ease of reference we at times refer to the first, second, fourth and sixth respondents (Loungefoam, Vitafoam, Steinhoff International and GommaGomma) collectively as the Steinhoff respondents and to the third and fifth respondents (Feltex Holdings and Kap International) as the Kap respondents.

[16] The amendments sought by the Commission in this application can be divided into four broad categories –

> [16.1] In the first category of amendments the Commission seeks to extend the charge of the chemical cartel to Feltex. The Commission wishes to "connect Feltex to the allegations regarding the joint purchasing of chemicals, or similar conduct, which had so far only been made against Loungefoam and Vitafoam".[10]

[9] Daun et Cie AG, Feltex Ltd, Courthiel Holdings (Pty) Ltd, Phaello Mattress and Bedding Corporation (Pty) Ltd and Restonic SA (Pty) Ltd.
[10] Founding Affidavit para 10 seeking to amend the referral affidavit by the introduction of new paragraphs 30.8 to 30.14 of the referral.

[16.2] The second category of amendments relate to the defence raised by the respondents that Loungefoam and Vitafoam form part of a single economic activity.[11] The Commission disputes that Loungefoam and Vitafoam form part of one single economic activity and could not have infringed section 4(1)(b) of the Act. However because the Steinhoff respondents have raised this as a defence, the Commission wishes to amend its referral by inserting an alternative charge. In the event that it is found that Steinhoff enjoys sole control over both Loungefoam and Vitafoam the Commission wishes to allege in the alternative, a charge of a broader or wider collusion between the Steinhoff group of companies ("Steinhoff") and the Kap group of companies ("Kap"). In support of its alternative charge, the Commission alleges a number of material facts in its proposed clause 32.

[16.3] The third category of amendments relate to the relief sought by the Commission against Loungefoam, Vitafoam, Steinhoff, Steinhoff Africa and GommaGomma.

[16.4] The fourth group consists of a number of sundry amendments to the Commission's referral papers consisting of a new paragraph 10 to the referral affidavit,[12] the introduction of a new para 29.10 to the referral affidavit,[13] a proposed

[11] Founding affidavit para 11 seeking to replace existing para 32 in the referral affidavit by the insertion of 32, 32.1- 32.40 but not the proposed 32.39.
[12] Para 7 of the founding affidavit.

[13] Founding affidavit para 8.

amendment of the supplementary referral affidavit,[14] a proposed amendment to the referral reply[15] and to the Notice of Motion.[16]

[17] The proposed amendments in the third and fourth categories evoked limited independent opposition from the respondents because they were largely proposed as consequential amendments to those in the first and second categories. However the proposed amendments in category 1 and 2 were strongly opposed.

Approach to Amendments

[18] We have previously stated that our approach to amendment applications is a permissive one that echoes the approach adopted by the High Court in civil proceedings. The Tribunal's approach is also informed by the fact that it seeks to promote the public interest by ensuring a full ventilation of issues in a complaint. In *Competition Commission v Omnia & Yara*,[17] we stated that –

> *"The approach taken by our courts in the civil law context towards amendments has been a permissive one. In deciding whether or not to grant an application for an amendment the court exercises discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.[18] Applications for amendments will not be granted if they result in prejudice to the other party which cannot be cured by an order of costs or postponement. The fact that an amendment introduces a new cause of action or may result in a loss of tactical advantage or even defeat of the other party does not*

[14] Founding affidavit para 9.

[15] Founding Affidavit para 13.

[16] Founding Affidavit para 14.

[17] Case No: 31/CR/May05.

[18] Harms page 188.

constitute prejudice and will not outweigh the concern to determine the real dispute between parties

This Tribunal has in the past followed such an approach to applications for amendments brought in terms of Tribunal Rule 18. However the Tribunal has also made it abundantly clear that in exercising its public duty it would adopt a permissive approach to applications for amendments so that a complaint being prosecuted in the public interest could be fully ventilated"[19]

[19] While our approach to amendments has been a permissive one, we are cautioned by our courts that an amendment that would render a relevant pleading excipiable should not be granted. After all it makes no sense to grant an amendment in the sure knowledge that a respondent will immediately note an exception, which in itself may require a further amendment.[20] At the same time applications for amendments ought not to descend into mini-trials since amendment proceedings are not intended to determine factual issues such as whether a claim has prescribed. Nor is it intended that amendment proceedings should determine the strength or weakness of a particular case.

