

**Procedural Formalities in terms of the Competition Act 89 of 1998: The *Woodlands Omnia* Debate
– A Critical Review of the Supreme Court of Appeal’s approach to Complaint Initiation and Referral
in Competition Law Enforcement**

**Dissertation submitted in partial fulfilment of the requirements for the degree Master of Laws at
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DECLARATION

I,

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hereby declare that “Procedural Formalities in terms of the Competition Act 89 of 1998: The *Woodlands Omnia* Debate – A Critical Review of the Supreme Court of Appeal’s approach to Complaint Initiation and Referral in Competition Law Enforcement” is my own work and that all sources used or quoted have been indicated and this dissertation was not submitted by me for another degree at another University.

L Killian

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Summary

The overarching purpose of this study is to utilise different factors, such as South Africa's controversial history and the development of competition law policy in light thereof, the effect of democracy and the Constitution on competition enforcement and the legislature's intention codified in the provisions of the Competition Act, in an attempt to explain the judiciary's recent approach to competition law enforcement by the Competition Commission and Competition Tribunal.

South African competition law develops largely through case law and as such, the decisions of the Tribunal, coupled with their review by the Competition Appeal Court, the Supreme Court of Appeal and ultimately the Constitutional Court, will ultimately inform how competition law is regulated going forward. This means that tremendous value is being placed on these judgments and it is therefore of critical importance that the correct approaches are followed when they are being decided.

Focussing on the initiation of complaints as the first step in the process of complaint proceedings, the relevant regulatory institutions and the nature and scope of their powers, as well as current procedures and laws involved in regulating complaint initiation and referral, an attempt is made shed some much needed light on recent, fairly controversial, jurisprudence by our courts pertaining to the enforcement of competition law in South Africa.

The *Woodlands* and *Omnia* cases forms the basis of this enquiry, hence a closer look is taken at how these disputes came about and eventually found their way to the Supreme Court of Appeal (the "SCA"). The focus in both instances is primarily on the initiating complaint, its referral to the Tribunal for adjudication, the appeal to the Competition Appeal Court (the "CAC") and the final appeal to the SCA.

Proceeding from the premise that for the sake of effective competition law enforcement and uniform policy development a purposive interpretation to the nature and powers of the Commission and Tribunal is desirable, it is submitted that formal procedure still plays a vital role in achieving coherent results. The extent of formality required however, must be softened in order to achieve the Act's objectives of creating free and fair markets, consumer welfare and promoting greater ownership and employment to address the economic injustices of the past.

Following the SCA's decision in *Omnia*, some in the legal fraternity has viewed the SCA's judgment as a 'relaxation' of the "referral rule" which brings the rule in line with a more purposive interpretation of the provisions of the Act. Others have commented that the *Omnia* judgment appears to reflect a reversion by the SCA towards both the handling and interpretation of initiation and complaint proceedings in terms of section 49B of the Act. In light of the findings in the *Senwes* judgment however, an argument is made that the former, more cautious view is the more favourable

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CHAPTER 1 – HISTORICAL BACKGROUND AND CURRENT PROCEDURE

1. Introduction

The advent of democracy in South Africa brought with it sweeping changes to all spheres of the legal and economic landscape within the country, some more rigorous than others. Policy development previously informed by the interests of a self-serving exclusionist regime could now evolve under a new liberated dispensation supported in large by a fledgling constitution. National competition policy and anti-trust law was no exception. Born of an era characterised by State sanctioned monopolistic behaviour, rampant anti-competitive market activity and a complete lack of regulation and enforcement, competition policy was in dire need of being revolutionized.¹ A fresh approach to competition regulation is however, only as effective as its method of implementation in light of the effects of the outdated policies it seeks to replace.

The need to regulate competition in a market based economy is not a novel concept. Free and fair competition benefits the ultimate consumer, hence, competition law consists of rules and provisions with the sole purpose to “ensure and sustain a market where vigorous – but fair – competition will result in the most efficient allocation of economic resources.”²

Free markets do not always succeed, despite the best efforts of those participating in them, and when they fail government intervention is required in an attempt to improve market outcomes for the consumer.³ The aim of competition policy therefore is in essence to “emulate free market conditions by creating regulatory institutions and procedures or laws that will ensure equal opportunities for all businesses, stimulate economic efficiency and protect consumers.”⁴

It is these regulatory institutions, procedures and laws that form the subject of this study in an attempt to shed some much needed light on recent, fairly controversial, jurisprudence by our courts pertaining to the enforcement of competition law in South Africa. Borrowing extensively from foreign jurisdictions, informed by seemingly sound economic policies and keeping South Africa’s unique history in mind, the legislature created a codified set of competition rules and provisions which a reformed judiciary has interpreted and applied with varying degrees of success. Constitutional protections afforded to every participant at all levels in the market has further highlighted the importance of legal certainty and procedural fairness in competition law enforcement, and provided the opportunity for studies such as the one being undertaken here in order to critically review the results.

Twenty one years on, any discussion on the current state of competition policy and legislation in South Africa necessitates a retrospective glance, however brief, at its origins and development, at the very least acknowledging the influence the changes and challenges it faced has had on its interpretation, application and enforcement.

¹ The Competition Commission and Competition Tribunal Report, ‘Unleashing Rivalry: Ten years of enforcement by the South African competition authorities’ (1999-2009), at 1 & 2.

² Neuhoff M (ed) et al, *A Practical Guide to the South African Competition Act*: Durban Butterworths, (2006) at 11.

³ *Ibid* at 12.

⁴ *Ibid* at 11.

1.1 A Brief History

The roots of what we know as “competition law” today can be traced as far back as Roman Dutch writings and edicts regulating resale price maintenance and aimed at preventing monopolies.⁵ The nature of these rules had a criminal undertone early on and transgressions were considered criminal acts carrying appropriate criminal sanctions aimed at punishing wrongdoers.⁶

Throughout history it has been economic policy and underlying market conditions that not only created the need for competition regulation but also informed it. The setting for South Africa’s competition policy foundations and economic policies of government ownership, protection and import substitution⁷ “differed from what is often found in transition and developing country situations. In South Africa, these policies were coupled with strong property rights and well developed market institutions.”⁸

South Africa has been described as having a well developed legal culture combining elements of several traditions, with the importance of law being paramount.⁹

Property and contract law can be traced back to its Roman Dutch origins, while intellectual property law, financial and company law draw heavily from English sources.¹⁰ The Constitution was superimposed onto this well established legal framework, embodying unique features of the country’s legacy that informs its approach to competition policy and showcasing that “basing policy on law and implementing policy according to proper legal procedures are important values”.¹¹

It is submitted that these two elements, the legal basis of policy and maintaining proper procedures, is precisely the reason for the differing approaches to legislative interpretation and application under scrutiny in this study.

1.1.1 South African Competition Law Pre-1994

In 20th century South Africa early attempts by government at competition law enquiry first appeared following the formation of the Board of Trade and Industry and it being empowered, by way of the Undue Restraint of Trade Act¹², to advise the State on competition matters.¹³ Unsurprisingly, this Act suffered from severe shortcomings and following a scathing report by the Board¹⁴ itself was replaced by the Regulation of Monopolistic Conditions Act.¹⁵ Some may

⁵ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014) at 136.

⁶ Ibid, at 137 – 138.

⁷ An OECD Peer Review (May 2003): ‘Competition Law and Policy in South Africa’, at 9.

⁸ Ibid at 9.

⁹ Ibid at 11.

¹⁰ Ibid at 11.

¹¹ Ibid at 11.

¹² Act 59 of 1949.

¹³ Sutherland and Kemp: *Competition Law of South Africa* (LexisNexis, Durban 2000), at para 2.1.

¹⁴ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 138.

¹⁵ Act 25 of 1955, as amended.

suggest that this was South Africa's first attempt at a true general competition law, however when it came to application and enforcement, the authorities fared no better than was the case under its predecessor.¹⁶ Weak regulatory bodies and irregular enforcement plagued the development of competition policy which ultimately resulted in a formal commission of enquiry into the dismal state of affairs.¹⁷

Following its inquiry, the Mouton Commission¹⁸ proposed a new competition law regime for South Africa¹⁹ in the form of the Maintenance and Promotion of Competition Act.²⁰ This Maintenance and Promotion of Competition Act²¹ was the first to set up a truly specialised body tasked with investigation and dealing with specific prohibited practices which was to be treated as criminal offences.²² Yet again its provisions and the enforcement thereof fell far short of what an effective competition regime should entail due to resource sharing with an already strained criminal adjudication system and prosecutors inexperienced in the specialised domain of competition matters.²³

At the same time as the State's haphazard attempts at instituting a statutory framework for efficient market regulation, the minority government actively sought to exclude participants in the market based on race. The OECD in 2003 noted at the time that discrimination and protection were combined in policy measures that shielded white farmers and business owners against all African competition, by reserving the majority of the land for white ownership and giving white farmers and white-owned enterprises preferences in subsidy and support programs, in essence, leaving black entrepreneurs outside of the formal economy.²⁴

1.1.2 The Development of Competition Policy and Enforcement in the post-Apartheid era

In 1994, the fall of Apartheid signalled a change in the political structure of South Africa. A new democratically elected government sought to address the extent of highly concentrated market power, with competition policy specifically being reflected in the 1994 Reconstruction and Development Programme which ultimately foreshadowed the Competition Act.²⁵ Moving away from a criminal based system of competition law enforcement, the Department of Trade and Industry in 1997 in its proposed policy guidelines for new competition legislation recognised the

¹⁶ Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 138.

¹⁷ Ibid at 139.

¹⁸ The outcomes of the commission's inquiry was published as the Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act (1978).

¹⁹ Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 139.

²⁰ Act 96 of 1979, as amended.

²¹ Ibid.

²² Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 139.

²³ Ibid at 139.

²⁴ An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 9.

²⁵ The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 2.

need for competition law to be effected by an independent, competent and professional body with investigative powers and the ability of rapidly responding to anti-competitive conduct.²⁶

Conceding that the decisions of such an institution will still be subject to judicial review, the Department did however note that it is Government's intention to remove competition law enforcement out of the jurisdiction of the criminal courts to avoid long and complex litigation proceedings.²⁷

In promulgating a new competition act, the legislature made a deliberate policy choice to decriminalise anti-competitive conduct as criminal enforcement had been deemed ineffective if previous experience was anything to go by.²⁸ This rationale was confirmed by the authorities themselves in the *Federal Mogul case*²⁹, where it was commented that competition cases, by their very nature, are difficult to conduct, not only because they are fact intensive, but also because they involve the application of both law and economics and neither the Department of Justice nor the SA Police Service have members with the appropriate skill set.³⁰

From the beginning, national authorities appeared to have established enforcement processes and procedures and developed a reputation for independence which is said to be reflected in their decisions on competition matters.³¹

In order to deal with the country's legacy of economic distortions, these processes and procedures will have to find a balance between a strict implementation of the law on the one hand, and underlying policy goals on the other. As such, the promotion of free and fair competition and market efficiency will also have to ensure access to those players in the market that have previously been denied an equal opportunity to participate.³²

The success of such a balancing exercise from a procedural perspective forms the substance of the questions that this paper will investigate and attempt to address.

1.2 The Competition Act 89 of 1998

The South African Competition Act of 1998³³ came into effect on 1 September 1999 and applies to all economic activity in, or having an effect within the Republic.³⁴ The Act specifically regulates horizontal practices (interaction between competitors), vertical practices (interaction between suppliers and customers), the abuse of dominance (the behaviour of firms with market

²⁶ Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 139.

²⁷ Ibid at 139.

²⁸ Ibid at 139.

²⁹ Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & others (08/CR/Mar01)

³⁰ Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 140.

³¹ The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 3.

³² An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 16.

³³ Act 89 of 1998, as amended.

³⁴ Ibid at Section 3.

power), pricing behaviour and mergers.³⁵ Provision is made for a three tier enforcement structure consisting of the Competition Commission, Competition Tribunal and Competition Appeal Court tasked with applying and enforcing competition law as set down in the Act.³⁶ Each institution is created as an independent body separate from the others and responsible for a different leg of the enforcement process: the Commission with investigation, the Tribunal with adjudication and the Appeal Court with appeal and review.³⁷

When it comes to legislative interpretation, the general principle finds application in statutory competition law as well, namely that “Interpretation of the Act should be in a manner that is consistent with the Constitution and that gives effect to the Competition Act’s stated purposes while also complying with South Africa’s international law obligations.”³⁸

It has been argued that the nature of the legislation is distinctly socio-economic and as such, the remedies at the disposal of the competition authorities must be viewed in the same light.³⁹ Accordingly, enforcement of the Act must be seen to be used to provide equitable relief rather than to punish those who fall foul of its provisions.⁴⁰ It is submitted that this approach is not only in keeping with the development of our unique national approach to competition policy but also best serves the intention of the legislature set down within the Act itself.

The conduct the Act concerns itself with can, for ease of reference, be grouped into two main categories, namely prohibited practices and mergers.⁴¹ While mergers in its totality, along with the specific elements of the different prohibited practices falls outside the scope of this paper, it is important to acknowledge the broader context from which enquiries such as these arise. Keeping context in mind, the focus of this study will be narrowed down to only investigation and adjudication proceedings as provided for in the Act, with the spotlight on the formalities of complaint proceedings as a precursor to any given investigation.

1.2.1 The Act’s Objectives

The legislature’s intention in drafting a new competition statute and the aims of the Act are clearly set out in its preamble. The Act itself identifies its provisions as a means to

- provide all South Africans equal opportunity to participate fairly in the national economy;
- achieve a more effective and efficient economy in South Africa;

³⁵ Neuhoff M (ed) et al, *A Practical Guide to the South African Competition Act*: Durban Butterworths, (2006) at 14 & 15.

³⁶ Ibid at 18.

³⁷ Armstrong, GC, ‘Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison’ (2011), at 160.

³⁸ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 141.

³⁹ Ibid at 142.

⁴⁰ Ibid at 142.

⁴¹ The Competition Commission and Competition Tribunal Report, ‘Unleashing Rivalry: Ten years of enforcement by the South African competition authorities’ (1999-2009), at 3.

- provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- create greater capability and an environment for South Africans to compete effectively in international markets;
- restrain particular trade practices which undermine a competitive economy;
- regulate the transfer of economic ownership in keeping with the public interest;
- establish independent institutions to monitor economic competition; and
- give effect to the international law obligations of the Republic.⁴²

Although clearly informed by economic principles of free and fair trade and having consumer benefit as its ultimate goal, what makes the statute unique in comparison to its international counterparts is the specific inclusion of public interest factors aimed at transformation and the redistribution of wealth. It is interesting to note that most of the concerns listed above are focussed on equity and justice, rather than efficiency, with the preamble describing restrictions on free and fair competition as ‘unjust’ rather than ‘inefficient’.⁴³ The Act emerged as a clearly South African product, however not all policy makers agree that legislation intended to regulate competition can be used to address wider macro-economic or public interest goals.⁴⁴ Criticisms directed at the aims of the Act are twofold, firstly highlighting that “the scope for error, flexible interpretation and subjectivity of judgment seems great.”⁴⁵

The second negative takes aim at the definition of the notion of ‘public interest’ and what it includes, namely redistribution, labour interests and black economic empowerment⁴⁶, holding that “relying on competition policy to achieve these objectives is inappropriate.”⁴⁷

Regardless of whether economists and legal scholars believe transformation and public interest aims have no place in what informs competition policy, the language used in the Act, and accordingly so too the intention of the legislature, is clear. It seems logical that what a statute aims to achieve should inform its interpretation and application, and as a result, it appears to be evident that a purposive approach⁴⁸ to interpreting the provisions of our Competition Act is inevitable. In what seems as a veiled warning to South Africa’s competition authorities, the

⁴²Act 89 of 1998, as amended at 2.

⁴³ An OECD Peer Review (May 2003): ‘Competition Law and Policy in South Africa’, at 18.

⁴⁴ Neuhoff M (ed) et al (2006), *A Practical Guide to the South African Competition Act*: Durban Butterworths, at 14.

⁴⁵ Ibid at 14.

⁴⁶ Ibid at 14.

⁴⁷ Ibid at 14.

⁴⁸ “A Purposive Approach to interpretation is one that starts off from the acknowledgment that legislation cannot be precisely drafted to anticipate every eventuality, and that questions of interpretation should be resolved by reference to the broad purposes of the enactment.” Introduction to the Promotion of Administrative Justice Act, Chapter 1.

OECD remarks that “achieving coherent results requires disciplined choice among multiple and potentially inconsistent goals.”⁴⁹

1.2.2 Statutory Enforcement: The Commission, Tribunal, Competition Appeal Court and Supreme Court of Appeal

It has been argued that the legislature’s intent behind the framing of the Act was apparent⁵⁰ when it came to enforcing the provisions of this newly promulgated piece of legislation. The legislature seemed to be determined not to repeat the mistakes of the past, as experience had shown that criminal enforcement of competition law had been ineffective and it was subsequently decided to overhaul competition law enforcement in its entirety.⁵¹

This argument gains specific relevance when one reviews the approach of the appellate courts in reviewing the competition authorities’ interpretation of their own powers of enforcement. The Act itself establishes the institutions that are responsible for enforcing its provisions, and to a certain extent, sets out the nature and powers of each. When looking at enforcement procedures implemented by these bodies, the logical question that arises then is whether the legislature’s intention and purpose should not be the main tool used during their review processes.

The Competition Commission is established in terms of section 19 of Chapter 4 of the Act with section 20 confirming its independence and stating that it is only subject to the Constitution and the law.⁵² Of the many functions the Commission is tasked with carrying out, the investigation and evaluation of alleged contraventions of the Act⁵³ is arguably the most important. The Commission therefore must play the role of impartial investigator and ‘prosecutor’ in bringing potential transgressors of the Act before the Tribunal.⁵⁴ The Commission as a body is also responsible for ensuring the consistent application of the provisions of the Act and advising and interacting with other regulatory authorities.⁵⁵

Under Part B section 26 of the Act, the Competition Tribunal is established as a separate body and a tribunal of record⁵⁶, however, the legislature saw no need to explicitly highlight its independence in the statute. The Tribunal is however clearly an institution separate from the Commission if one looks at its nature and powers. The main function of the Tribunal is to

⁴⁹ An OECD Peer Review (May 2003): ‘Competition Law and Policy in South Africa’, at 18.