[20] The respondents in this matter have already indicated that they would be inclined to note an exception if the applications for amendments in category one and two were granted. Accordingly we are required to deal with the merits of their arguments.

[21] In relation to the extension of the chemical cartel charge to Feltex, it was argued that the Commission had not initiated a complaint alleging a chemical cartel against Feltex as required by section 49B(1) - the jurisdictional fact of initiation for purposes of referral was absent. The

[19] Para 47 and 48.
[20] See the discussion and the cases quoted in Harms, *Civil Procedure in the Supreme Court*, at page 189.

proposed amendments if granted would render the pleadings excipiable on the basis of the Tribunal's lack of jurisdiction and ought not to be granted. An additional basis for objection was that the Commission had not initiated against the entity it had referred against namely Feltex Holdings.

[22] A similar argument was raised in relation to the second category of amendments. It was submitted that the Commission had not initiated a complaint against the respondents, the Steinhoff and the Kap respondents. It had only initiated this complaint against Loungefoam and Vitafoam and it could therefore not refer this to the Tribunal. An additional ground of opposition in relation to the second category was that the Commission's amendment sought to introduce two mutually destructive propositions.

[23] The approach we have taken in this decision is to consider the application in relation to the amendments in category one and two. If the application succeeds in relation to these then the application in relation to three and four would also succeed.

The Initiating Documents

[24] The Commission's initiation documents consist of a form CC1 and an attached statement of conduct or "initiation statement" signed by the Commissioner. The cover page has blocks in which to insert the name of the person submitting the complaint, the name of person whose conduct is the subject of the complaint and a concise statement of the

conduct that is the subject of the complaint. It appears that the purpose of the statement of conduct is to expand on the concise statement on the cover page. The Commission is in the practice of sending the cover page of its initiation documents (form CC1) to firms or entities as notification of an initiated investigation. However the attached statement of conduct remains restricted information, not available to the public, until the matter is referred or non-referred.

[25] The Commission had first initiated a complaint on 3 September 2007 against Vitafoam and Loungefoam. Prior to this initiation the Commission had received a complaint from Mr Carelse of Foaming Carpets (Pty) Ltd on 25 May 2007. In that document Mr Carelse had complained that "suppliers of chemicals used to manufacture flexible urethane foam" were engaged in anti-competitive conduct. His complaint did not specify any sections of the Act but merely stated that "A vicious trend has developed in the manufacturing of flexible polyurethane foam industry regarding the supply of these chemicals, weekly price fluctuations without notification, unavailability of stocks, suppliers using biased manners of selecting whom to supply to and at what price and opposition of greater magnitude gaining competitive advantage by entering discriminatory relationships with those suppliers". The Commission had sent the CC1 to Vitafoam and Loungefoam who had objected that the CC1 did not cite either of them. For this reason the Commission saw it fit to initiate a complaint itself on 3 September 2007.

[26] The Commission's initiation documents of 3 September 2007 consist of a form CC1, and an attached statement of conduct. Form CC1 lists Vitafoam and Loungefoam as the persons whose conduct is the subject of this complaint. In the box requiring a concise statement of the conduct, the Commission states that the subject of the complaint is "Price fixing and dividing markets by allocating customers in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii), Exclusionary acts,

inducement, predatory pricing and buying up a scarce resource in contravention of sections 8(c), 8(d)(i), 8d(iv) and 8(d)(v)."

[27] In the attached initiation statement, the Commission states that it had done a preliminary investigation into the flexible polyurethane market a complainant (probably a reference to Mr Carelse) had submitted evidence that Vitafoam and Loungefoam were in contravention of the Act but did not list them on his CC1. In paragraph 3 of that statement the Commission states that it had evidence available that shows that both Loungefoam and Vitafoam are in contravention of sections 4(1)(b)(i), 4(1)(b)(ii), 8(c) and 8(d)(iv). It also states that further investigation is required to establish whether sections 8(c), 8(d)(i) and 8(d)(v) had been contravened. In paragraph 4 of the statement, the Commissioner states "I therefore initiate an investigation into the conduct set out in paragraph 3 above, in terms of section 49B(1)."

[28] On 27 November 2007 the Commission expanded its investigation to include Feltex (Pty) Ltd,[21] Unimattress (Pty) Ltd, Strandfoam (Pty) Ltd and Feel-o-Foam (Pty) Ltd. It saw it necessary to issue another CC1 which was sent to all the respondents listed therein. These were Loungefoam, Vitafoam, including Feltex (Pty) Ltd, Unimattress (Pty) Ltd, Strandfoam (Pty) Ltd and Feel-o-Foam (Pty) Ltd. The Commission's concise statement of the conduct on the CC1 was exactly the same as the previous one, namely -

> [22.1] "Price fixing and dividing markets by allocating customers in contravention of sections 4(1)(b)(i) and 4(1)(b)(ii), Exclusionary acts, inducement, predatory pricing and buying up a scarce resource in contravention of sections 8(c), 8(d)(i), 8d(iv) and 8(d)(v)"

[29] In the statement attached to this form, the Commission explains that it has initiated an investigation in the polyurethane market against

[21] Feltex (Pty) Ltd was replaced with Feltex Holdings (Pty) Ltd on 21 July 2009.

Vitafoam and Loungefoam for alleged contraventions of sections 4(1)(b)(i), 4(1)(b(ii), 8(c), 8(d)(i), 8(d)(iv) and 8(d)(v) of the Act. It goes on to say that the documents summonsed from these respondents show that Feltex Ltd, Unimattress, Strandfoam and Feel-o-Foam, which were not identified when the case was initiated, as being involved in conduct contravention of the Act. The statement goes on to say that the evidence available shows that Feltex entered into an agreement with Loungefoam and that clause 16 of the agreement which contains a reciprocal restraint clause has the effect of a market division agreement between Loungefoam, Vitafoam and Feltex. The respondents rely on this statement to argue that the complaint of the chemical cartel had not been initiated against Feltex and that only the market division complaint had been initiated against Feltex.

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

[31] On 26 May 2008, the Commission expanded its investigation to include Steinhoff International Holdings Ltd and Kap International Holdings Ltd. Form CC1 contained the same allegations in the concise statement as before, the only difference being that Steinhoff and Kap were added to the list of parties. In the attached statement, the Commission demonstrates that it had obtained more information about the links between Vitafoam and GommaGomma, that Steinhoff has a shareholding in Loungefoam and Vitafoam and that Feltex is owned by Kap International Holdings Ltd. Of relevance to us in that statement is the last paragraph in which the Commission states "*The relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of*...."

Requirements of Section 49B(1)

[32] As far as proposed amendments in relation to the chemical cartel are concerned there was no dispute between the Commission and the respondents that the chemical cartel, as in a complaint, had in *fact* been initiated. The only issue was whether this complaint had been initiated against Feltex. In relation to the second category of amendments the respondents argued that the Commission had not initiated this complaint of a broader collusion between Steinhoff and Kap.

[33] The respondents argued that the Commission may not refer a complaint of a prohibited practice to the Tribunal if it had not in the first instance initiated, in terms of section 49B, an investigation into that matter.[22] Initiation is thus a jurisdictional requirement for referral and absent such initiation the Tribunal lacked the jurisdiction to hear the referral.

[34] Furthermore they argued an investigation must be initiated against entities which the Commission intended to eventually prosecute *at the time the Commission initiates a complaint into an alleged prohibited practice*. In other words if in its initiation documents the Commission did not allege that a specified respondent had engaged in particular conduct it could not afterwards, at the stage of the Tribunal proceedings seek to cite this respondent. Mr Van der Nest, appearing on behalf of the Kap respondents further submitted that because section 67(1) precludes the Commission from initiating a complaint three years after the practice has ceased, the Commission could not be permitted, through an amendment process, to "initiate" a complaint against a particular respondent and thereby avoid the limitations imposed by section 67(1).