⁵⁰ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 143.

⁵¹ Ibid at 143.

⁵² The Competition Act 89 of 1998, Section 20(1)(a).

⁵³ Ibid, Section 21(1)(c).

⁵⁴ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 143.

⁵⁵ Neuhoff (ed) M et al (2006), *A Practical Guide to the South African Competition Act*: Durban Butterworths, at 19.

⁵⁶ The Competition Act 89 of 1998, Section 26(1)(c).

adjudicate on any prohibited conduct listed in Chapter 2 to determine whether any such conduct has occurred, and if so, to impose the appropriate remedy provided for in the Act.⁵⁷

The Tribunal is therefore tasked with the adjudication leg of the enforcement structure.

It is important to recognise that the Commission and Tribunal are creatures of statute, but that the intention behind their creation envisaged an informal and speedy resolution of competition law transgressions outside of the normal court system. As mentioned by Prins and Koornhof, the procedures implemented by these bodies in performing this task is unlike something that has been seen before in South African competition regulation as “it was hoped that the more informal proceedings of an inquisitorial nature would aid the efficient administration of the Act. The proceedings of both the Commission and the Tribunal would be sui generis, with aspects related to both civil proceedings and criminal proceedings, although seemingly weighted towards the former.”⁵⁸

Whereas the powers of the Commission are of a preliminary and investigative nature, the Tribunal is empowered by the Act to adjudicate on prohibited practices and make determinations.⁵⁹ This distinction has proved to be of great importance when the procedure each body implements to fulfil its mandate and the formalities they should or should not comply with is debated on appeal. Our courts have also previously noted that the Tribunal is not an ordinary court within the meaning of Section 35 of the Constitution, but rather an independent and impartial tribunal for the purposes of the just administrative action provisions contained in Section 33.⁶⁰

Its power to issue administrative penalties was also deemed to not be of a criminal nature but rather have civil characteristics, as the purpose of the imposition of penalties under the Competition Act was not to punish transgressors but rather to correct behaviour in a non-criminal way.⁶¹

The Competition Appeal Court, the only body of the three with status similar to that of a High Court⁶², is established in terms of Section 36 of Part C of Chapter 4. Also separate from the rest, it consists of at least three High Court judges and operates procedurally the same as other courts in the judiciary. The Competition Appeal court is responsible for reviewing any decision of the Tribunal⁶³ and also considering appeals against Tribunal decisions.⁶⁴ Although its creation under the Act is sanctioned to fulfil the appeal and review function in competition matters, it is not the final forum in this regard. A further right to appeal lies to the Supreme Court of Appeal and also to the Constitutional Court where competition matters are disputed on constitutional grounds.⁶⁵

⁵⁷ Ibid, Section 27(1)(a).

⁵⁸ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 143.

⁵⁹ Ibid at 145.

⁶⁰ Ibid at 144.

⁶¹ Ibid at 144.

⁶² The Competition Act 89 of 1998, Section 36(1)(a).

⁶³ Ibid at Section 37(1)(a).

⁶⁴ Ibid at Section 37(1)(b).

⁶⁵ Ibid at Section 62(4).

It has been suggested that in hearing matters brought before it, the Competition Appeal Court fulfils a unique and important role as a ‘gate-keeper’ in shaping competition law and policy in the country.⁶⁶ While the Commission and the Tribunal are generally seen as specialist bodies constantly applying competition law in a ‘hands-on’ manner, the Supreme Court of Appeal is a general court dealing with all areas of the law.⁶⁷ The Constitutional Court, sometimes also viewed as something of a generalist institution, is the highest court and final forum for appeal regarding all matters of a constitutional nature and falling within the ambit of the Bill of Rights.⁶⁸ It does therefore not deal with general matters in the broader sense of the term.

Nestled squarely in between them, the Competition Appeal Court functions as a gate-keeper dealing with the practicalities of competition law enforcement on the one hand, and strict theoretical legal application on the other. This position has however proved to be somewhat of a precarious one and the Competition Appeal Court has arguably in the past struggled to straddle the line between theory and practice.

1.3 Complaint Proceedings: Chapter 5

Complaint proceedings in terms of the Act can largely be divided into four different phases, namely, initiation of a complaint, the investigation into such a complaint, the outcome of the complaint and the final phase which involves settlement and leniency applications prior to referral thereof to the Tribunal. The entire process falls within the scope of the Competition Commission’s powers and functions. The focus of this study will only be on the initiation of complaints as the first step in the process of complaint proceedings. Without this crucial first step, no prohibited practice enquiry and adjudication will ever see the light of day. Although the ambit of the analysis to be done in this paper has been narrowed as aforesaid, the complaint referral process will also form part of the study to a lesser extent, in an attempt to contextualise the importance of the complaint initiation giving rise to a possible referral.

1.3.1 Complaint Initiation

As mentioned, the initiation of a complaint forms the first step in any inquiry into an alleged contravention of the Act. Section 49B of the Act provides who may initiate such a complaint and reads as follows:

“(1) The Commissioner may initiate a complaint against an alleged prohibited practice.

(2) Any person may –

- (a) submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or

⁶⁶ Kariga HR, ‘Between a rock and a hard place? A closer look at the Competition Appeal Court’, at 6.

⁶⁷ Ibid at 5.

⁶⁸ The Constitution of the Republic of South Africa, Act 108 of 1996, Section 167.

- (b) submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.

(3) Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.⁶⁹

It should be noted that the Act provides for two separate avenues of complaint initiation. Firstly, the Commission itself is empowered to initiate a complaint against a prohibited practice and secondly, any third party may do so of own accord. This distinction has become of paramount importance in understanding the Competition Appeal Court and Supreme Court of Appeal's approach to evaluating the validity of specific initiations based on where the complaint originated from. It is further interesting to note that in both instances, the Act provides for a complaint to be initiated against a 'prohibited practice' (as an action) and not against those who have allegedly committed such a practice (as a party). Furthermore, unlike the legal standing requirement traditionally applied by our courts, complainants in competition matters do not need to demonstrate a direct and present interest in the subject matter of such complaints.⁷⁰

Complaints initiated by the Commission can be done in any manner or form, however complaints initiated by a third party must be in the 'prescribed form'.⁷¹ Such a complainant is required to submit a Form CC1 containing all relevant information about the complaint, including the name of the party being complained about, a description of the practice giving rise to the complaint, a statement indicating whether the conduct is still occurring and a written submission setting out, in detail, the cause for the complaint and how it arose.⁷²

This distinction becomes very important in the context of procedural formalities and has given rise to a multitude of disputes before the Appeal Courts. Whether this means the Commission has free reign regarding the form and content of complaints it initiates has also become the subject of much debate. Similarly, if no such procedural formalities exist, when does the actual initiation take place and how can this be determined? Due to the fact that time limits exist within which a complaint must be referred to the Tribunal for adjudication (as set out below), the Commission, Tribunal and Appeal Courts have all attempted to answer this question, in some instances, with completely contradictory results.

1.3.2 Complaint Referral

Section 50 of the Act deals with the outcome of a complaint and provides that:

- (1) At any time after initiating a complaint, the Competition Commission may refer the

⁶⁹ The Competition Act 89 of 1998, pg 75.

⁷⁰ Neuhoff M (ed) et al (2006), *A Practical Guide to the South African Competition Act*: Durban Butterworths, at 241. A party's interest in a complaint only becomes relevant in the proceedings during the Competition Tribunal's adjudication stage.

⁷¹ *Competition Commission v Yara (SA) (Pty) Ltd (784/12)* [2013] ZASCA107 (13 September 2013), at para 21.

⁷² Neuhoff M (ed) et al (2006), *A Practical Guide to the South African Competition Act*: Durban Butterworths, at 242.

complaint to the Competition Tribunal.

- (2) Within one year after a complaint was submitted to it, the Commissioner must –
- (a) subject to subsection (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or
 - (b) in any other case, issue a notice of non-referral to the complainant in the prescribed form.
- (3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)(a), it –
- (a) may –
 - (i) refer all the particulars of the complaint as submitted by the complainant;
 - (ii) refer only some of the particulars of the complaint as submitted by the complainant; or
 - (iii) add particulars to the complaint as submitted by the complainant; and
 - (b) must issue a notice of non-referral as contemplated in subsection (2)(b) in respect of any particulars of the complaint not referred to the Competition Tribunal.⁷³

Compliant referral is a completely separate process from complaint initiation, even though they are interdependent. Complaint initiation precedes complaint referral. It is accordingly submitted that challenges to the procedures pertaining to complaint referrals can therefore also be said to be indirect challenges to the initiation process that gave rise to the investigation that ultimately resulted in the Commission's decision to refer a complaint to the Tribunal or not.

1.4 The Importance of Uniform Procedure

The competition authorities themselves have recognised that development of competition policy in South Africa is largely up to them, remarking that “the nature of competition law and the workings of the institutions mean that competition law and policy develop around cases. This is where key principles are debated and questions are framed and answered.”⁷⁴

The authorities have on numerous occasions emphasized that although international theory and examples are important to ensure South African competition law develops on a global platform, what is required locally is a case by case evaluation while taking into account uniquely South African factors.⁷⁵

⁷³ Ibid at 77 – 78.

⁷⁴ The Competition Commission and Competition Tribunal Report, ‘Unleashing Rivalry: Ten years of enforcement by the South African competition authorities’ (1999-2009), at 4. The report emphasizes that a major strength of the competition law regime is its focus on interrogating through evidence and witnesses, reflecting how competitive dynamics actually play out in a given market and industry.

⁷⁵ Ibid at 4.

It is therefore evident that the decisions of the Tribunal, coupled with their review by the Competition Appeal Court, the Supreme Court of Appeal and ultimately the Constitutional Court, will ultimately inform how competition law is regulated going forward. This means that tremendous value is being placed on these judgments and it is therefore of critical importance that the correct approaches are followed when they are being decided. Due to the fact that the Commission and the Tribunal are administrative bodies of the state, it has been stated that it is important that the procedural powers of the Commission and the Tribunal be clearly defined and understood, and that these are exercised in a manner that is beyond reproach.⁷⁶

The application of competition law essentially combines administrative and quasi-judicial approaches, with the Commission having the first responsibility with respect to every matter that arises under the Act.⁷⁷ As mentioned before, both the Commission and the Tribunal are administrative bodies empowered by the Act, which from a practical standpoint means that the environment in which they operate is inherently a legal one of contesting evidence and legal interpretation, even where the analysis is fundamentally an economic one.⁷⁸ Naturally then, the legal nature of these institutions' processes has also given rise to a multitude of procedural challenges.⁷⁹

Although these procedural challenges are necessary to ensure procedural fairness in competition matters, it has also resulted in prolonged delays in resolving cases⁸⁰, putting pressure, it can be argued, not only on the resources of the competition authorities themselves, but also on every party involved in the dispute, a problem easily resolved by a certain and uniform approach to procedural formalities.

Prior to the decision in *Competition Commission v Yara (SA) (Pty) Ltd*⁸¹, the appellate courts in South Africa in a series of prominent and arguably controversial decisions, strongly asserted the principles of legality and rationality in its review of the requirements and limits applicable to the exercise by the Competition Commission of its powers, along with the requirements for Tribunal jurisdiction to adjudicate a complaint.⁸² The OECD remarks in this regard that a central concept of this jurisprudence, although expressed in varying formulations, is that the content of a complaint, as submitted to the Commission by a complainant or formulated by the Commission,

⁷⁶ The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 7.

⁷⁷ An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 40. When it comes to contested matters, decisions are made by the Competition Tribunal, on the record and following an open hearing of the views of the Commission and the other parties.

⁷⁸ The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 4.

⁷⁹ *Ibid* at 4.

⁸⁰ *Ibid* at 7.

⁸¹ (784/12) [2013] ZASCA 107 (13 September 2013). For ease of reference this case will be referred to as the *Omnia* decision throughout this paper.

⁸² OECD Competition Committee Policy Roundtables, Procedural Fairness: 'Competition Authorities, Courts and Recent Developments' (2011), at 240.

circumscribes or delineates the ambit of the ensuing investigation, the referral to the Tribunal and the ultimate adjudication of the complaint.⁸³

It is clear that the courts are attempting to establish certainty when it comes to procedural formalities in terms of the Competition Act, and rightly so. However, it is submitted that a uniform procedure is only useful if it came about through application of the correct jurisprudential approach. The Constitutional Court itself has noted that the rule of law requires the exercise of public power not to be arbitrary, commenting that decisions must be rationally related to the purpose for which the power was given.⁸⁴

Seeing as complaint initiation is the first step in the competition enforcement process, an action on which all others follow, ensuring that the processes implemented in taking this step are correct, valid and legal is crucially important. It is submitted that this is precisely what the appellate courts have been attempting to do when hearing appeals and undertaking reviews related to decisions by the Commission and Tribunal pertaining to complaint initiation and referral, and laying down certain procedural requirements as a result. It has been suggested that the underlying rationale for these requirements is that the administrative penalties that can be imposed under the Competition Act are akin to criminal penalties, and this therefore requires that the Commission's powers of investigation be interpreted in a manner that least impinges on the respondent's right to privacy, fair trial and just administrative action.⁸⁵

Should this contention hold true, it is submitted that it would raise some serious concerns for competition policy development. If history taught us anything, it was that competition law enforcement based on criminal proceedings is a path we do not want to go down again.

1.5 The Aims of this Study

The overarching purpose of this study will be to utilise different factors, such as South Africa's controversial history and the development of competition law policy in light thereof, the effect of democracy and the Constitution on competition enforcement and the legislature's intention codified in the provisions of the Competition Act, in an attempt to explain the judiciary's recent approach to competition law enforcement by the Competition Commission and Competition Tribunal.

This study therefore aims to –

- Critically review the Supreme Court of Appeal's findings in the cases of *Woodlands*

⁸³ Ibid at 240.

⁸⁴ Ibid at 241. According to the Constitutional Court it follows therefore that in order to pass constitutional scrutiny, the exercise of public power by the executive and other functionaries must at the very least comply with this requirement, otherwise it will fall short of the standards demanded by the Constitution. See *The Pharmaceutical Manufacturers Association of South Africa and Another* in re: Ex Parte Application of the President of the Republic of South Africa 2000 (2) SA 674 (CC).

⁸⁵ Ibid at 241.

Dairy v Milkwood Dairy (105/2010) [2010] ZASCA 104 (14 September 2010) and *Competition Commission v Yara (SA) (Pty) Ltd (784/12) [2013] ZASCA 107 (13 September 2013)* with reference to the preceding Competition Appeal Court judgments in each case;

- Analyze the approach of the Court in interpreting and applying the provisions of the Competition Act in each instance as it pertains to procedural formalities in complaint proceedings, with specific reference to the nature and powers of the Commission and Tribunal;
- Evaluate the effects of this difference in approach on the complaint initiation process as envisaged by the Act, in light of the purpose and aims of the legislation and the Constitution, with specific reference to the Constitutional Court's findings in the *Senwes*⁸⁶ judgment;
- Suggest which approach should be favoured by the Appeal Courts based on the above findings.

If competition policy is established by and large through case law, the approach followed by appellate courts with final jurisdiction in deciding competition matters should be scrutinized by the legal fraternity to ensure uniform application. Differing approaches by the same court in interpreting the same piece of legislation can only lead to confusion and unjust outcomes which the legislature could not have intended.

⁸⁶ *Competition Commission of South Africa v Senwes Limited* Case CCT 61/11 [2012] ZACC 6.

CHAPTER 2 – THE WOODLANDS AND OMNIA CASES: LAYING THE FOUNDATION FOR DEBATE

2. Introduction

The *Woodlands* and *Omnia* cases forms the basis of this enquiry, hence it is vital to have a closer look at how these disputes came about and eventually found their way to the Supreme Court of Appeal (the “SCA”).⁸⁷ The focus in both instances here will primarily be on the initiating complaint, its referral to the Tribunal for adjudication, the appeal to the Competition Appeal Court (the “CAC”)⁸⁸ and the final appeal to the SCA.

2.1 The *Woodlands* Case

The SCA handed down judgment in this case on 13 September 2013, concluding a somewhat controversial enquiry into complaint initiation and referral in terms of the Competition Act.⁸⁹ This case revolved around the requirements for valid complaint initiation and referral and the consequences of invalid initiation, with reference to the power of the Commission to issue interrogation summonses.

The adjudication leg of the process in this specific instance, began prior to the scheduled hearing before the Tribunal, of complaint referrals against Woodlands Dairy (“Woodlands”) and Milkwood Dairy (“Milkwood”), when both parties applied for an *in limine* determination of certain issue. During its determination, the Tribunal found that two summonses, to submit to interrogations and produce documents, issued in terms of section 49A were void.⁹⁰

Evidence obtained by way of these summonses was however not declared to be inadmissible and the Tribunal issued an order for its preservation, which meant the adjudication of the complaints referred had to continue.⁹¹

Woodlands and Milkwood appealed this decision to the CAC with the Commission lodging a cross-appeal, both which were upheld in part by the CAC.⁹² The Court agreed with the Tribunal that one of the summonses, issued to Woodlands, was void but that the other, issued to Milkwood was valid.⁹³ The CAC then ordered the Commission to return all evidence obtained by virtue of the void summons to Woodlands, which order led to a dispute between the parties and same seeking a clarification order by the CAC along with leave to appeal to the SCA which was dismissed.⁹⁴

The subsequent judgment of the SCA forms the basis of enquiry for the purposes of this study.

⁸⁷ The Supreme Court of Appeal will hereinafter be referred to as the SCA throughout this paper.

⁸⁸ The Competition Appeal Court will hereinafter be referred to as the CAC throughout this paper.

⁸⁹ Act 89 of 1998, as amended.

⁹⁰ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 2.

⁹¹ *Ibid* at para 2.

⁹² *Ibid* at para 3.

⁹³ *Ibid* at para 3.

⁹⁴ *Ibid* at para 4. The order directed the Competition Commission to “return forthwith to the applicants all documents and copies thereof in its or its legal representatives’ possession and control procured from the applicants together with transcripts of the interrogations of Dr Kleynhans, Mr Gush and Mr Fick, including the documents attached to affidavits included in the papers filed by the Competition Commission before the Competition Tribunal in the main proceedings”.

2.1.1 The Complaint

The initial ‘complaint initiation’ process had started back in June 2004 when a Mrs Louise Malherbe, a dairy farmer from Riversdal, wrote a letter to the Commission alleging that Nestlé, Parmalat and Ladismith Cheese were guilty of cartel activity through fixing the price of fresh milk.⁹⁵

It was common cause, the Court noted, that this letter from Mrs Malherbe was not a formal complaint by a complainant, but rather contained information submitted to the Commission under section 49B(2)(a) of the Act.⁹⁶

Following what seemed to be a high level investigation by the Commission, a memorandum was submitted to the then Commissioner recommending that a complaint be initiated against Parmalat and Ladismith Cheese in terms of section 4(1)(b).⁹⁷ It is important to note that no recommendation was made to initiate a complaint against Nestlé or any other member of the dairy industry, and furthermore, the memorandum did not suggest that the investigators uncovered any information about contraventions of any other provisions of the Act.⁹⁸

Not following their recommendations, the Commissioner went ahead and initiated a single complaint ‘concerning’ these entities in February 2005.⁹⁹ The Court noted that the initiating statement recorded that the purpose of the ‘contact’ reflected in the memorandum was to establish “whether there is anticompetitive behaviour at ‘any level’ in the milk producing industry”.¹⁰⁰

The Commissioner subsequently stated that he had formed the belief¹⁰¹ that there existed anticompetitive behaviour in the milk industry and proceeded to initiate without any qualification, a full investigation into the milk industry.¹⁰²

During March 2005, an interrogation summons was issued by the Commissioner against the then managing director of Woodlands, to be interrogated and produce documents, with the summons itself recording that it had been issued in relation to a full investigation based on the Commissioner’s reasonable belief in the existence of anticompetitive behaviour in the milk industry, which apart from price fixing and abusive behaviour, included restrictive vertical

⁹⁵ Ibid at para 21.

⁹⁶ Ibid at para 21. Section 49B(2)(a) permits any person or entity to provide the Competition Commission with information concerning an alleged prohibited practice without submitting a formal complaint (at para 23).

⁹⁷ Ibid, at para 23. In their memorandum the investigators that followed up Mrs Malherbe’s information, Messrs Liebenberg and Theron also recommended that a complaint be initiated against Clover under section 8 of the Act.

⁹⁸ Ibid at para 23.

⁹⁹ Ibid at para 24. The SCA suggest that if the Commissioner followed the recommendations of the investigators, the proceedings before it would never have arisen (at para 24.)

¹⁰⁰ Ibid at para 24.

¹⁰¹ The Commissioner stated that he had formed this belief in the light of the memorandum provided, the letter by Mrs Malherbe and public comments made two years earlier by the Minister of Agriculture about the alleged high food prices (at para 24).

¹⁰² Ibid at para 26.

practices in terms of section 5.¹⁰³ The latter had not even been mentioned in the complaint initiation. A similar summons for the interrogation of a representative of Milkwood was then issued, seemingly based on ‘information’ gathered as a result of what can be argued to be the previous Woodlands summons.¹⁰⁴

Interestingly, it was noted by the Court that during the latter interrogation, the Commission stated the investigation was in relation to prohibited practices in the milk industry and that the party subject to the complaint was Parmalat.¹⁰⁵

The Commission did not disclose that Woodlands Dairy was being investigated and that the whole purpose of the interrogation was to extract information from Milkwood regarding the relationship between the two businesses. Even more telling, was that Parmalat was not mentioned once during the course of the interrogation.¹⁰⁶

On appeal to the Tribunal, it was found that both summonses had been defective, albeit for different reasons.

2.1.2 The Referral

The 2005 complaint was not referred to the Tribunal by the Commissioner, it can be argued, due in some part to the invalidity of the interrogation summonses. Instead, the Commissioner referred six complaints that were initiated in 2006.¹⁰⁷ The first accused Woodlands Dairy and others of price fixing, two more complaints were initiated against Woodlands Dairy a few months apart and the final complaint involving both Woodlands and Milkwood was initiated in December of that year in relation to practices prohibited by section 4(1).¹⁰⁸ The SCA noted that the remaining complaints did not directly affect either Woodlands or Milkwood.¹⁰⁹

2.1.3 The CAC judgment

The appeal by Woodlands and Milkwood (the Appellants) to their continued prosecution by the Tribunal resulted in the CAC granting an order in the following terms (only the relevant portion of the order is repeated here) – “1,3 The Respondent is directed to return forthwith to Woodlands all documents and any copies thereof in their possession and control or of their legal representatives procured from Woodlands in these proceedings, together with transcripts of the interrogation of Kleynhans and Gush.”¹¹⁰

¹⁰³ Ibid, at para 27. The Act defines these practices as an agreement between parties in a vertical relationship that has the effect of substantially lessening or preventing competition in a market (see section 5 of Chapter 2). An example of such an agreement would be resale price maintenance, where upstream supplier attempts to control or maintain the minimum price at which a product is resold by its customers (see Neuhoff M (ed) et al, *A Practical Guide to the South African Competition Act*: Durban Butterworths, (2006) at 88).

¹⁰⁴ Ibid at para 30.

¹⁰⁵ Ibid at para 32. The SCA notes that not only was this statement palpably untrue and that Parmalat was but one of the three companies named in the initiation.

¹⁰⁶ Ibid at para 32.

¹⁰⁷ Ibid at para 37.

¹⁰⁸ Ibid at para 37.

¹⁰⁹ Ibid at para 37.

¹¹⁰ *Woodlands Dairy (Pty) Ltd & Milkwood Dairy (Pty) Ltd v The Competition Commission 88/CAC/MAR09* [7 December 2009], at 2.

Following the Tribunal's determination that both the Woodlands summons and the Milkwood summons were defective, but still maintaining that both Appellants be prosecuted in terms of the complaint initiation, the CAC went further by declaring that the Milkwood summons was validly issued.¹¹¹ It made the above order but did not go as far as to declare the prosecution of the Appellants by the Tribunal to be invalid, and subsequently the Appellants requested an order from the CAC clarifying its decision.¹¹²

As stated by the CAC, the question the Appellants required to be answered, the CAC having accepted and found that the Woodlands summons was invalid, was whether the order made provided that the Commission could directly or indirectly use evidence obtained as a result of the unlawful summons against Woodlands.¹¹³

The Appellants furthermore applied for leave to appeal to the SCA, the determination of which forms the noteworthy portion of the CAC's reasoning in its judgment on the matter. The argument in favour of being granted leave to appeal advanced on behalf of the Appellants was summarised by the court as follows:

- The Competition Commissioner sought on 9 February to initiate a complaint. The complaint which he initiated was against the "milk producing industry".
- In terms of section 49B of the Act, the Commissioner may initiate a complaint against an alleged prohibited practice. Therefore, the complaint must specify the enterprises against which the complaint is lodged.
- It cannot be a complaint against an industry.¹¹⁴

The CAC did not agree, stating that such an approach cannot be sustained by the precise wording of the Act.¹¹⁵ On the CAC's interpretation of the relevant statutory provisions, the Act provides that the Commissioner may initiate a complaint against an alleged prohibited practice, no more or no less. In turn, the meaning of a prohibited practice is set out in Chapter 2 of the Act.¹¹⁶ The Court held further that there is nothing in the Act that would suggest an investigation against an industry comprising of a number of firms is not a matter which was not envisaged by the Act or the wording of its relevant provisions.¹¹⁷

It illustrated the logic behind its reasoning with reference to cartels¹¹⁸, stating that it would be very difficult, if not impossible, to initiate proceedings against a cartel as the Commission would

¹¹¹ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 2.

¹¹² *Ibid*, at para 2 & 3.

¹¹³ *Woodlands Dairy (Pty) Ltd & Milkwood Dairy (Pty) Ltd v The Competition Commission* 88/CAC/MAR09 [7 December 2009], at 2.

¹¹⁴ *Ibid* at 11.

¹¹⁵ *Ibid* at 11.

¹¹⁶ *Ibid* at 12.

¹¹⁷ *Ibid* at 12.

¹¹⁸ The cartel arrangement involves competitors meeting to agree on types of products offered at specific prices and other terms such as discounts, with the main objective of keeping prices to customers high (see The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 43.

have to specify each firm forming part of the cartel without having sufficient knowledge as to the part played by the respective firms or even which firms are involved.¹¹⁹ This interpretation, the Court contended, is “not reflective of the purposive jurisprudence which seeks to balance the exercise of power, captured in a doctrine of proportionality which is central to the constitutional structure.”¹²⁰

In short, the Appellants’ argument before the court was that because of the letter of 9 February 2005, an investigation followed into an industry that was not sustainable in terms of sections 49A and B of the Act.¹²¹ Accordingly, due the fact that the investigation was not sustainable, everything that flowed there from should be set aside, including the information procured¹²² and, it is submitted, so too the two complaints initiated during the course of 2006 which was based on this information.

It appears from the judgment that the view taken by the Court was that by initiating the 2006 complaints, the Commission acted to correct the errors it made during the initiation of the initial complaint in 2005. It did not regard the arguments advanced by the Appellants that the latter complaints should be set aside because the Commission “overstretched the scope of its power when it initiated its initial complaint”¹²³ as a possible basis for granting special leave to appeal its decision.¹²⁴ To find in favour of the Appellants, the Court indicated that, by setting aside the 2006 complaints on the basis of finding that the 2005 complaint was invalid, would be tantamount to preventing the Commission from ever correcting any errors it makes in exercising its powers in the future.¹²⁵

In concluding its findings, the CAC was satisfied that disallowing the information obtained via the illegal Woodlands summons was sufficient ‘relief’ for the Appellants, without finding that either the 2005 complaint initiation or the complaints initiated in 2006 were invalid as a result. The Woodlands summons did not in the court’s view pass an intelligibility test as a reasonable reader of the summons would not know what case it is required to meet, which in law is required in order for a summons to be regarded as valid.¹²⁶

2.1.4 The SCA judgment

Harms DP made it clear at the outset of the SCA’s judgment¹²⁷ that he disagreed with the views of the CAC that due to the fact that it may be difficult to establish the existence of a prohibited

¹¹⁹ Ibid at 12.

¹²⁰ Ibid at 12 – 13. The CAC stated here that there is nothing in the Act to suggest that an investigation into an industry is not a matter that was envisaged by, nor does it appear in the wording, of the Act.

¹²¹ Ibid at 13. The heads of argument prepared by the appellants posed the question whether the Tribunal was correct in holding for Woodlands and Milkwood as it did, that on the facts, in a central respect, the Commission was unauthorised in procuring its documents and interrogating its officers in the way that it did. Similarly, was the Tribunal then wrong in leaving undetermined the other attacks on the Commission’s actions (at 13 – 14).

¹²² Ibid at 15.

¹²³ Ibid at 16.

¹²⁴ Ibid at 16.

¹²⁵ Ibid at 16.

¹²⁶ Ibid at 19 – 20.

¹²⁷ The bench consisted of Harms DP, Lewis, Heher, Ponnar JJA and Ebrahim AJA, with the latter four judges concurring.

practices, such as cartel activity for example, a generous interpretation of the Commission's procedural rights would be justified.¹²⁸ Such an approach, the Court notes, would imply that the more difficult a crime is to prove, the fewer procedural rights an accused would have.¹²⁹

The Court stated that in competition matters, a matter may reach the Tribunal as a result of being referred to it by the Commission and as such, a complaint referral by the Commission is a jurisdictional fact for the exercise of the Tribunal's powers of adjudication.¹³⁰ It follows therefore, that a complaint referral is a prerequisite to the Tribunal exercising its powers in competition matters.¹³¹ When it comes to complaint initiation, the Court noted that the Commission has exclusive jurisdiction to initiate a complaint in terms of section 49B(1) and as a result, posed the question whether there could be any jurisdictional requirements for the initiation of a complaint by the Commissioner.¹³²

Seemingly answering this question in the affirmative, Harms DP stated that as a matter of principle, the Commissioner must at the very least "have been in possession of information 'concerning an alleged practice' which objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice"¹³³ failing which, there could not have been a rational exercise of the Commissioner's power to initiate a complaint.¹³⁴ According to the Court this approach is consistent with the provisions of section 49B(2)(a) which permits anyone to provide information concerning a prohibited practice to the Commission without submitting a complaint.¹³⁵

The intricacies relating to the initiation and referral of a complaint was subsequently dealt with by the Court in several uniquely separate steps¹³⁶: Firstly, the Court drew an interesting distinction between complaints initiated by the Commission and those initiated by a third party complainant when it analyzes the meaning of the wording of section 49B(3). In both instances, the Act provides that an investigation 'must' follow as quickly as practicable at the direction of the Commissioner, however here the Commission submitted that an investigation "may" precede the initiation of a complaint by the Commission while the Appellants argued that it "must" precede a complaint initiation.¹³⁷ Although the Court noted that when it comes to statutory interpretation, 'must' has often been equated with 'may', however it indicated that

¹²⁸ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 11.

¹²⁹ *Ibid* at para 11.

¹³⁰ *Ibid* at para 12.

¹³¹ *Ibid* at para 12. The SCA here remarked that a complaint referral by the Commission is (subject to section 50(1) of the Act) a jurisdictional fact for the exercise of the Tribunal's powers.

¹³² *Ibid* at para 13. The Court notes that this section also deals with the submission of formal complaints, being complaints submitted by a member of the public in the prescribed form and not one put in motion by the commissioner (at para 14).

¹³³ *Ibid* at para 13.

¹³⁴ *Ibid* at para 13.

¹³⁵ *Ibid* at para 13.

¹³⁶ *Ibid* at para 15 – 18. It is submitted that the manner in which the court describes the differences between initiating and referring a complaint may be indicative of the approach the court will follow in the latter parts of its judgment.

¹³⁷ *Ibid* at para 16.

submissions about the meaning of the Act here must be tested against the wording employed in the Act itself.¹³⁸

In the opinion of the SCA, an investigation is necessary when a formal complaint is submitted by a third party complainant.¹³⁹ However, with the informal submission of facts to the Commission or the uncovering of facts in the course of another investigation, the Commission could reasonably be said to have discretion whether to launch an investigation prior complaint initiation.¹⁴⁰ Based on the explicitly selective use of the words ‘must’ and ‘may’ through the body of the Act, the Court criticised the legislature’s decision to deal with both distinct avenues of complaint initiation in the same way, stating that the same word cannot bear different meanings in the same sentence and “even recourse to purposive construction superimposed on benevolent construction does not help”.¹⁴¹

Secondly, the Court appears to have agreed with the CAC’s rationalisation in the *Sappi* case¹⁴² that the powers of the Commission do not extend to the investigation of conduct which it “generally” considers to be anticompetitive behaviour. Instead, a complaint can only relate to an ‘alleged contravention of the Act’ as specifically contemplated by an applicable provision, otherwise the Commission would be acting beyond its jurisdiction.¹⁴³

Following this line of thought, the Court rejected the Commission’s submission that its power to summons a person for the purpose of interrogation, a power the Court deemed far-reaching and invasive, can be used for a ‘fishing expedition’ without the initiation of a valid complaint based on a reasonable suspicion.¹⁴⁴

Applying these steps practically, the actions of the then Commissioner at the initiation stage of this specific complaint came under fire by Harms DP and his learned colleagues. When a complaint was initiated against the milk industry as a whole, the Court was of the belief that the Commissioner has been oblivious to the fact that he was obliged to initiate a complaint against a prohibited practice that would lead to an investigation by the Commission’s inspectors.¹⁴⁵

The SCA proceeded to lambast the manner in which both the Tribunal and the CAC dealt with the invalidity of the 2005 complaint initiation, or more precisely, the complete lack thereof. It was the Court’s view that the CAC’s use of the example of the impossibility of initiating a

¹³⁸ Ibid at para 16.

¹³⁹ Ibid at para 17. The court states that it would otherwise not be possible for the Commission to refer the complaint to the Tribunal or to issue a notice of non-referral to the complainant.

¹⁴⁰ Ibid at para 18.

¹⁴¹ Ibid at para 18.

¹⁴² *Sappi Fine Paper (Pty) Ltd v Competition Commission of SA and Papercor CC 23/CAC/SEP02*. Here the CAC found that the Commission is only empowered to investigate a complaint alleging contraventions of specific provisions of the Act and does not have the power to investigate conduct generally considered to be anti-competitive (see Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 145.

¹⁴³ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 19.

¹⁴⁴ Ibid at para 20. Otherwise, the SCA holds, it would mean that the exercise of this power would be unrestricted because there is no prior judicial scrutiny as is the case with a search warrant under section 46.