[22] In terms of section 49B(1).

[35] The Commission argued that as a matter of law, all that the Commission is required to do is to initiate a complaint against an alleged *prohibited practice*. Once the Commission has initiated a complaint into an alleged *prohibited practice* in other words, the conduct, against some respondents as was done in this matter, the Commission would have satisfied the jurisdictional requirement suggested by the respondents. If it became clear to the Commission in the course of the investigation or at a later stage, after referral, that other hitherto non-suited entities were implicated in this illegal conduct the Commission was entitled to seek an amendment to join such entities or seek the amendments as proposed in this matter.

[36] We have on previous occasions set out the initiation and referral scheme of the Act in relation to complaint procedures. We do not intend to traverse the entire jurisprudence regarding the Commission's powers under section 50(2) or the components of a valid complaint but do seek to delineate aspects relevant to issues of initiation.

[37] Section 49B(1) of the Competition Act states –

> [37.1] "The Commissioner may initiate a complaint against an alleged *prohibited practice*."

[38] Section 1(xxiv) of the Act defines a prohibited practice as "a practice prohibited in terms of Chapter 2". Chapter 2 in turn concerns itself with two parts setting out the practices, or the conduct that is prohibited. In Part A (section 4 and 5) certain types of restrictive horizontal practices and restrictive vertical practices respectively are prohibited. Part B (sections 7, 8 and 9) prohibits dominant firms from engaging in certain conduct.

[39] The language of section 49B(1) is clear and unambiguous. The Commission must initiate an investigation into an alleged *prohibited practice,* i.e. any *conduct* that is prohibited under chapter 2. There is no stipulation that the prohibited practice be alleged against specified

respondents or all possible entities that the Commission may wish to later prosecute at the time of initiation. This interpretation is supported by the wording of the remaining sub-sections and section 50.

[40] Section 49B(2)(b) provides that any person may submit a complaint against – and once again we see the same wording - an alleged *prohibited practice* to the Commission. There is no requirement that the prohibited conduct be alleged against a specific respondent or a group of respondents. We see here that in both cases the only requirement is that the complaint be in relation to an alleged practice which has been prohibited in Chapter 2.

[41] The initiation by the Commission or the submission by a third party (complainant) of a complaint to the Commission triggers a number of processes.[23] In the first instance the Commissioner is required to direct an inspector to investigate the complaint.[24] Once the investigation is completed the Commission is entitled to refer a complaint to the Tribunal in terms of section 50 (1) any time after initiating a complaint.

[42] In order to determine whether the contents of an initiation statement suffice to meet the jurisdictional requirement underpinning the complaint referral that follows it, we must appreciate what its purpose is. If we appreciate its purpose if follows that one can then determine whether its terms are adequate. An act of initiation by the Commission under section 49B(1) serves to clearly delineate that the complaint is to be dealt with under section 50(1) and not 50(2). Hence the time limitations applicable to an investigation into a complaint submitted by a complainant in section 50(2) would not apply. An act of initiation also serves to remove any dispute as to who "owns" the complaint or whether or not the time periods provided in section 50(2) have lapsed. By demarcating both time and content of the Commission's investigation, it can also provide would-be complainants with an

[23] Investigation and referral, interim relief and consent orders.

[24] Section 49B(3).

opportunity to assess whether or not they should submit their own complaint. In addition it serves to demarcate time and conduct for purposes of section 67(1).