¹⁴⁵ Ibid at para 26. It agreed with the Tribunal’s contention that competition law is about anticompetitive effects that take place in markets, not in industries, and noted that the Commissioner did not have any direct evidence to support his belief that such conduct was taking place in the industry under scrutiny.

complaint against a cartel within a specific industry to justify its approach here, blatantly ignored “the structure of the Act, the impact of the Constitution on its interpretation, the CAC’s own jurisprudence, not only in *Sappi* but also in *Glaxo Wellcome*, and the relevant facts.”¹⁴⁶

As such, the CAC neglected to realise that an initiation must at the very least have a jurisdictional ground based on a reasonable suspicion, with both the initiation and the subsequent investigation relating to the information available or the complaint filed by a complainant.¹⁴⁷

It appears that the Court then proceeded to provide a ‘checklist’, at the very least some sort of guideline, against which a complaint initiation can be tested, by comparing it to a summons and stating that –

- Firstly, it must survive the test of legality and intelligibility. The scope of an interrogation or discovery summons may not be wider than the initiation.
- Secondly, the Act presupposes that a complaint (subject to amendment and fleshing out) as initiated will be referred to the Tribunal for adjudication. The referral of an investigation into all levels of an entire industry is hardly rational.
- Thirdly, a suspicion against certain participants in a market cannot be used to investigate all market players.
- Finally, the information gathered about additional transgressions during a validly initiated investigation can be used to amend a complaint or initiate a different complaint and further investigations.¹⁴⁸

Turning its attention to the complaints initiated during the course of 2006, the Court proceeded to highlight the deficiencies in the approach adopted by the Commission. The fatal element of these subsequent initiations, the Court noted, is that they all relate directly to, and came about as a direct result of, the 2005 investigation.¹⁴⁹

Finding the 2005 complaint to be invalid, it followed therefore that the 2006 complaints were similarly invalid, coming about only as a direct result of an invalid complaints procedure.¹⁵⁰ As such, without the initial invalid complaint initiation and procedure, the later complaints would never have materialised.¹⁵¹

In concluding its judgment, the Supreme Court of Appeal set aside not only the complaints initiated by the Commission against Woodlands and Milkwood in 2006, but also the referral of those complaints to the Tribunal later that year.

¹⁴⁶ Ibid at para 34.

¹⁴⁷ Ibid at para 34.

¹⁴⁸ Ibid at para 35 – 36.

¹⁴⁹ Ibid at para 43. Harms DP remarks that even though he agrees that as a general rule the determination of whether evidence is admissible in a competition matter should be left to the Tribunal, this general rule does not find application in the present case.

¹⁵⁰ Ibid at para 44.

¹⁵¹ Ibid at para 43. In making this finding the SCA applied the approach in *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) paras 71-73.

2.2 The *Omnia* Case

The SCA handed down judgment on 13 September 2013 in this case¹⁵², sparking what many believe to be a complete turnaround on its previous approach to complaint initiation and referral set down in the *Woodlands*¹⁵³ case. It essentially involved the issue of tacit complaint initiations by the Commissioner in terms of section 49B(1) where a referral to the Tribunal embodies new complaints not covered by a complaint submitted by a complainant in terms of section 49B(2)(b).

Following the submission of a third party complaint by Nutri-Flo against Sasol Chemical Industries Ltd (“Sasol”), the Commission referred the complaint to the Tribunal for adjudication. Even though Nutri-Flo did not seek any relief against either Yara (South Africa) (Pty) Ltd (“Yara”) or Omnia Fertiliser Ltd (“Omnia”) by way of its complaint, the Commission included in its complaint referral allegations of prohibited practices against both parties.¹⁵⁴ In reaching a settlement agreement with the Commission, Sasol provided information of collusive dealings with Yara and Omnia which did not form part of the Commission’s initial investigations and agreed to assist in the latter’s prosecution.¹⁵⁵

Yara and Omnia both indicated that they considered this incriminating information provided by Sasol to go beyond the scope of the complaint referral and the Commission attempted to amend its referral which the companies vehemently opposed.¹⁵⁶ This led to the Commission lodging an application for the amendment of its referral and a counter-application by Yara and Omnia to have the referral set aside, which made its way via the Tribunal to the CAC and eventually formed the subject matter of the SCA’s review.¹⁵⁷ The Tribunal allowed the Commission’s amendment application, while on appeal, the CAC sided with the counter-application and set aside the initial referral.¹⁵⁸

2.2.1 The Complaint

On 3 November 2003, Nutri-Flo CC and Nutri-Flo Fertiliser CC (“Nutri-Flo”), a blender, distributor and supplier of fertilizer, submitted a complaint to the Commission in terms of section 49B(2)(b) in the prescribed form CC1 concerning two specific companies in the Sasol group.¹⁵⁹ It is important to note that the CC1 did not make mention of any other parties apart from Sasol. Simultaneously with the complaint Nutri-Flo also lodged an urgent application for interim relief

¹⁵² The bench consisted of Brand, Nugent, Malan, Petse and Saldulker JJA with the latter four concurring.

¹⁵³ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010).

¹⁵⁴ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 5 & 7.

¹⁵⁵ *Ibid* at para 8.

¹⁵⁶ *Ibid* at para 9.

¹⁵⁷ *Ibid* at para 9.

¹⁵⁸ *Ibid* at para 9.

¹⁵⁹ *Ibid* at para 5. The CC1, under “Description of Complaints”, stated that Sasol had imposed price increases in respect of raw materials its supplies to Nutri-Flo so such an extent so as to render the latter’s continued operation unviable and to constitute various prohibited practices set out in the attached affidavit.

with the Tribunal in terms of section 49C, with the same affidavit accompanying both the application and the complaint initiation.¹⁶⁰

In this affidavit, three parties were cited as respondents, being Sasol, Yara and Omnia, although it clearly stated that the latter two were joined in the application not because relief was sought against them, but because of their legal interest in the matter.¹⁶¹ The content of the affidavit made mention of Yara and Omnia as Nutri-Flo's main competitors in the market, with Sasol being the company's only supplier of the raw materials needed for the manufacture of fertilizer.¹⁶² It stated that Sasol was in fact the only producer of ammonia in South Africa, the main source of Nitrogen as one of the two base elements of fertilisers.¹⁶³

Furthermore, Nutri-Flo alleged that the importation of Urea, which can be used as an ammonia substitute, was being controlled by a cartel of which Sasol, Yara and Omnia are members.¹⁶⁴ As such, Nutri-Flo complained that an increase in Sasol's prices that year resulted in the latter being guilty of excessive pricing, exclusionary pricing and discriminatory pricing in contravention of sections 8 and 9 of the Act.¹⁶⁵

2.2.2 The Referral

After launching an investigation into Nutri-Flo's initiating complaint, the Commissioner during May 2005, proceeded to refer a complaint against Sasol, Omnia and Yara to the Tribunal for adjudication. The content of the referral not only included complaints of exclusionary and excessive pricing by Sasol in contravention of subsections 8(a) and 8 (c) of the Act, but more importantly also contained the allegation that all three parties engaged in collusive dealings in contravention of section 4(1)(b), alternatively section 4(1)(a) of the Act.¹⁶⁶

¹⁶⁰ Ibid at para 5.

¹⁶¹ Ibid at para 5.

¹⁶² Ibid at para 6.

¹⁶³ Ibid at para 6.

¹⁶⁴ Ibid at para 6. It is interesting to note that even though Nutri-Flo alleged that Yara and Omnia are part of this cartel, its affidavit specifically stated both companies had been joined in the application because of their legal interest in the matter and that no relief was sought against them.

¹⁶⁵ Ibid at para 6. Price discrimination can be defined as selling the same product or service to buyers at different prices, where the differentiation in price does not reflect the difference in the cost of servicing the respective customers. An excessive price is one that bears no reasonable relation to the economic value of that good or service, while exclusionary pricing constitutes pricing conduct that prevents a competitor from entering into or expanding within a market (see Neuhoff (ed) M et al (2006), *A Practical Guide to the South African Competition Act*: Durban Butterworths, at 112, 117 & 132).

¹⁶⁶ Ibid at para 7. Section 4(1) of the Act provides as follows –

(1) 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 –

(a) 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 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.

2.2.3 The CAC judgment

Following the decision by the Tribunal to grant the Commission's application to amend its initial referral, Yara and Omnia (the "Appellants") appealed to the CAC not against any particular facet of the Tribunal's judgment, as was the case in *Woodlands*, but seemingly to the amendment of the referral as a whole. In upholding the appeal by Yara and Omnia, the CAC turned to its own jurisprudence and proceeded from the premise of what was referred to as 'the referral rule' by counsel for the Commission.¹⁶⁷

In its original form, this rule essentially requires that the referral made by the Commission to the Tribunal must correspond and may not go wider than the complaint submitted by a complainant or initiated by the Commission, failing which, the referral must be set aside.¹⁶⁸ Following this strict approach, the CAC held that absent any initiation of a complaint by the Commission itself, it may only refer to the Tribunal those prohibited practices which the complainant intended to constitute distinct complaints.¹⁶⁹ The rationale of the CAC in reaching this conclusion was summarised by Dumbuzo JA by way of the following example:

"Information relevant to a s 8 case against X may point to a s 4 contravention by X, Y and Z. However, if the information is supplied by the complainant solely in the support of the s 8 case and, in circumstances where the private party did not signal an intention also to be a complainant in respect of a s 4 case, the submission of the information does not constitute the initiation of a s 4 complaint."¹⁷⁰

Applying the so-called 'referral rule' to the given set of facts in this case, the CAC concluded

- Firstly, that the complaint by Nutri-Flo was aimed exclusively at Sasol and was never intended to be a complaint against Yara and Omnia at all; and
- Secondly, and in any event, the complaints against Yara and Omnia that were referred to the Tribunal by the Commission went wider than the initiating Nutri-Flo complaint, and as such, the referral could not stand.¹⁷¹

Accordingly, the appeal by Yara and Omnia was upheld.

2.2.4 The SCA judgment

It is noteworthy to mention that by the time this case reached the Supreme Court of Appeal, Yara had been liquidated and Sasol neither supported nor opposed the appeal, hence Omnia remained as the only interested party hence the reason the case is commonly referred to as the "*Omnia case*".¹⁷² For the purposes of this study and for ease of reference, this case will continue to bear its common reference.

¹⁶⁷ Ibid at para 11.

¹⁶⁸ Ibid at para 11.

¹⁶⁹ Ibid at para 11.

¹⁷⁰ Ibid at para 11.

¹⁷¹ Ibid at para 12.

¹⁷² Ibid at para 2.

In its appeal to the SCA, the Commission challenged firstly the extension of the referral rule by the CAC to include the intent of the complainant and secondly the “referral rule” itself.¹⁷³ In examining these objections the Court turned to the CAC’s jurisprudence in which the rule is believed to have its origins. For ease of reference, these cases and their findings will be mentioned separately and briefly below where applicable.

According to the Court, one of the cases in which the referral rule was founded so to speak was that of *Glaxo Wellcome*.¹⁷⁴ In upholding an objection by a respondent to a third party complaint referred by the complainant itself after a deemed non-referral, the CAC determined that the Act does not allow a complainant to bypass the Commission by holding back some of its complaints, get a non-referral and then add to the complaint information not disclosed to the Commission.¹⁷⁵ The CAC held that the correct approach is to first determine what conduct is mentioned in the complaint and how it relates to specific prohibited practices, and then to consider the referral in order to see whether the conduct complained of is substantially the same.¹⁷⁶

The SCA in *Omnia* further noted that the extension of the referral rule to include the intention of the complainant appears to come from the CAC’s reasoning in the *Clover*¹⁷⁷ judgment. The CAC’s reasoning appeared to employ a fairly literal approach to the interpretation of the facts in this particular instance. The Court made explicit reference to the provisions of the Act in justifying its approach and, it is submitted, sought to draw a clear distinction between mere information submitted to the Commission “complaining” of certain conduct so to speak, and the actual submission of a formal complaint.

By applying these authorities to the facts at hand, Brand JA agreed with what he refers to as the ‘factual finding’ of the CAC that, the complaint submitted by Nutri-Flo was aimed exclusively at Sasol.¹⁷⁸ In short, Nutri-Flo did not “intend” to complain against any prohibited practice by *Omnia*¹⁷⁹, however in the SCA’s opinion, this was not the “intent” that the *Clover* case had in mind.

The Court believed that the *Clover* judgment merely links intention to the distinction between submitting information on the one hand and the submission of a complaint on the other. The

¹⁷³ Ibid at para13.

¹⁷⁴ *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 (21 October 2002).

¹⁷⁵ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 13.

¹⁷⁶ Ibid at para 13.

¹⁷⁷ *Clover Industries Ltd v The Competition Commission* 78/CAC/1 Jul 08 (12 November 2008). In this case Clover and its co-respondents objected to a referral by the Commission on the basis that it derived from a complaint submitted to the Commission by a Mrs Malherbe in terms of s 49B(2)(b); that the one year time period provided for in s 50(2) had lapsed since submission and was therefore time barred to be referred. The Commission denied in acted in terms of this section, arguing that it had initiated the complaint in terms of s 49B(1) on information provided by Mrs Malherbe and as such it was referral in terms of s 50(1). The CAC held that Mrs Malherbe did not intend to be a complainant and distinguished Glaxo Wellcome from this case stating that the party who completed the document in the Glaxo case clearly intended to be a complainant (see *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 15.

¹⁷⁸ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 16.

¹⁷⁹ Ibid at para 17.

SCA remarked that once it is determined that what was submitted was intended to be a complaint, it does not matter at whom the complaint was aimed.¹⁸⁰ Accordingly, it was held that the extension of the referral rule to the present matter was unsustainable and as a result the fact that Nutri-Flo's complaint was not directed at Omnia was of no consequence.¹⁸¹

Turning its attention to the scope of the referral, the SCA again agreed with the CAC's findings of fact.¹⁸² The referral by the Commission relied on prohibited practices by Sasol, Omnia and Yara in contravention of the provisions of section 4 of the Act. The Court remarked that if the only source of this complaint was indeed the Nutri-Flo complaint it would have been hopelessly deficient as the statements made therein do not seem to be based on any accompanying facts.¹⁸³ These charges of market division, price fixing and bid rigging were not covered by the Nutri-Flo complaint, a fact that seem to be implied in the wording of the referral itself. The referral states that "the Commission has in the course of its investigations uncovered further instances of anti-competitive conduct committed by the respondents...These activities are referred to the Tribunal herewith as well".¹⁸⁴

The Court suggested that if the referral rule was to be strictly applied to the facts of the present matter, then the order made by the CAC would be upheld.¹⁸⁵ However, in looking at the Commission's challenge to the referral rule itself, the SCA distinguished the *Glaxo Wellcome* and *Clover* cases from the situation under scrutiny *in casu* and found merit in requiring a correlation between the complaint submitted by a third party and the complaint eventually referred to the Commission.¹⁸⁶ Brand JA explained this reasoning by setting out instances where and why determining the ambit of a third party complaint is necessary and linking the scope of the complainant's 'ownership' of the complaint and the regulation of the relationship between the complainant and the Commission as one of the purposes of such a determination.¹⁸⁷

The defining element of the SCA's approach in reviewing the CAC's findings is the distinction it draws between a complaint submitted by a private person and a complaint initiated by the Commission. Treating these separate processes as if they are the same, as was done in the CAC's *Netstar*¹⁸⁸ judgment, was according to Brand JA the point where the CAC had erred in the past.¹⁸⁹

¹⁸⁰ Ibid at para 16.

¹⁸¹ Ibid at para 16.

¹⁸² Ibid at para 17.

¹⁸³ Ibid at para 17.

¹⁸⁴ Ibid at para 17.

¹⁸⁵ Ibid at para 18.

¹⁸⁶ Ibid at para 18.

¹⁸⁷ Ibid at para 18. The SCA held that in cases like *Glaxo*, where the complaint is referred by the original complainant and not by the Commission, the purpose of the requirement is to protect the legislature's preference of the Commission as its investigator and prosecutor of first choice. In *Clover* on the other hand, the referral would have been time barred in terms of s 50(2) if it was the company submitted by the original complainant.

¹⁸⁸ *Netstar (Pty) Ltd v Competition Commission* 2011 (3) SA 171 (CAC). The CAC in this case held that the Tribunal's jurisdiction is confined to a consideration of the complaint 'so referred' and the terms of that complaint are likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person.

¹⁸⁹ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 20.

When it comes to formalities, the Court suggested that the legislature draws a clear distinction between a complaint initiated in terms of section 49B(1), where no formalities are prescribed, and a complaint submitted in terms of section 49B(2)(b) which must be in the prescribed form.¹⁹⁰ The Commission does not ‘initiate’ a complaint but starts the process by directing an investigation, hence it appears that all that is required in terms of formalities is a decision by the Commission to open a case: In the opinion of the SCA, this decision can be informal or even tacit.¹⁹¹

According to the SCA, a further problem with the CAC’s approach in reaching its decision to uphold Omnia’s appeal is that it conflates the requirements for initiating a complaint and the requirements for a referral and in doing so completely misses the reason a complaint is initiated in the first place.¹⁹²

Accordingly, the Court held that the CAC’s motivation that a complaint, whether initiated by the Commission or submitted by a private party, must clearly set out the conduct complained of so that the contravening party can know what the charge against it is goes against the SCA’s own jurisprudence laid down in *Simelane NO v Seven Eleven Corporation SA (Pty) Ltd*.¹⁹³ The latter decision was informed by the Tribunal’s statements set out in *Norvatis*¹⁹⁴ and summarised as follows:

- The purpose of complaint initiation is to trigger an investigation that might eventually lead to a referral.
- An initiation is therefore only the preliminary step in a process that does not affect a respondent’s rights.
- The principles of administrative justice are observed in the referral and the adjudication phase that takes place before the Tribunal.
- It is at the adjudication phase of the process that a respondent becomes entitled to state its side of the case.¹⁹⁵

The SCA agreed with the CAC where it found there is no provision in the Act or the Tribunal rules which allows for the amendment of a complaint, however, it disagreed that this applies to

¹⁹⁰ Ibid at para 21.

¹⁹¹ Ibid at para 21.

¹⁹² Ibid at para 24.

¹⁹³ 2003 (3) SA 64 (SCA) para 17.

¹⁹⁴ *Novartis SA (Pty) Ltd v Competition Commission* (CT22/CR/B Jun 01). In this case the applicants alleged that the Commission acted *ultra vires* by referring a third party complaint to the Tribunal outside of the prescribed time limit. The applicants alleged that their constitutional rights were violated by the procedures employed by the Commission. The applicants applied to the Tribunal for a stay in its proceedings while its appeal lodged at High Court level regarding the same set of facts was being heard. The Tribunal held that the administrative efficiency of the Commission in rendering its duties could be severely affected if, in exercising its discretion in terms of s 50(2), its every action would be subject to scrutiny under the principle of administrative review in the manner suggested by the applicants.

¹⁹⁵ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 24.

complaints initiated by the Commission.¹⁹⁶ The SCA proceeded to distinguish its own findings in the *Woodlands* case from the basis of the dispute in this case and cautioned against interpreting individual statements made in that judgment on the subject at hand in the same light as statutory provisions.¹⁹⁷

The final death blow to the referral rule as a whole is dealt by the SCA in its referral to the Constitutional Court's decision in the *Senwes* case, a decision it regards as "wholly destructive of the CAC's formulation of the referral rule".¹⁹⁸ In *Senwes*, the Constitutional Court found that the fact that a complaint is not covered by a referral, the Tribunal is not precluded from determining that complaint. Even though the Tribunal is not empowered to initiate a hearing, this does not by definition mean that it cannot determine complaints brought to its attention during the course of deciding a referral.¹⁹⁹

The SCA suggested that to demand that a referral corresponds with the contents of the complaint initiated is nonsensical if a complaint initiation on the part of the Commission consist of nothing more than an informal decision to investigate.²⁰⁰

In concluding its judgment the SCA argued that it can be inferred that in this instance, the Commission decided to tacitly initiate complaints against Sasol, Omnia and Yara that fell outside the scope of Nutri-Flo's complaint submitted to the Commission, by way of its decision to investigate these complaints.²⁰¹ The Commission's appeal was accordingly upheld.

¹⁹⁶ Ibid at para 25.

¹⁹⁷ Ibid at para 26.

¹⁹⁸ Ibid at para 27.

¹⁹⁹ Ibid at para 27. Brand JA's view was accordingly that if the Tribunal can consider a complaint not raised in the referral, it must follow that a referral is not confined to the parameters of the original complaint.

²⁰⁰ Ibid at para 28.

²⁰¹ Ibid at paras 30 & 31.

CHAPTER 3 – AN ANALYSIS OF CONFLICTING APPROACHES AND THE SENWES COMPARISON

3. Introduction

It can be argued that what makes competition law and its enforcement somewhat unique is the specialist nature of the subject matter which it aims to regulate. Acknowledging this, the legislature purposively decided to create specialized enforcement institutions outside of the normal court system, which, it is submitted, by their very nature and the powers attributed to them have given rise to the need for an equally unique approach to competition law appeal and review proceedings.

Our courts have always favoured keeping specialised disputes in the realm of the bodies tasked with their resolution, and the Commission and Tribunal should not be regarded as any different. It can accordingly be argued that any appeal court, in this case the CAC and the SCA, having the responsibility of reviewing the decisions and procedures of such institutions should as a matter of principle and approach keep this in mind.

It has been said that in South Africa, there has been speculation in recent years regarding the nature and scope of the powers conferred on the Commission and the Tribunal.²⁰² The reason for this seeming uncertainty can be found in the divergent opinions in the case law surrounding these powers, the interpretation of provisions relating to administrative penalties as well as the introduction of new criminal sanctions in the Act.²⁰³ As case law is regarded as the main tool used in developing competition law and policy²⁰⁴, a consistent approach to interpreting the competition authorities' powers can only aid in establishing uniform procedure.

As has already been mentioned, the Act established the Commission and Tribunal as bodies ,independent of each other, tasked with the investigation and adjudication of alleged prohibited competition law practices respectively. Every action taken by these *sui generis* institutions can therefore be argued to be an exercise of their powers, hence the ever increasing number of challenges mounted in the appeal courts against the seemingly arbitrary extension of the scope of these powers by the authorities when it comes to procedure.

Although they are constituted as independent institutions, it has been argued that there are good reasons to take a combined view of the processes followed by the Commission and the Tribunal when considering issues of for example, efficiency.²⁰⁵ It is submitted that the same rationale can be applied in the context of procedural formalities each institution should comply with in enforcing the Act's provisions.

²⁰² Prins D & Koornhof P, 'Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development' Volume 18 (2014), at 136.

²⁰³ Ibid at 136.

²⁰⁴ The Competition Commission and Competition Tribunal Report, 'Unleashing Rivalry: Ten years of enforcement by the South African competition authorities' (1999-2009), at 4.

²⁰⁵ Coetser P & Raath R, 'A Long and Expensive Wait – Assessing the Procedure for Adjudicating Complaints', Paper for Eight Annual Competition Law, Economics and Policy Conference (2014), at 3.

3.1 The Nature and Scope of the Powers of the Competition Commission

The multitude of functions the Commission is mandated to perform is contained in section 41 of the Act and includes the responsibility to:

- implement measures to increase market transparency;
- implement measures to develop public awareness of the Act;
- investigate and evaluate alleged contraventions of Chapter 2;
- grant or refuse applications for exemption in terms of Chapter 2;
- authorise, prohibit or refer mergers in terms of Chapter 3;
- negotiate and conclude consent orders;
- refer matters to the Competition Tribunal and appear before the Tribunal;
- negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters and ensure the consistent application of the principles contained in the Act; and
- deal with any matter referred to it by the Tribunal.²⁰⁶

The actions taken by the Commission is informed by the powers granted to it by the provisions of the Act. It is submitted that the vague, varying and open ended nature of the functions the Commission, an institution that does not evaluate the merits of each case that comes to its attention in an adversarial manner, must perform could logically lead to an incoherent exercise of its powers. It has been argued that following the initiation of a third party complaint but prior to its referral, even though an accused firm may make submissions to persuade the Commission a complaint has no merit, the Commission tends to only provide its high level view and does not enter into a discussion on merits.²⁰⁷

With the Commission being the investigative arm of the competition authorities tasked with initiating and referring complaints, as well as the body initially left with the decision of whether a contravention of the Act has taken place, it is not surprising the majority of procedural challenges heard by the appeal courts originated as a result of its actions. Coetser and Raath similarly remarks that in the past, it has not so much been accused firms but rather the Commission that has shown a tendency to “change its case and introduce new grounds as the matter progresses.”²⁰⁸

²⁰⁶ Competition Act 89 of 1998, Section 21.

²⁰⁷ Coetser P & Raath R, ‘A Long and Expensive Wait – Assessing the Procedure for Adjudicating Complaints’, Paper for Eight Annual Competition Law, Economics and Policy Conference (2014), at 3.

²⁰⁸ Ibid at 8.

Despite its name, the Commission is not a collegial body but rather an executive administrative body with its power vested mainly in the Commissioner as its chief executive officer.²⁰⁹ In order to fulfil its functions related to the law's application, the Commission can be said to be required to combine administrative and quasi-judicial approaches.²¹⁰ The investigative powers of the Commission are broad, but due to this they are subject to judicial review when it comes to sensitive areas.

The investigation phase of the enforcement process starts off with the Commission receiving or initiating a complaint and appointing an inspector to investigate the matter, followed by a screening phase to determine whether a formal investigation is necessary.²¹¹ Should a formal investigation be warranted, the Commission uses its wide reaching powers of investigation to summons documents, interrogate persons under oath and conduct search and seizure operations.²¹²

Where the Tribunal can be seen to function as a quasi court, the Commission appears to assume the role dual role of investigator and prosecutor. The role of the Commission in the investigative process comes to an end as soon as a complaint is referred to the Tribunal, where after it assumes the guise of a prosecuting authority.

What can be said to be the most controversial power of the Commission is the power of search and seizure granted to it in terms of Part B of Chapter 4. The Commission is empowered to enter and search any premises if reasonable grounds exist to believe that a prohibited practice is taking place there or that the premises contain anything connected to one of its investigations.²¹³ However, the Act specifically provides that due process protections apply to the Commission's exercise of this far-reaching power.²¹⁴

3.2 The Nature and Scope of the Powers of the Competition Tribunal

The functions of the Tribunal are set out in section 27 of the Act and include:

- to adjudicate on any conduct prohibited in terms of Chapter 2 to determine whether prohibited conduct has occurred and if so, to impose any remedy provided for;
- to adjudicate on any other matter the Act allows and that falls within its jurisdiction and impose appropriate remedies;

²⁰⁹ An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 37.

²¹⁰ Ibid at 40.

²¹¹ Coetser P & Raath R, 'A Long and Expensive Wait – Assessing the Procedure for Adjudicating Complaints', Paper for Eight Annual Competition Law, Economics and Policy Conference (2014), at 3.

²¹² Ibid at 3.

²¹³ An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 41.

²¹⁴ Ibid at 41. A search must be done with due respect and order and for personal dignity, security and freedom, and privacy, and persons must be advised of their right to legal representation. When it comes to interrogations, it is noted that besides the protection against self-incrimination, confidentiality is the first subject in the section on investigative powers in the Act. It is argued that this position most likely reflects its priority to the business community (at 42).

- to hear appeals from, or review any decision of, the Competition Commission that may in terms of the Act be referred to it; and
- to make any ruling or order necessary or incidental to the performance of its functions in terms of the Act.²¹⁵

What is ostensibly clear is that the Tribunal operates as a collegial body²¹⁶ and serves as the “forum” of first instance for the adjudication of competition law matters as well as the first avenue of appeal or review when the actions or decisions of the Commission is challenged. The Tribunal performs these functions by exercising the various powers granted to it in terms of the Act and is limited by the scope and wording of those empowering provisions.

Being regarded as the adjudication arm of the competition authorities, the powers of the Tribunal have often been equated with those of a prosecuting authority when dealing with complaint referrals, issues of procedural fairness in enforcement proceedings as well as the nature of the remedies imposed in these proceedings.²¹⁷

Opinions range from the belief that the specific powers and duties of the Tribunal are necessary to abide by the stated objectives of the Act and that administrative penalties imposed on contravening firms are merely a form of equitable relief on the one hand, to the argument that the system is eerily similar to that of criminal proceedings and should therefore be held to a higher standard and burden of proof on the other.²¹⁸

Arguably the most significant power of the Tribunal is laid down in section 59 of the Act, which provides that it may impose an administrative penalty if a firm is found to have been engaged in prohibited practices. In making this determination, the Act provides that the Tribunal must conduct its hearings in public in a speedy manner and in accordance with the “principles of natural justice”.²¹⁹ When it comes to procedure, the Tribunal may, subject to its own rules of procedure²²⁰, “determine any matter of procedure²²⁰ at a hearing with due regard to the circumstances of that case and the principles of natural justice, and may condone any technical irregularities arising in any of its proceedings”.²²¹

The rules of the Tribunal are regarded as *sui generis* and can be said to combine aspects of both action proceedings and motion proceedings available to parties in South African Courts.²²² The referral of a complaint, together with the other pleadings, constitute evidence under oath as can

²¹⁵ Competition Act 89 of 1998, Section 27.

²¹⁶ An OECD Peer Review (May 2003): ‘Competition Law and Policy in South Africa’, at 38.

²¹⁷ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 137.

²¹⁸ Ibid at 137.

²¹⁹ Ibid at 142.

²²⁰ The current version of the Rules of Conduct of Proceedings in the Competition Tribunal came into effect on 1 February 2001, published in Government Gazette 22025.

²²¹ Ibid at 142.

²²² Coetser P & Raath R, ‘A Long and Expensive Wait – Assessing the Procedure for Adjudicating Complaints’, Paper for Eight Annual Competition Law, Economics and Policy Conference (2014), at 6. In the case of *Paramount Mills (Pty) Ltd v Competition Commission* 112/CAC/SEP11 it was held that Competition Tribunal proceedings are not equivalent to motion proceedings in the strict sense.

be found in motion proceedings, however as is the case in action proceedings evidence is still presented and tested orally.²²³

Currently in our system, complaint referral proceedings involve three separate instances where evidence is produced by the parties, firstly in affidavits, secondly in witness statements and finally during oral evidence.²²⁴ An intrinsic problem with the way in which this multi-pronged system functions specifically in the context of competition law enforcement, it has been argued, is that complaint referrals are not as focussed on setting out the essential elements of a complaint as would be the case in affidavits required in action proceedings.²²⁵ Instead, referrals contain more background information and examples of the questionable conduct complained of combined with a vague explanation of how the Act is allegedly being contravened.²²⁶

As a result, so the argument goes, an accused firm is left uncertain as to the exact elements of the conduct the Commission considers constituting the contravention, and also, to the full extent it supposedly contravened the Act.²²⁷ Coetser and Raath are accordingly of the opinion that the referrals that reach the Tribunal for adjudication therefore lacks the clarity of a pleading in action proceedings and the exhaustiveness of a founding affidavit in motion proceedings.²²⁸

3.3 The Competition Appeal Court

In terms of section 37 of Part C of the Act, the functions of the CAC includes:

- to review any decision of the Competition Tribunal;
- to consider an appeal arising from the Tribunal in respect of any of its final decisions, other than consent orders, and any of its interim or interlocutory decisions that may be taken on appeal;
- to make any order or give any judgment, which includes orders to amend or set aside a decision of the Tribunal and to remit a matter to the Tribunal for a further hearing on appropriate terms.²²⁹

The three tier structure of the competition authorities in South Africa, of which the CAC forms the top tier, is regarded as a desirable one that gives effect to competition principles while at the same time taking cognizance of established legal principles that guarantee justice and fairness.²³⁰ It has however been argued that the decisions handed down by the CAC and the SCA

²²³ Ibid at 7.

²²⁴ Ibid at 8. Coetser & Raath remarks that although it is not prescribed by the rules of the Tribunal, over time it has become practice for pre-hearing directives to order the parties to file witness statements on facts prior to hearings. These statements are filed after discovery but before the filing of expert witness statements.

²²⁵ Ibid at 9.

²²⁶ Ibid at 9.

²²⁷ Ibid at 9.

²²⁸ Ibid at 9. It is interesting to note that the authors are of the view that the role of affidavits has been reduced by the Tribunal's approach in recent years, which approach they believe the Constitutional Court endorsed in *Senwes*, to allow a complainant's case to develop beyond the ambit of the complaint referral in pursuance of what is referred to as the Commission's 'public duty' (at 10).

²²⁹ The Competition Act 89 of 1998, Section 37.

²³⁰ Kariga HR, 'Between a rock and a hard place? A closer look at the Competition Appeal Court', at 2.

in recent years have had unexpected, and somewhat less desirable, effects on the functioning of the Commission and the Tribunal and the manner in which these institutions exercise their powers.²³¹

As has been mentioned, the CAC is a central institution wedged in between the Commission and the Tribunal on the one hand, and the SCA and Constitutional Court on the other. It is an independent court in the general sense that is tasked with applying competition law to make decisions independent of the Commission, the Tribunal and the State.²³² Similarly, the Commission and the Tribunal also apply competition law independently as creatures of statute.²³³ The interpretation given by the CAC on the Commission and Tribunal's actions therefore plays a critical role in shaping not only the procedures by which this area of law is enforced but also competition policy as a whole.

Since its inception, it has been said that the CAC has interpreted the Act in a purposive manner. Evidence of this can be found in the CAC's judgments in *Mittal*²³⁴, *Nationwide Poles*²³⁵, *Senwes*²³⁶ and *Woodlands*²³⁷. One can argue that in the first two instances the CAC may have applied incorrect economic principles to the facts before it, this was presumably aimed at giving effect to the purposes of the Act.²³⁸ Pertaining to the latter decisions however, the CAC's attempts at purposive interpretation were overturned by the SCA. In *Senwes* the CAC held that the Tribunal should not be confined to pleadings before it as would a civil court during a trial, which is clearly a purposive reading of the legislation, as was its judgment in *Woodlands* which found that section 49B does not require an investigation against specific firms, but against a prohibited practice.²³⁹

Some in the legal fraternity are of the opinion that the CAC has failed to fulfil its mandate as set out in the Act by changing its approach to interpreting the Act's provisions from a purposive to a formalistic approach.²⁴⁰ This change, it is argued, was brought about by the SCA's decision in *Woodlands* and can be seen in its approach in reaching decisions in cases that followed. Kariga accordingly holds the view that by doing so, the CAC "may have gone beyond the bounds of what it seeks to protect and promote, i.e. the spirit and purpose of competition law as envisaged in the Act."²⁴¹

²³¹ Ibid at 1.

²³² Ibid at 5 – 6.

²³³ Ibid at 6.

²³⁴ *Mittal Steel South Africa Limited, Mactseel International Limited BV, Macsteel Holdings (Pty) Ltd vs Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited* 70/CAC/Apr07.

²³⁵ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/Apr05.

²³⁶ *Omnia Fertilizer Ltd v The Competition Commission* 77/CAC/Jul08.

²³⁷ *Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd v The Competition Commission* 88/CAC/Mar09.

²³⁸ Kariga HR, 'Between a rock and a hard place? A closer look at the Competition Appeal Court', at 8.

²³⁹ Ibid, at 9. In its *Senwes* judgment, the CAC held that the specific sections of the Act under review indicate that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings. The Tribunal is entitled to conduct hearings as 'expeditiously as possible' and in 'accordance with the principles of natural justice', as such, it is empowered to conduct its hearings in an informal manner or choose an inquisitorial approach.

²⁴⁰ Ibid at 13.

²⁴¹ Ibid at 14.

This argument clearly favours a purposive approach to interpreting and applying competition provisions, even, it is submitted, where it extends to procedural formalities and reviewing the actions taken by the Commission and the Tribunal in enforcing their respective mandates.

A prime example of this radical shift in the CAC's approach can be seen in the court's findings in the *Yara*²⁴² case. In this instance the CAC stated that instead of only mentioning the prohibited conduct complained of together with the facts to allege the conduct, as was the rationale in the *Glaxo Wellcome* decision, the complainant also needs to have the intention to lodge a specific complaint.²⁴³ The argument has been made that here the CAC applied to third party complaints the test of legality and intelligibility adopted by the SCA in the *Woodlands* decisions, while the issue of third party complaints was not canvassed by the SCA in its judgment.²⁴⁴

Kariga further argues that the formalistic interpretation by the CAC in the *Yara* decision is not only an incorrect interpretation of the Act as such, but also unduly prejudices third parties who lodge complaints with the Commission as such complaints would fail to meet the standard set by the CAC.²⁴⁵ As a result, the third party will miss out on the rights accruing to a complainant in terms of the legislation.