[43] The Competition Appeal Court has already required us to take a purposive approach to section 49B. In Woodlands Dairy (Pty) Ltd, Milkwood Dairy (Pty) Ltd v The Competition Commission,[25] the Court held that -

> *"The dictum of this court in Glaxo Welcome which was cited by Mr Bhana develops a substantive as opposed to a formalistic approach to the definition of a complaint. The question arises as to whether the complaint had to be against a specified entity as opposed, for example, to an industry. The spirit of the Glaxo Welcome dictum seeks to promote the objectives of the Act, which, in this context, means the investigation of practices that may well undermine the central objective of the Act: the promotion of a competitive economy. In the present case, the wording of section 49 B does not refer to a specific entity. Hence it is permissible to read the provision to promote its purpose as sourced in the Act. Were this restrictive interpretation to be applied, it would hamper investigations triggered off by a complaint against a practice carried on by an entire industry. That interpretation, not supported by the wording of section 49 B(1), could prove to be subversive of a central purpose of the Act and the approach previously adopted by this court in Glaxo Welcome supra."*[26] (Our emphasis)

[44] At paragraph 36 the Court held further that –

> *"Given this court's interpretation of section 49 B…..The advocated purposive interpretation of section 49 B supports the*

[25] 88/CAC/Mar09.
[26] Para 33.

argument that the complaint does not have to be framed against a specific entity."

[45] The CAC has also held that in a case where a complaint has been submitted to the Commission in terms of section 49B(2)(b), the Commission need not go back and initiate particulars it wishes to add to a complainant's particulars. Moreover it has held that in a case involving a complaint submitted by a third party all that the Commission has to demonstrate is that "*the complaint must be cognizably linked to the particular prohibited conduct or practices and that there must be a rational or recognizable link between the conduct referred to in a complaint and the relevant prohibition in the Act*".[27]

[46] That is the *most* that that Commission has to demonstrate. Its complaint could obviously contain more details or greater specificity but all that it is required to demonstrate, for a court to be satisfied that a valid complaint had been initiated is a rational link between the conduct and a relevant prohibition in the Act. There is no need for the Commission at the moment of initiation to provide precise details of the parties involved or even all the product markets that could potentially be involved. Nor is it required to know with a degree of precision which particular entities in a group of companies was involved in the alleged prohibited practice.

[47] Although this was a finding in respect of a complaint initiated in terms of section 49B(2) and referred in terms of section 50(2) there can be no basis for distinguishing it from a complaint initiated under section 49B(1) and referred in terms of section 50(1). While section 50(1) is silent on the issue of additional particulars, we must interpret it in the context of the Act. To interpret sections 49B(1) and 50(1) in any other way would subvert the very purpose of the Act, namely to promote competition in the economy and to do so expeditiously. [28]

[27] Glaxo paras 15 and 16.
[28] See CAC judgment.

[48] Indeed the Act contemplates that when the Commission initiates a complaint it does so with limited information at its disposal. The reason for this is obvious. The Commission may have received some information from third parties, it may have been asked to look into a particular industry or it may of its own accord have observed that a particular sector warrants investigation.

[49] In most instances the information received by it and gleaned from its *prima facie* observations, would not provide it with sufficient particularity for it to make a determination, at the time of initiation, as to whether a prohibited conduct has occurred which warrants prosecution. It is only after it has *investigated* a complaint and by possibly using its summons and search and seizure powers is it placed in a better position to assess whether in fact a prohibited practice had been established or not and if so, further details about its nature, its duration and its extent. [29] Hence the Commission cannot be expected to know details about an alleged prohibited practice at the point of initiation which it would know after its investigation. This why section 49B(3) requires the appointment of an inspector to conduct an investigation.

[50] To require the Commission to go back and initiate a fresh complaint every time it uncovered a new potential respondent or discovered that it had cited a party incorrectly would render the schema unworkable and would undermine the very purpose of this Act. Moreover if the legislature intended that section 50(1) were to be applied so mechanistically why bother to grant the Commission the right to "initiate" a complaint in the first instance and then require it to investigate it? All the Commission would need to do is *refer* each and every instance of *suspected* anti-competitive behaviour to the Tribunal, without bothering to investigate its merits.

[29] In which it can utilise its powers of summons and search and seizure contained in sections 46-48.