In order to avoid undesirable policy development when it comes to the application of competition law in South Africa, all the institutions involved in the implementation of the Act must comply with its provisions while giving effect to the intention of the legislature.²⁴⁶ This can arguably only be achieved if the competition authorities work towards a common purpose and respect the tenets of justice in a professional environment.

When it comes to the CAC as a developer of competition policy, Kariga strongly argues that while the SCA has adopted a restrictive interpretation of the Act, the CAC needs to go beyond the SCA's jurisprudence and interpret the Act less restrictively, as he believes that "much can be achieved by continuing to apply the purposive interpretation of the Act within the boundaries set, rightly or wrongly, by the SCA".²⁴⁷

3.4 Theories of Interpretation: A Difference in Approach

It is argued that when it comes to interpreting legislation, the rules of interpretation are important for various reasons.²⁴⁸ Firstly, these 'rules' or approaches inform interpreters what values and factors to take into account when they engage with a piece of legislation, and secondly, they supply the 'vocabulary' in which texts are analyzed and explained.²⁴⁹

²⁴² *Omnia Fertilizer Ltd v The Competition Commission* 77/CAC/Jul08.

²⁴³ Kariga HR, 'Between a rock and a hard place? A closer look at the Competition Appeal Court', at 19.

²⁴⁴ *Ibid* at 19.

²⁴⁵ *Ibid* at 19.

²⁴⁶ *Ibid* at 24.

²⁴⁷ *Ibid* at 25. Kariga goes on to argue that the CAC has the potential to, and should, improve on its function of being gate-keeper and assist in the building of competition institutions in its decisions. He is of the view that much can be achieved by practicing deference save where the CAC sees that such a move will not serve the interests of justice (at 24 – 25).

²⁴⁸ Kafesu, LT, 'Interpretation of Fiscal Statutes by the Courts: A South African Tax Law Perspective' (2011), at 13. Even though this study focused on the interpretation of tax legislation, it is submitted that it does serve to shed light on the interpretation of legislation in general which can also be applied to competition laws.

²⁴⁹ *Ibid* at 13.

Furthermore, these elements can be said to shape the arguments used by those who engage with legislation in defending their preferred interpretation and also by judges in justifying their findings in a particular case.²⁵⁰

It is trite in our law that the main approaches to interpretation are twofold, with either a formalistic or restrictive approach being favoured on the one hand or a purpose more flexible approach being used on the other. Regardless of which theory of interpretation is favoured by an enforcement authority, the common thread that flows through all legislative interpretation in South Africa is the supremacy of the Constitution which makes it clear in section 39 that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”²⁵¹

Competition law is no exception, and it is submitted that even when it comes to procedure and enforcement, this constitutional mandate should inform the manner of interpretation implemented by not only the Commission and Tribunal, but by the Appeal Courts as well.

3.4.1 A Formalistic Approach

In terms of the literal or textual approach to statutory interpretation, the true meaning of a statutory provision is to be found exclusively in the very words used by the legislature in the text of the statute.²⁵² On this approach, the ordinary meaning of a word or group of words is not their dictionary meaning as such, but rather the meaning that would be understood by a “competent language user upon reading the words in their immediate context”.²⁵³ Kafesu argues that the rationale behind this literal approach is twofold. Firstly, the words used by the legislature themselves are the most indicative of the author’s actual subjective intention and secondly, the law needs to be objectively known so that all reasonable people can rely on its in planning their affairs.²⁵⁴

It is submitted, when looking at the SCA’s approach in the *Woodlands* judgment specifically, that in the context of competition law this approach is somewhat less ‘literal’ and can be said to be more ‘formalistic’. Using the language of the Act in the context of the Constitution, a more restrictive approach emerges that focuses more on text itself than the purpose for which it was drafted. Interestingly enough, it is noted that since the advent of the Constitution arguments against the continued application of a literal approach are said to have gained momentum, with

²⁵⁰ Ibid at 13. Kafesu goes on to argue that the failure to ‘follow’ or ‘apply’ any specific rule of statutory interpretation is not an appealable or reviewable error. Although bad interpretations may be appealed or reviewed, the error lies in failing to interpret the statute correctly, not in failing to apply a particular rule of statutory interpretation.

²⁵¹ The Constitution of the Republic of South Africa Act 108 of 1996, Section 39(2).

²⁵² Kafesu, LT, ‘Interpretation of Fiscal Statutes by the Courts: A South African Tax Law Perspective’ (2011), at 15.

²⁵³ Ibid at 15.

²⁵⁴ Ibid at 15. In justifying this view Kafesu referenced the Appellate Division’s findings in *R Koster & Son Pty Ltd & Another v CIR* 47 SATC 24 where it was held that in construing a provision of an Act of Parliament, the plain meaning of the its language must be established.

many commentators, including the judiciary, suggesting that a purposive approach should be followed.²⁵⁵

3.4.2 A Purposive Approach

In a nutshell, a purposive approach to interpretation can be summarised as one that starts off from the acknowledgment that legislation cannot be precisely drafted to anticipate every possible situation or eventuality. As a result, questions of interpretation should be resolved by reference to the broad purposes of an enactment when issues of interpretation arise.²⁵⁶

Kafesu notes that the term 'legislative purpose' refers to a number of different things, including the primary aim or object of the enactment, in other words, the effect the legislature hopes to produce through the operation of the provisions of a particular statute.²⁵⁷ It can also be said to refer to the function performed by a provision or series of provisions in a legislative scheme, as a purposive methodology "looks beyond the manifested intention".²⁵⁸

3.5 The Approach In Woodlands

In disagreeing with the CAC's view that the difficulty in establishing a prohibited practice justifies a generous interpretation of the procedural powers of the Commission, the SCA turned to the Constitution for support in justifying its approach.²⁵⁹

The SCA explicitly mentions that what is important in the context of this case, is that the Constitution finds its roots in the rule of law, the affirmation of the democratic values of dignity and privacy and guaranteeing the right to privacy, a fair trial and just administrative action.²⁶⁰ The second important element the SCA refers to is that the actions of the Commission, when it comes to Chapter 2 complaints, are administrative in nature and can lead to punitive measures or administrative penalties that closely resemble criminal penalties.²⁶¹ According to the court it follows then, that the procedural powers of the Commission must be interpreted in a manner that at the very least impinges on these rights and values.²⁶²

It becomes clear therefore, that the approach adopted by the SCA in reaching the *Woodlands* decision cannot be anything but a formalistic or restrictive approach. It is interesting to note that the court in *Woodlands* views the Act's statement that it must be interpreted in a constitutional manner as superfluous, while at the same time seemingly ignoring the purposes of the Act as the

²⁵⁵ Ibid at 19.

²⁵⁶ Introduction to the Promotion of Administrative Justice Act, Chapter 1, at 13.

²⁵⁷ Ibid at 19.

²⁵⁸ Ibid at 19. The purposive theory is said to have its ratio in the fact that a statute is a legislative communication between the legislature and the public that is inherently purposive. Whoever engages with the legislation must attempt to infer the design and purpose which lies behind the legislation.

²⁵⁹ *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 10.

²⁶⁰ Ibid at para 10.

²⁶¹ Ibid at para 10. Section 59 of the Act provides for these administrative penalties that may be imposed by the Tribunal. The SCA notes that this provision 'more appropriately' refers to such penalties as 'fines'.

²⁶² Ibid at para 10.

more important tool of interpretation.²⁶³ It chooses instead to focus on the accused firm's rights to privacy, a fair trial and just administrative action. It furthermore employs a "criminal" analogy even though this has been criticized in the past as a fallible and inappropriate comparison.

It is submitted that the SCA favours a more literal approach to interpretation in *Woodlands* which is evident in its referral to the view of Davis JP in the CAC which entails that submissions about the meaning of the Act must be tested against the wording employed by the Act.²⁶⁴ This argument can be said to be strengthened by the court's statement that "the same word cannot bear different meanings in the same sentence depending on the circumstances"²⁶⁵, even though it makes reference to the importance of contextualisation earlier in its judgment.

As a result, the court seems to be confused as to the practicalities of weighing up the purposive intention implored by the Act and the formalities needed to give effect to administrative justice. It employs the Constitution to highlight the importance of formal procedure that gives effect to the rights of the 'accused' firm, justifying a strict interpretation of the powers of the Commission and the procedures to be followed against the severity of an adverse finding against such a firm that appears to be akin to criminal punishment.

Interestingly enough, it appears that the SCA does not choose to focus on the importance of competition law and policy development in the context of the Act and the purpose served by effectively enforcing its provisions.

3.5.1 Initiation v Referral

The dispute in *Woodlands* had its roots in the validity of two interrogation summonses issued by the Commission during the course of its investigation into alleged prohibited practices in the milk producing industry which led to the initiation of a series of complaints against Woodlands and Milkwood. The argument was made that due to the fact that the summonses had been found to be invalid, the information obtained as a result of those summonses could not be used to initiate valid complaints against the firms under scrutiny.²⁶⁶ Hence, the Commission's initiations were tainted which also resulted in invalid referrals.

Following the submission of information by a third party against certain players in the milk industry, the then Commissioner proceeded to initiate a full investigation into the 'milk industry' as a whole. The SCA regarded this action by the Commissioner as an error in judgment as he was supposed to initiate a complaint against an alleged prohibited practice.²⁶⁷ The two summonses were issued against senior management member of both Woodlands and Milkwood in an

²⁶³ The SCA *in casu* remarks that the Act 'unnecessarily' reminds us that it must be interpreted in a manner that is consistent with the Constitution and which gives effect to the purposes set out in s 2 of the Constitution (refer para 10).

²⁶⁴ Ibid at para 16.

²⁶⁵ Ibid at para 18.

²⁶⁶ Ibid at para 38. The appellants' argument before the SCA was premised on the finding that all the Commission's evidence against them was derived from the initial invalid initiation in 2005 and subsequently tainted interrogations and the production of documents. They argued that "since the commission's investigation preceded these complaints it placed, according to the argument, the cart before the horse which means that the commission acted beyond its powers" (refer para 38).

²⁶⁷ Ibid at para 26.

attempt to extract information from them about the two firms' relationship to each other, without stating that either party was being investigated.²⁶⁸

Focussing on the initiating statement itself, the SCA remarked that the Act presupposes that a complaint as initiated will be referred to the Tribunal and that a complaint initiated against the milk industry as a whole is not logically capable of being so referred.²⁶⁹ In the court's view, the manner and form in which the summonses were issued also evidenced how seriously flawed the initial initiation had been.²⁷⁰ The validity of at least one of the summonses did not appear *ex facie* the document itself²⁷¹, while the other had been issued without the foundation of a properly initiated complaint based on a reasonable suspicion.²⁷²

It appears clear from the basis of the SCA's review of the CAC's decision that its focus was not so much on the content of the initiation itself, its correlation to the referral or the ambit of the referral, but rather the investigation undertaken as a result of the complaint being initiated. The court seemingly merely mentions these issues as a result of it following a logical thread through the complaint adjudication procedure. The actual crux of this case, it is submitted, was the exercise of powers in essence 'activated' by the complaint initiation and the impact of the invalidity of such an exercise on the preceding initiation.

The SCA mentions that regardless of whether a complaint is initiated by a private party or the Commission itself in terms of section 49B, the Commission is obliged to direct an investigation into the complaint.²⁷³ The Commission contended that where information, as opposed to a formal complaint, is submitted to the Commission by a third party, the powers of investigation granted to it by the Act can be exercised prior to the Commission's decision to initiate a complaint.²⁷⁴ The SCA disagreed, as in its view, it could not have been the intention of the legislature that the Commission may issue summons for the purposes of conducting interrogations and requiring the production of documents in an unrestricted manner without prior judicial scrutiny.²⁷⁵

It can accordingly be argued that due to the finding that the Commission not only exceeded the scope of its investigatory powers but exercised these powers incorrectly, a series of complaint initiations against Woodlands and Milkwood were invalidated which resulted in the subsequent referral suffering from the same invalidity. In this case therefore, it can be said that the events

²⁶⁸ Ibid at para 32. The SCA noted that the whole enquiry targeted the relationship between Milkwood and Woodlands, and not one question was asked about Parmalat during the entire interrogation.

²⁶⁹ Ibid at para 35.

²⁷⁰ Ibid at para 27. In the view of the SCA the summons issued against Dr Kleynhans recorded that it had been issued in connection with a 'full' investigation into the milk industry based on the commissioner's reasonable belief in the existence of anti-competitive behavior, which in 'included' restrictive vertical practices in terms of section 5 of the Act, an allegation that was never mentioned in the complaint initiation.

²⁷¹ Ibid at para 31. The SCA remarks that since the information obtained pursuant to the summons was found to be tainted by the CAC, it is difficult to see how that information could have given validity to the summons. Other problems with the summons, such as the unbounded request for documents, was also not addressed by the CAC in its findings.

²⁷² Ibid at para 20.

²⁷³ Ibid at para 15.

²⁷⁴ Ibid at para 20.

²⁷⁵ Ibid at para 20.

that followed the incorrect initiation of a complaint was the focal point of the court's decision rather than the content of a faulty initiation invalidating subsequent referrals.

It is submitted that the court's reasoning that the invalid exercise of administrative powers granted by way of legislative provisions combined with an invalid complaint initiation which in turn results in an invalid referral, does not automatically pass judgment on the link between initiation and referral in general. However, it does seem to affirm the importance of procedural formalities and confirm that irregular procedure will result in a flawed enforcement of competition legislation.

3.5.2 Rationale

The SCA took upon itself the difficult task of shedding light on the meaning of the action of 'initiation', specifically in the context of section 49B(1) which grants the Commission exclusive jurisdiction to exercise this power in terms of this provision.

In my view, in posing the question whether there are any jurisdictional requirements for the initiation of a complaint by the Commissioner, the court makes known its rationale behind arriving at its final decision further in its judgment. Harms JP states that as a matter of principle, the Commissioner must "at the very least" have been in possession of information concerning an alleged practice which "objectively speaking" could give rise to the reasonable suspicion of the existence of such a practice.²⁷⁶

According to the court in *Woodlands*, without this information there could not be a rational exercise by the Commission of its investigative powers. On the court's interpretation this view is also supported by the provisions of the Act which permit anyone to provide the Commission with information on alleged prohibited practices without the submission of a formal complain.²⁷⁷

The court's reasoning is argued to be rooted in the judiciary's constitutional mandate that the exercise of all public power must comply not only with the Constitution itself but also the doctrine of legality which is foundationally entrenched in South African legal policy.²⁷⁸ The right to just administrative action that is lawful, reasonable and procedurally fair is entrenched in the Constitution as constitutional control over the exercise of public power. The exercise of this power is in turn subject to the principles of legality and accountability, while competition law enforcement is classified as the exercise of public power.²⁷⁹

As has already been mentioned, the Commission is a creature of statute and as such must exercise its powers in accordance with its empowering statutes, being the Act. It follows therefore that the exercise of the powers given to the Commission by the Act is limited by the

²⁷⁶ Ibid at para 13.

²⁷⁷ Ibid at para 13.

²⁷⁸ OECD Competition Committee Policy Roundtables, Procedural Fairness: 'Competition Authorities, Courts and Recent Developments' (2011), at 239.

²⁷⁹ Ibid at 239. The principle of legality has been described by our courts in *Vorster and Another v Department of Economic Development, Environment and Tourism, Limpopo Province and Others* 2006 (5), SA 291 (T), where it was stated that "Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute" (refer Ibid, at 240).

Act itself and cannot be exercised on terms the Commission itself establishes. On this point the Constitutional Court made its view known by expressly stating that “it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in fact arbitrary and inconsistent with this requirement.”²⁸⁰

A further reason why the SCA in *Woodlands* decided to lay down certain procedural formalities it seems, is its rationalisation that the administrative penalties that can be imposed in terms of the Act are akin to criminal penalties.²⁸¹ For some reason, this reoccurring analogy seems to have left the lasting impression that as a result procedural formalities, when it comes to competition policy and enforcement, should mimic those found in criminal proceedings. It is submitted that evidence of this underlying rationale can be found in Harms JP’s references to the Commission’s powers to issue a summons as “far-reaching” and “invasive”²⁸², the importance of the “structure of the Act”²⁸³, *Woodlands*’s right to privacy being unfairly breached by the proceedings²⁸⁴ and the judgment’s constant referrals to the reasonable suspicion as a basis for complaint initiation.

Finally, the SCA lays down the requirements that an initiation must comply with by equating it with a summons and the procedural formalities that must be complied with when it comes to the latter. It holds primarily that a complaint initiation must survive the test of legality and intelligibility in light of an interrogation or discovery summons’s dependence on the terms of the initiation statement and also the scope of the initiation as the basis of a referral.²⁸⁵

3.6 The Approach in *Omnia*

It appears that after narrowing down the issue it was tasked to determine in the *Omnia* case to whether a referral amendment complied with the necessary requirements, the SCA focussed more intently on specific provisions of the Act. In particular, it remarked that the outcome of its decision would be largely informed by ‘an’ interpretation of sections 49B and 50 of the Act.²⁸⁶

Making reference to the provisions of section 50(1) and (2) of the Act, the court noted that although the Commission may refer its own complaint to the Tribunal any time after initiation, this is not the case with complaints submitted by third party complainants where a one year referral deadline applies.²⁸⁷ It becomes relatively clear from fairly early on in Brandt JA’s judgment that the court intends to draw a distinction between complaints initiated by the Commission on the one hand and those submitted by complainants on the other.

The complaint initiated by the complainant in this instance did not involve *Omnia* as a party against whom relief was sought, however the Commission’s referral included allegations of

²⁸⁰ Ibid at 241. See here *Pharmaceutical Manufacturers Association of South Africa and Another In re: Ex Parte Application of the President of the Republic of South Africa* 2000 (2), SA 674 (CC) at para 85.

²⁸¹ Ibid at 241.

²⁸² *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010), at para 20.

²⁸³ Ibid at para 34.

²⁸⁴ Ibid at para 39.