[51] Moreover, initiation and referral are not identical processes and to conflate the two is to conflate their different legal consequences. When the Commission initiates a complaint into an alleged prohibited practice it is, to utilise a criminal analogy, not laying charges against these entities. These entities are mere suspects. It is not axiomatic that the Commission would refer a complaint against all the entities it has investigated. Its investigations might reveal after all that those that it had initially suspected were not the actual culprits. Likewise it might find at a later stage that those that it had not suspected were in fact implicated in an offence. It may be that the Commission's investigation will reveal that there is no prohibited conduct worthy of being referred to the Tribunal and the investigation will stop.

[52] Once the Commission has referred the matter against some entities it is only then that they become the respondents, or "accused". The *contravention* or the "crime" *has* been found to exist. If the identity of an additional culprit comes to light at a later stage the public interest would be better served if the Commission prosecutes all at the same time.

[53] Such an approach to 49B(1) would also be applicable for purposes of section 67(1). Section 67(1) states –

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

[54] The heading of the section is entitled "Limitations of bringing action". Notably the wording of the section refers to conduct and makes no stipulation about respondents. The purpose of section 67(1) is obvious. It seeks to deploy scarce resources into matters that can be successfully investigated and prosecuted rather than those in which evidence and possible anti-competitive effects may have been eroded through the passage of time. Hence it seeks to limit the Commission's

possible forays into the distant past. In practice however there are only a limited number of circumstances in which the Commission will have actual knowledge of when these practices ceased *prior to an act of initiation*.

[55] The Commission will only be able to make an assessment of exactly when a practice has ceased when it has clear evidence of that. It could of course come across such evidence through information provided to it by third parties or could glean this during an investigation into another prohibited practice or an investigation in a different sector. Because the precise moment of cessation would, in general, be within the respondents' sole knowledge one can anticipate that in most cases knowledge of cessation would only be obtained by the Commission – through for example information provided by respondents or leniency applicants - ***after*** it has initiated a complaint and during a process of investigation.

[56] While the section is silent on the question of onus it is the respondent who will have to show, by leading some evidence - during the investigation or prosecution stages - that such practice ceased and the Commission was not entitled to initiate. This defence of prescription is a substantive one and can be raised by a respondent at any stage of the Commission's investigation or referral.[30] On the other hand, all that the Commission needs to demonstrate, in the event that it does initiate a practice that might attract a section 67(1) defence, is that there is enough content in the act of initiation to make a cognizable or rational link with a subsequent referral. It cannot be expected to know at the stage of initiation what the process of investigation will reveal.

[57] Relying on section 67(1) as a basis for arguing that the Commission must go back in time to initiate a complaint against a named respondent, which the Commission at that time did not know was

[30] See our discussion in Pioneer, case no: 15/CR/Feb07 & 50/CR/May08.

involved in the conduct being investigated amounts to begging the question. Such an approach would also lead to undesirable consequences and would subvert the purpose of the Act. Consider the following circumstances. A and B have been charged with cartel activities in the some market. Let us assume for argument's sake that they did engage in such conduct but the conduct ceased one year before the Commission's initiation in 2004. The Commission refers the complaint against A & B in 2007. C was also a member of this cartel but the Commission was only able to find evidence to this effect in 2009, some five years after the practice had ceased. On the respondents' favoured view, C would be able to raise a defence of prescription but its erstwhile cartel members not.

[58] Thus far we have outlined, as a matter of law, what we consider to be the purposive approach to sections 49B(1) and 50(1), the acts of initiation and referral. The Commission may initiate a complaint against an entire industry and not necessarily against specific respondents. It may of course after its investigation into the industry *refer* a complaint against a limited number of respondents in that industry or not refer the matter at all.

[59] As a corollary to this principle, the Commission is not required to initiate a complaint against each and every respondent that it may, after its investigation, wish to prosecute. Nor is it required to state at that time with any degree of precision which subsidiaries or which respondents are implicated in which prohibited practices. Nor is it required to go back and initiate a fresh complaint into every fact that it subsequently uncovers during its investigation.