²⁸⁵ Ibid at para 35.

²⁸⁶ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 3.

²⁸⁷ Ibid at para 3.

collusive dealings against Sasol, Yara and Omnia.²⁸⁸ Entering into a settlement with the Commission, Sasol, during the Commission's investigation of the initiated complaint, provided information of alleged contraventions of the Act by Omnia to the Commission, which the Commission sought to include in the scope of the complaint referral by way of an amendment.²⁸⁹

It is submitted that in contrast to the situation in *Woodlands*, the approach followed by the SCA in reaching its decision in *Omnia* is not as explicit or clear cut. Hardly making mention of the Constitution or how constitutional principles, as the supreme law, should or did inform its findings or those of the lower institutions, the court appears to have decided to focus instead on the CAC's jurisprudence and other precedent it used as reasons for its judgment. In each instance, Brandt JA makes mention of the CAC's findings on a certain issue in dispute, the preceding judgment used as support for its decision and then continues to either distinguish the one from the other or highlight the CAC's incorrect interpretation or application of the principles set down in each such case.

In the view of the SCA, a vital consideration in evaluating the cogency of the CAC's approach lies in the fact that the legislature clearly distinguishes between complaints initiated by the Commission and those submitted by a private person when it comes to formalities.²⁹⁰ This distinction accordingly seems to inform the court's interpretation of the Act's provisions and its approach to their application to the set of facts at hand.

The court's preference for purpose over formalism can also be said to be evident in its submission that although certain formalities are usually present in an initiation by the Commission for the sake of clarity and good order, such formalism is not a requirement in terms of the Act.²⁹¹ What can be inferred here, it is submitted, is that the court will only favour a formalistic approach if so required by the empowering legislation.

Brandt JA continues to allude to the fact that the court does not agree with the CAC's 'strict' application of its own jurisprudence²⁹², and is of the opinion that the formalism insisted on by the CAC gives rise to difficulties when a set of facts similar to those under review *in casu* comes before the authorities.²⁹³ As such, it is argued that the logical conclusion that can be drawn is that the court's approach in *Omnia* is a purposive one.

²⁸⁸ Ibid at para 5. In the affidavit that accompanied the CC1 form, three parties had been cited as respondents, namely Sasol, Yara and Omnia, however the affidavit also specifically stated that the latter two parties were merely joined in the proceedings because of their 'legal interest' in the matter and that no relief was sought against them.

²⁸⁹ Sasol admitted by way of the settlement agreement that it had contravened section 4(1)(b) of the Act by entering into what was presumably an informal agreement with Yara and Omnia on various pricing formulae for discounts on products manufactured or supplied by these parties (see Ibid, at para 8).

²⁹⁰ Ibid at para 21.

²⁹¹ Ibid at para 21.

²⁹² Ibid at para 18.

²⁹³ Ibid at para 25. The SCA notes that the CAC in the present case held that there is no provision in the Act for the amendment of a complaint. While holding that with regards to complaints submitted by private complainants this is indeed the case, the SCA holds that it appears 'equally clear' that the same position does not necessarily hold when it comes to complaints initiated by the Commission.

3.6.1 Initiation v Referral

In contrast to what was the case in *Woodlands*, the focus here appeared to be less on the exercise of the Commission's powers while performing its investigatory function, and more on the correlation between the content of the initiation and its correlation to the subsequent referral.

Omnia opposed the referral of a complaint against it on the basis that the Commission was not referring its own initiated complaint to the Tribunal, but rather the complaint submitted by Nutri-Flo against Sasol where no allegations had been levied against Omnia.²⁹⁴ During its investigation of this specific complaint the Commission allegedly uncovered evidence against Omnia of supposed prohibited practices and consequently attempted to amend its referral to the Tribunal, a move Omnia vehemently opposed.²⁹⁵

As a referral cannot take place without a preceding initiation, the court, in my view, did not so much focus on whether a referral is capable of amendment in the strict sense, but rather what the requirements are for a complaint to be regarded as initiated by the Commission.

The majority of the SCA's judgment in *Omnia* focussed on a review of the 'referral rule' that had been born out of the CAC's own jurisprudence, and its application to the set of facts at hand. As previously mentioned, the referral rule essentially requires that a referral to the Tribunal must correspond with and may not go wider than the complaint submitted by a complainant or initiated by the Commission itself.²⁹⁶ Furthermore, in the absence of any complaint initiation by the Commission itself, it may only refer to the Tribunal those allegations that a third party complainant intended to form distinct complaints.²⁹⁷

As the referral rule requires a direct correlation between the content of an initiation and the scope of the subsequent referral, it can be argued that its application reverts to a sense of formalism and restrictive interpretation that may not align with the objectives set out in the opening provisions of the Act.

3.6.2 Rationale

In its judgment, the SCA dealt with the Commission's contentions on appeal in two distinct phases, firstly its challenge to the extension of the referral rule by the CAC to the intent of the complainant and secondly, against the rule in its original form.²⁹⁸

In examining the authorities used by the CAC in support of its findings, namely in the *Glaxo Wellcome*²⁹⁹ and *Clover*³⁰⁰ cases previously mentioned, the court agreed that on a proper

²⁹⁴ Ibid at para 4.

²⁹⁵ Ibid at para 4. Omnia in actual fact brought a counter-application for the referral to be set aside on the basis that it was not covered by Nutri-Flo's complaint and that the "position was exacerbated by the amendments sought".

²⁹⁶ Ibid at para 11.

²⁹⁷ Ibid at para 11.

²⁹⁸ Ibid at para 13.

²⁹⁹ *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 (21 October 2002). This case involved the referral of a complaint by a third party complainant itself. The respondents here

interpretation of the complaint submitted by Nutri-Flo it was never aimed at Omnia, in other words, there was never an intention to complain against any prohibited practice by Omnia.³⁰¹ Brandt JA however noted that this interpretation of the *Clover* findings are not correct, instead holding that “once it has been determined that what was submitted was indeed intended to be a complaint, it makes no difference at whom the complaint was aimed”.³⁰² This view could potentially take an interesting turn if one were to delve into the constitutional rights that a party, against whom a complaint was not aimed, but that must now defend itself against competition allegations, has and to what extent such a view could impact on these rights.

Brandt JA continues to justify this interpretation by way of the following example: the example supposes that if what was submitted amounted to a complaint that A and B were involved in an agreement of price fixing or other prohibited practice, it makes no difference that the complainant intended to complain against only A and not B, as ‘ordinary’ language dictates that it also constitutes a complaint against B.³⁰³ The court turned to the Act for assistance in interpretation and found that its provisions do not contain any contrary indication to this thread of reasoning.³⁰⁴ It is submitted that it can accordingly be argued, that the court chose to rationalise its reasoning in terms of the purpose the Act attempts to serve, i.e. to enforce competition law for the benefit of markets and consumers and ‘punish’ those responsible for abuses, instead of turning to formal procedure in an attempt to uphold the principles of legality and the rule of law.

Turning to the link between the content of an initiation and the scope of the subsequent referral, the SCA points out that in cases such as *Glaxo* and *Clover* there is merit in requiring a correlation between the complaint submitted by the private complainant and the complaint eventually referred for adjudication.³⁰⁵ One such purpose as mentioned earlier in this dissertation is to define the scope of the complainant’s ownership of the complaint and to regulate the relationship between the complainant and the Commission pertaining to the complaint.³⁰⁶ According to Brandt JA, the crucial mistake that the CAC makes however, is to treat the two avenues of complaint initiation identically.³⁰⁷

objected to the referral on the basis that it did not represent the complaints initially to the Commission in terms of section 49B(2)(b) of the Act.

³⁰⁰ *Clover Industries Ltd v The Competition Commission 78/CAC/1 Jul 08* (12 November 2008). A complaint referred by the Commission was the subject of the dispute in this case.

³⁰¹ *Competition Commission v Yara (SA) (Pty) Ltd (784/12)* [2013] ZASCA107 (13 September 2013), at para 16.

³⁰² *Ibid* at para 16.

³⁰³ *Ibid* at para 16.

³⁰⁴ *Ibid* at para 16.

³⁰⁵ *Ibid* at para 18. The SCA notes that in *Glaxo*, where the complaint is referred by the original complainant and not by the Commission, the purpose of the requirement is to protect the legislature’s preference of the Commission as the prime investigatory body. In *Clover*, the referral would have been time barred if it was submitted by the original complainant.

³⁰⁶ *Ibid* at para 19.

³⁰⁷ *Ibid* at para 20. The SCA remarks that this transposal appears clearly from statements made in the *Netstar* judgment, where it was stated by the CAC that Tribunal’s jurisdiction is confined to a consideration of a complaint referred in terms of section 50 of the Act, and the terms of the complaint are likewise constrained by the complaint initiated by the Commissioner or by a third party. As such, if the original foundation of the complaint is that there was a prohibited agreement, the Tribunal is unable to determine same on the basis of a different prohibited practice.

When it comes to complaints initiated by third party complainants, such a complaint is required to be submitted in the 'prescribed form'. It follows therefore that the Act prescribes procedural formalities pertaining to complaints initiated in this way. However, the SCA notes, no such formalities are prescribed for complaints initiated by the Commission.³⁰⁸ It remarks further that in practice, the Commission does not really 'initiate' or start a complaint as such, but rather begins the process by directing an investigation which may lead to a referral. Since no formalities are required the court notes, section 49B(1) "seems to demand no more than a decision by the Commission to open a case. That decision can be informal, it can also be tacit."³⁰⁹

It is submitted that this distinction forms the basis of the SCA's reasoning in this case.

The CAC's own jurisprudence laid down in the *Netstar* case³¹⁰ and the subsequent *Loungefoam* decision³¹¹ also came under fire. In requiring that any complaint, regardless of how it was initiated, must express the conduct complained of with sufficient clarity to enable the accused firms to know what the charge is and be able to rebut it, is according to the SCA a conflation of the requirements relating to initiation a complaint on the one hand and a referral on the other and misses the whole point of initiating a complaint.³¹²

The initiation of a complaint is only the preliminary step in competition law enforcement. The court holds that the principles of administrative justices are accordingly observed in the referral and the hearing before the Tribunal³¹³, and is not required, it appears, to such a strict degree where the initiation is concerned.

3.7 Initiation v Referral: Are the Judgments distinguishable?

Faced with this question to a certain extent in the *Omnia* case, the SCA appeared to have a very clear answer. Where the CAC seemingly found support for its findings in *Omnia* in the SCA's own

³⁰⁸ Ibid at para 21.

³⁰⁹ Ibid at para 21.

³¹⁰ *Netstar (Pty) Ltd and others v the Competition Commission and another*, 2011, 99/CAC/MAY10. The central issue in *Netstar* revolved around whether potential entrants to the vehicle tracking and recovery industry were excluded or hampered in their efforts to enter the market by certain standards set down by the Vehicle Recovery Association of South Africa. In making its findings, the CAC made reference to the path by which a complaint reaches the Tribunal as well the ambit of a complaint referral in light of the preceding initiation. The CAC employed a formalistic approach to complaint initiation and remarked that there can be no excuse for resorting to vague generalities instead of formulating complaints accurately and in detail. As such, the court was also of the view that it is the responsibility of the Tribunal to ensure that complaints brought before it are pursued on this basis so that it determines only the complaint laid before it, not something else that arises during the course of the proceedings (at *Netstar (Pty) Ltd and others v the Competition Commission and another*, 2011, 99/CAC/MAY10, 17 – 18).

³¹¹ *Loungefoam (Pty) Ltd v Competition Commission and others* [2011] 1 CPLR 19 (CAC). In this case the Commission sought an amendment to its founding affidavit to include further allegations against the respondents and also sought to join an additional party, previously not party to the proceedings, and an amendment to the relief claimed to reflect its revised approach.

³¹² *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 24.

³¹³ Ibid at para 24. It is at this stage of the enforcement process, the SCA holds, that the suspect firm becomes entitled to put its side of the case.

decision in the *Woodlands* case, Brandt JA makes it clear that *Woodlands* does not provide this support.³¹⁴

As has already been noted throughout this dissertation, the *Woodlands* case essentially concerned the validity of two summonses issued by the Commission in terms of section 49A of the Act as part of an investigation into the milk industry as a whole. In recalling its own previous findings, the SCA highlights that it considered the scope of the initiating complaint to determine whether the summonses issued during the course of investigation had been valid.³¹⁵

What it accordingly held was

- that there can be no investigation in terms of the Act without a complaint submitted by a complainant or initiated by the Commission against an alleged prohibited practice;
- that a complaint can only be initiated by the Commission on the basis of a reasonable suspicion; and
- that information of a prohibited practice involving nominated members of the milk industry did not warrant an investigation into the milk industry as a whole.³¹⁶

The SCA explicitly states that in *Omnia* the focus of the court was on the degree of correlation there has to be between an initiating complaint on the one hand, and the ultimate referral on the other.³¹⁷ The facts and issues in dispute were accordingly different and the SCA warns that loose statements in the *Woodlands* judgment on the aforementioned subjects should not be “submitted to a process of interpretation akin to the construction of the statutory provisions”.³¹⁸

Although it is arguable that the distinction between the two cases can be said to be that straightforward, it is submitted that the SCA’s view expressed in *Omnia* is the correct one.

On a technical level, both appeals involved elements of both complaint initiation and referral and the connection between the two. However, whereas it can be argued that one focused on the valid exercise of the Commission’s investigative powers and the basis and scope of a valid initiation, the other seemingly has its focus on the link between a validly initiated complaint and the subsequent referral which included the scope of said referral. This study purports to highlight that when it came to the former, the court opted for a formalistic approach in laying down the requirements for a valid complaint initiation whereas in the latter case it implemented a less restrictive purposive approach in order to, in broad terms, rationalise how the referral rule is not in keeping with the legislation and the legislature’s intention.

What needs to be kept in mind is that the *Woodlands* dispute emanated from information submitted by a private person and a complaint initiated by the Commission itself, which led to a flawed investigation and a subsequent equally flawed referral. In contrast, the dispute in *Omnia*

³¹⁴ Ibid at para 26.

³¹⁵ Ibid at para 26.

³¹⁶ Ibid at para 26.

³¹⁷ Ibid at para 26.

³¹⁸ Ibid at para 26.

arose as a result of a complaint validly initiated by a private complainant, which resulted in a valid investigation and a subsequent valid referral. The facts that gave rise to the dispute in each case, as well as the circumstances surrounding it are therefore clearly different.

3.8 The *Senwes* Case

The Constitutional Court handed down its judgment in this case on 12 April 2012, and although not the most recent decision under review in this study pertaining to the *Woodlands Omnia* debate, it remains the highest authority all lower courts must adhere to. At the outset of its judgment the Court makes reference to South Africa's legacy of apartheid and discrimination and points out that the establishment of a credible competition law and effective administrative structures is not only enshrined in the Constitution but is necessary to create an efficient functioning economy.³¹⁹

The Constitutional Court goes further to highlight the public interest and socio-economic objectives of the Act, stating that the legislation seeks to promote a greater spread of business ownership in order to increase access to it by historically disadvantaged people and that it "sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved."³²⁰

The case reached the Constitutional Court as an application by the Commission for leave to appeal against the judgment of the SCA, which set aside the finding by the Tribunal that Senwes Limited ("Senwes") had contravened section 8(c) of the Act by engaging in what was referred to as a "margin squeeze".³²¹ The Court points out that as its basis, this case concerns the nature and scope of the public power conferred on the Tribunal in order to fulfil its mandate in terms of the Act.³²²

As the exercise of their powers by the Commission and the Tribunal when it comes to procedural formalities forms the basis of the debate surrounding *Woodlands* and *Omnia*, this case appears to draw a line in the sand between the two approaches and on the face of its findings seems to favour one over the other.

Senwes challenged the Tribunal's ruling before the SCA on two alternative grounds, firstly, that the breach which the Tribunal found it had committed did not form part of the initial referral and consequently the Tribunal had no authority to determine it and secondly, that even if the complaint had been referred correctly, the essential elements of a margin squeeze had not been

³¹⁹ *Competition Commission of South Africa v Senwes Limited* Case CCT 61/11 [2012] ZACC 6, at para 2. The CC highlights that the preamble to the Act records that South Africa recognizes the discriminatory laws of the past which imposed unjust restrictions on 'free and full' participation in the economy by all South Africans. The Act further declares that "a credible competition law and effective structures to administer that law must be established in order to create an efficient functioning economy".

³²⁰ *Ibid*, at para 4.

³²¹ *Ibid*, at para 11.

³²² *Ibid*, at para 11.

definitely established.³²³ The SCA subsequently found that the Tribunal had indeed acted outside the scope of its powers by finding Senwes guilty of a section 8(c) contravention.³²⁴

In making its findings, the SCA proceeded to look at whether the Tribunal did in fact have the power to determine the margin squeeze complaint by adopting a two stage process. On the one hand, the Court considered whether the complaint referred to the Tribunal by the Commission covered the margin squeeze complaint and found that it did not.³²⁵ This determination is of primary importance for this dissertation's procedure focussed analysis.

On the other hand, the SCA considered whether the Tribunal had the power to decide on a complaint that did not form part of the referral and found that the referral "constitutes the boundaries beyond which the Tribunal may not legitimately travel".³²⁶ In doing so, the Court reasoned that permitting the Tribunal to determine complaints not covered by a referral would violate the principal of legality.³²⁷

The SCA also justified its findings in terms of section 52(1) of the Act, which obliges the Tribunal to conduct a hearing into every matter referred to it in terms of the Act. It appears therefore that the SCA reasoned that the Tribunal cannot adjudicate matters not covered in a referral as such matters would not have been referred to it in the technical sense.