[60] To hold otherwise would be tantamount to conflating the act of *initiation* with the act of *referral*, and not allowing for further information or facts that may be revealed through the process of investigation or through information obtained post referral. However the Commission is

required to initiate a complaint into a particular *prohibited practice* as a jurisdictional requirement to referral.

[61] As far as the proposed amendments in relation to the chemical cartel are concerned there was no dispute between the Commission and the respondents that the chemical cartel has in fact been initiated. Hence the jurisdictional ground for extending the complaint to Feltex has been met and the application in relation to the category one amendments is granted.

[62] As far as the proposed amendments in relation to the second category are concerned we see that the Commission in its initiation statement of 26 May 2008 states "*The relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of*....". It was in this statement that the Commission extended the complaint of collusion to Steinhoff International and Kap International. Recall that section 49B(1) only requires the Commission to provide a rational link between the conduct complained of and a relevant section of the Act. There is clearly a rational link between the Commission's statement of "the relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of" and section 4(1)(b)(i) and/or (b)(ii).

[63] Moreover section 4(1)(b) provides that an agreement 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 it involves any of the following restrictive horizontal practices–

> [63.1] "(i) directly or indirectly fixing the purchase or selling price or any other trading conditions;
>
> [63.2] (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services"

[64] Any person seeking to understand what section 4(1)(b)(i) prohibited would see that "price fixing" in our legislation refers to the fixing of *both* purchase and selling prices. That person would also understand that a contravention of section 4(1)(b)(i) would involve the fixing of "any other trading condition". The reader will also see from section 1(xiii) that "horizontal relationship" means a relationship between competitors. Reading sections 4(1)(b)(i) and (ii) together will indicate to that reader that the Commission has initiated an investigation into collusive conduct between competitors. Such conduct may involve price fixing and/or market allocation. But the Commission's statement of 26 May 2008 goes even further than that – it actually contemplates a broader type of collusion between all the parties listed in its initiation statement effected through their relationship.

[65] Accordingly we find that the conduct complained of – namely that of collusion between competitors in the flexible polyutherane market to fix prices and/or allocate customers had been initiated and is rationally linked to section 4(1)(b)(i) and (ii). As we have stated above there was no need for the Commission at that stage to identify exactly which, how many or even which subsidiaries or divisions of the respondents were involved in collusive activities.

[66] In conclusion we find that that the chemical cartel as well as the complaint of collusion between Steinhoff and Kap were initiated by the Commission and the jurisdictional requirement for a referral against Feltex, and Steinhoff and Kap respectively, has been satisfied. It is not necessary for us in these proceedings to assess the strength or weakness of the Commission's proposed amendment in relation to these respondents. That is a matter to be decided at trial. Given that the matter has not been set down for hearing as yet, no prejudice will be caused to the respondents if we were to grant the application. The respondents will have an opportunity to file answers or supplementary papers if so desired.

[67] Accordingly we make the following order-

[67.1] The Commission's application for the proposed amendments contained in annexure A is granted; and

[67.2] The Commission's application for joinder of Steinhoff Africa Holdings (Pty) Ltd is granted.

[67.3] The Commission is required to file within 10 days of date hereof a comprehensive complaint referral document clearly indicating the amendments granted in this application and the previous applications ("the amended complaint");

[67.4] Any respondent may, within 20 days after the filing of the Commission's amended complaint, file answering affidavits and if it does, must also file a comprehensive document clearly indicating supplementary answers to the amended complaint referral ("the comprehensive answer"); and

[67.5] The Commission may file a reply within 5 days of the filing of the answers in 67.4 above.

_____ **08 June 2010**

Yasmin Carrim Date

Norman Manoim and Takalani Madima concurring.

Tribunal Researcher : I Selaledi

For the Competition Commission	: Adv H Maenetje instructed by the State Attorney
For Loungefoam, Vitafoam, Steinhoff International, GommaGomma and Steinhoff Africa	: Adv D Unterhalter SC and Adv Mark Wesley instructed by Deneys Reitz Inc
For Feltex and Kap International	: Adv M van der Nest SC and Adv A Cockrell instructed by Shepstone and Wiley Attorneys