3.8.1 The Issues

Answering the question of whether leave to appeal the SCA's findings should be granted, the Constitutional Court stated that this matter undoubtedly raises a constitutional issue. The SCA's order is based on the finding that the Tribunal had exceeded its statutory powers and violated the principle of legality forming part of the rule of law, which the Constitutional Court regards as one of the most important principles in the control of public power in South Africa's constitutional order.³²⁸ The Court also regarded it to be in the interests of justice to grant leave to appeal by looking at three main considerations

- Firstly, the issue raised is of considerable public importance as the Tribunal was established to exercise its powers in the interests of the general public.³²⁹
- Secondly, as an administrative body established under the Act, the elimination of prohibited practices and the abuse of dominance falls within the Tribunal's jurisdiction and as such, a correct interpretation of the Tribunal's powers is essential in the fight against these practices.³³⁰

³²³ Ibid, at para 12.

³²⁴ Ibid, at para 13.

³²⁵ Ibid, at para 13.

³²⁶ Ibid, at para 14.

³²⁷ Ibid, at para 14. The Constitutional Court notes that the SCA found support for its reasoning primarily in the CAC's findings in the *Netstar* judgment.

³²⁸ Ibid, at para 16 & 17.

³²⁹ Ibid, at para 18.

³³⁰ Ibid, at para 19.

- Thirdly, the interpretation given to the Tribunal’s empowering provisions by the SCA can seriously undermine the objectives for which the Act was passed as these provisions are vital to the enforcement of the Act.³³¹

At constitutional level, the Commission challenged the Supreme Court of Appeal’s findings that the referral did not cover the complaint relating to the contravention of section 8(c) and contended that the complaint did in fact form part of the referral. Alternatively, the Commission argued, if the referral is found not to include the relevant complaint the provisions of the Act properly construed empowers the Tribunal to decide a complaint that did not initially form part of the complaint but that was added later.³³² Hence, the proper interpretation of the complaint initiation and referral provisions contained in the Act lies at the heart of the issues in this case.

3.8.2 The CC’s Findings – The Majority’s View

The starting point for every referral is the initiation of a complaint by either the Commission or a third party which the Commission then investigates. Once a complaint has been referred to it, the Tribunal is obliged to conduct a hearing on the matter. As such, the Court pointed out that it is the mere referral of a complaint that triggers the Tribunal’s adjudicative powers.³³³

Section 27 sets out the matters that fall within the competence of the Tribunal and the Court noted that if a complaint is properly referred to the Tribunal and the evidence led at the hearing establishes all necessary elements, the Tribunal is obliged to find against the firm against whom the complaint was brought.³³⁴ What is important is that the Tribunal is not required to “name” or put a label on the contravention, but is only required to determine whether an abuse of dominance has occurred.³³⁵

After looking at the wording of the section 8(c) complaint submitted by a rival trader against Senwes, the Constitutional Court was of the opinion that it was the same complaint that the Tribunal found to have been established on the evidence before it, however, the error made by the Tribunal was to call it a “margin squeeze”.³³⁶ The controversy was caused by the label attached to the complaint and not the complaint itself, as the complaint submitted to the Tribunal did not use the term ‘margin squeeze’ and neither does the section on which this label was based.³³⁷

Accordingly, it was found that the SCA erred when it held that the Tribunal considered a complaint that was not covered by the referral as the Constitutional Court was of the opinion that the alleged contravention fell squarely with the Commission’s referral.

³³¹ Ibid, at para 20.

³³² Ibid, at para 21.

³³³ Ibid, at para 23. The Constitutional Court noted that the object of the subsequent hearing is to determine whether a prohibited practice has indeed occurred.

³³⁴ Ibid, at para 29.

³³⁵ Ibid, at para 29.

³³⁶ Ibid, at para 39. The Commission had sought the advice of an expert on whether, on the basis of factual statements made to her, Senwes had contravened the Act. In her responding opinion, in addition to the abuses mentioned in the referral, the expert stated that Senwes had also committed a margin squeeze, which had been the first time that reference had been made to this term (at para 40).

³³⁷ Ibid, at para 44.

The SCA also held that the Tribunal's hearings are subject to the limitation that it must be confined to the matters set out in the referral due in part to the fact that the Tribunal is a creature of statute with no inherent powers.³³⁸ By relying on the provisions of section 52 as stated earlier, the SCA concluded that the referral constitutes the boundaries beyond which the Tribunal may not legitimately travel. It is interesting to note that the Constitutional Court's reading of section 52 differs from that of the SCA and focuses on the devolution of power between the competition authorities charged with the Act's enforcement.

The Court noted that the power to investigate complaints and initiate hearings vests in the Commission while the Tribunal itself does not initiate hearings. Hearings can only be initiated by means of a referral.³³⁹ Jafta J accordingly noted that although section 52 expressly states that the Tribunal must conduct a hearing into every matter referred to it, this provision does not mean that the Tribunal does not have the power to entertain a matter not included in a referral but which arises in the course of deciding a referral, as its purpose is not to define the powers of the Tribunal.³⁴⁰ Rather, it deals with the procedure to be followed when conducting a hearing, in other words, after a referral has already taken place.³⁴¹

Even though the Constitutional Court agreed that the Tribunal can only exercise powers given to it by the Act, the flaw in the SCA's approach to the subject, it argues, lies in the fact that the SCA conflates matters of jurisdiction and procedure.³⁴² Whereas the Tribunal's jurisdiction to adjudicate on possible contraventions of section 8 cannot be questioned, section 52 gives the Tribunal the freedom to adopt any form it considers appropriate for a particular hearing which can be formal or informal.³⁴³ Most importantly, the Court noted, is that this section authorises the Tribunal to adopt an inquisitorial approach to a hearing and the Court remarks that confining a hearing to matters raised in a referral "would undermine an inquisitorial enquiry".³⁴⁴

The Constitutional Court concluded that based on the circumstances of this case, a complaint of procedural unfairness by Senwes in respect of matters which were set out in the referral could not be upheld. Accordingly, the Commission's appeal succeeded.

3.8.3 The CC's Findings – The Minority View

Although agreeing with the findings of the majority in principle, Froneman J interestingly suggested that based on the facts at hand the referral is capable of two reasonable interpretations, namely the interpretation preferred by the Constitutional Court in its findings and the construction favoured by the SCA in its review of the matter.³⁴⁵ As a result, he was of the

³³⁸ Ibid, at para 46.

³³⁹ Ibid, at para 47.

³⁴⁰ Ibid, at para 48.

³⁴¹ Ibid at para 48. This section can be found in Chapter Five which is concerned with the investigation and adjudication procedures.

³⁴² Ibid, at para 49.

³⁴³ Ibid, at para 50.

³⁴⁴ Ibid, at para 51.

³⁴⁵ Ibid, at para 53.

opinion that the matter should not be decided by the Court but rather referred back to the Tribunal for a re-hearing.³⁴⁶

Froneman J remarked that each appeal court, including the Constitutional Court, which decided on this matter, came to opposing conclusions regarding the ambit of the referral and in each instance the Tribunal's findings were either confirmed or reversed. In doing so, he believed, the courts overlooked a crucial aspect of the Tribunal's function which is necessary to determine not only the ambit of a referral but also the procedure to be followed when a dispute about the ambit arises.³⁴⁷

In its determination of whether the ambit of the referral included a 'complaint of margin squeeze', the SCA used the terms 'charge' and 'conviction' and compares the procedural powers of the Tribunal with that of an adversarial proceedings in a normal court of law. The Act in turn, does not use the language of 'charge' and 'conviction' and Froneman J believed that these terms are suggestive of an approach that the Tribunal's powers to determine the ambit of a referral must be narrow and restrictive.³⁴⁸

The minority view *in casu* accordingly argued that the provisions of the Act do not justify this kind of restrictive approach and the SCA erred in adopting same. Froneman J was consequently of the opinion that the provisions of the Act indicate that there is a material and significant difference between the Tribunal and civil courts and that excessive formality would not be in keeping with its purpose.³⁴⁹

³⁴⁶ Froneman JA suggest that in each stage of the enforcement process relevant to this case, the conclusion has been to either affirm or reverse the Tribunal's findings. He however suggests that in doing so, a crucial aspect of the functioning of the Tribunal in terms of the Act has been overlooked.

³⁴⁷ Ibid at para 60.

³⁴⁸ Ibid at para 64 & 65. The Constitutional Court remarked that the language of criminal penalty and procedure, and hence a restrictive approach, might be more appropriate to the investigative powers of the Commission as mentioned in *Woodlands*.

³⁴⁹ Ibid at para 69.

CHAPTER 4 – A QUESTION OF INTERPRETATION: THE IMPACT OF SENWES AND THE WAY FORWARD

4. Introduction

The success of any critical analysis can be argued to rest squarely on how efficiently it addressed the aims it set out to achieve. At the beginning of this study its aims were clearly highlighted and set out as follows:

- To critically review the Supreme Court of Appeal's findings in the cases of *Woodlands Dairy v Milkwood Dairy (105/2010) [2010] ZASCA 104 (14 September 2010)* and *Competition Commission v Yara (SA) (Pty) Ltd (784/12) [2013] ZASCA 107 (13 September 2013)* with reference to the preceding Competition Appeal Court judgments in each case;
- To analyze the approach of the Court in interpreting and applying the provisions of the Competition Act in each instance as it pertains to procedural formalities in complaint proceedings, with specific reference to the nature and powers of the Commission and Tribunal;
- To evaluate the effects of this difference in approach on the complaint initiation process as envisaged by the Act, in light of the purpose and aims of the legislation and the Constitution, with specific reference to the Constitutional Court's findings in the *Senwes*³⁵⁰ judgment;
- To suggest which approach should be favoured by the Competition Appeal Court and the Supreme Court of Appeal based on the above findings.

Keeping these objectives in mind, it is submitted that straight forward conclusions can only be drawn with some difficulty and will be weighted heavily by personal views and opinion to interpretation of the competition legislation. Nevertheless, it is my belief that any conclusions drawn from such an investigation may well aid in developing a better understanding of competition law enforcement and its effect on legal policy development in South Africa.

4.1 A question of preference: Is there a correct approach?

It is submitted that the specific approach to be followed by any administrative body or court will largely be informed by the nature of the issues in dispute and the facts of the case before them. As such it is of vital importance that the competition authorities treat every single matter on a case by case basis.

The common thread throughout competition law enforcement, in my mind however, should always be the Act, its provisions and the underlying intention of the legislature, interpreted in such a manner so as to constitutionally further its aims and objectives in not only a legal but also an economic setting.

³⁵⁰ *Competition Commission of South Africa v Senwes Limited* Case CCT 61/11 [2012] ZACC 6.

4.1.1 The Legislature's Intention

The reason for focussing on the intention of the legislature as an objective tool used in statutory interpretation, is said to be to enable an interpreter, in this instance the competition authorities, to ascertain the legislature's policy in enacting a particular provision and interpreting it in a manner that would not defeat this policy.³⁵¹ This will logically entail, where appropriate, giving an expansive meaning to a statutory provision in certain circumstances and a restrictive meaning in others, depending on the policy of the legislature in enacting the specific legislation.³⁵²

The clearest reflection of the legislature's intention when promulgating the Act can be said to be evident in the aims set out in the preamble of the Act itself. Unlike competition legislation in many other countries, the South African Act has included in its aims elements that are referred to as "macro-economic or wider public-interest" goals, such as the promotion of employment equity and the expansion of what can be referred to as the ownership stakes of historically disadvantaged persons in the economy.³⁵³

When looking at the *Woodlands Omnia* debate from a critical standpoint, the view that the Act's policy statements about economic efficiency and consumer benefits leaves room for flexibility in application³⁵⁴ appears to hold true. It is however submitted that when it comes to competition law enforcement and policy development in light of the impact the legislature intended the legislation to have, the aims of the Act can only be achieved by the constant application of a purposive approach to procedure and procedural formalities by the appeal courts.

4.1.2 Objectives vs Application: The SCA's Interpretation

This study attempted a critical look at the SCA's judgments in both the *Woodlands* and *Ominia* cases by highlighting the issues under review, the rationale used by the judiciary in reaching seemingly divergent conclusions and the approach implemented by the court to interpret the provisions of the Act and the powers of the competition authorities tasked with its enforcement.

From a factual perspective, it is submitted that the *Woodlands* and *Ominia* cases are in fact distinguishable. The SCA itself explicitly remarked that in the *Woodlands* judgment its focus had not been on the degree of correlation there has to be between an initiating complaint, on the one hand, and the ultimate referral on the other, as was the case in *Ominia*. Where in the former instance the court's enquiry revolved around the requirements of a valid complaint initiation, its focus in the latter instance had been more centred towards the manner in which a valid initiation came about and its link to the ultimate referral of a complaint to the Tribunal.

³⁵¹ Kafesu, LT, 'Interpretation of Fiscal Statutes by the Courts: A South African Tax Law Perspective' (2011), at 9.

³⁵² Ibid at 9.

³⁵³ Neuhoof M (ed) et al, *A Practical Guide to the South African Competition Act*: Durban Butterworths, (2006) at 13.

³⁵⁴ An OECD Peer Review (May 2003): 'Competition Law and Policy in South Africa', at 20. The argument is made that the term 'efficiency' should not necessarily be understood in the sense of static welfare analysis, but rather coupling it with 'adaptability' implies a greater concern for dynamic considerations about for example entry into and mobility within a market.

The SCA on the one hand warned that statements made in its *Woodlands* judgment on topics decided in the *Omnia* case should not be treated as a formal attempt at statutory interpretation or seen as setting out fully formed rules. On the other hand, the court also stated that the *Omnia* judgment should not be understood to “authorise a formal investigation without a complaint initiation, nor the initiation of a complaint without reasonable grounds, nor to absolve the Commission of its obligation to provide those grounds when challenged to do so”.³⁵⁵

A further distinction can be found in the type of complaint initiation giving rise to the dispute in each case. The SCA in *Woodlands* had been confronted by a dispute arising out of a complaint initiated by the Commission in terms of section 49B(1) following the submission of information by a third party in terms of section 49B(2)(1), while in *Omnia* the dispute arose out of a complaint initiated directly by a third party complainant in terms of section 49B(2)(a).

I am in agreement with the SC’s view in *Omnia* that this distinction is important and the two types of complaints should not be treated identically when it comes to procedure. Whereas formalities are prescribed by the Act when a third party complaint is initiated, the same cannot be said when the Commission initiates a complaint. It is submitted that the legislature purposively chose to deal with the two types of initiation separately, and this purpose should be borne in mind by the competition authorities when the concepts of initiation and referral are engaged with.

It is also submitted, that in evaluating the findings of the CAC relating to the validity of a complaint initiation and the exercise of the Commission’s powers of investigation in *Woodlands*, the SCA opted for a more formal or restrictive approach with regards to procedural formalities, while the SCA in *Omnia* took a more purposive approach in its evaluation of the validity of the so called “referral rule” and its application to the case at hand.

In *Omnia* the SCA justified a purposive interpretation to its evaluation of the referral rule, not by dispelling the referral rule completely, but by dispelling its application to the situation before it in light of what the intention of the legislature would dictate and the provisions of the Act would support. It did however seemingly question the creation of such a rule in the strict sense, focussing instead on the merits of requiring a direct correlation between the initiation of a complaint and its referral when appropriate and on a case by case basis.

When it came to *Woodlands* the SCA turned to the principle of legality, the dangers posed by the exercise of public powers by administrative bodies and the Constitutional rights afforded to an ‘accused’ firm to justify a restrictive approach. It illustrated how a lack lustre attitude towards the exercise of its own powers by the Commission could result in serious consequences for parties via the use of a criminal analogy to competition law enforcement.

It is submitted that even though the analogy used may be inappropriate in the context of competition law, the importance of formal procedure should not be completely disregarded.

It can also be argued that based on the facts in *Woodlands*, even if a purposive approach had been followed the outcome would have been the same, albeit for different reasons. The invalid exercise of a statutory power remains invalid regardless of how purposively that power, and the

³⁵⁵ *Competition Commission v Yara (SA) (Pty) Ltd* (784/12) [2013] ZASCA107 (13 September 2013), at para 26.

statute that grants it, is interpreted. In the same breath it can be said that an insistence on excessive formalism when it comes to procedure will result in the objectives of the statute being negated as countless technical challenges obscures the end result the legislation aims to achieve.

In summary, and in an attempt to formulate a standard approach to complaint initiation drawing from both SCA judgments, it is submitted that some of the principles highlighted by the court can be set out as follows to provide guidelines on complaint initiation:

- A complaint must be validly initiated in order for a valid referral to follow. The invalid exercise by the Commission of its statutory powers will inevitably lead to an invalid investigation, which in turn invalidates all subsequent steps in the enforcement chain.
- Even though procedure is important in competition law enforcement in order to protect the Constitutional rights of the parties thereto, insisting on strict formalism can go against the aims which the Competition Act has at its core and the intention of the legislature in promulgating the statute.
- Competition law by its very nature, and especially in the context of South Africa requires a somewhat unique approach to enforcement, and superimposing elements of criminal procedure onto specialist enforcement bodies does not aid in creating or developing proper procedure.
- A complaint initiated by the Commission and a complaint initiated by a private complainant should not be treated the same, as different procedural rules and formalities will apply in each instance in order to give effect to proper enforcement.
- Strict implementation of the so called “referral rule” is not desirable and should not be blindly required in each and every competition case, although there may be merits in applying elements of the rationale behind the rule on a case by case basis.
- The Commission can initiate complaints informally and even tacitly by way of a decision to investigate alleged contraventions of the Act. Complaints will therefore still require a valid initiation, although they do not always have to be included in the initial complaint referral under review but can be added during the course of the proceedings.

4.2 The Impact of *Senwes* on the *Woodlands Omnia* Debate

As a starting point it should be noted that the Constitutional Court handed down its *Senwes* judgment prior to the SCA hearing the appeal in *Omnia*. It is submitted that this in itself may have had an impact, however, subtle, on the approach taken by the SCA and may have influenced the notion that the SCA departed from its previous formalistic approach present in *Woodlands*.

In its *Omnia* judgment, the SCA makes reference to the Constitutional Court’s findings in *Senwes* in support of its scepticism regarding the referral rule. The SCA remarks that in this case the

Constitutional Court found that the Tribunal was not precluded from determining a complaint that was not covered in the referral and although the Tribunal cannot initiate a complaint, this does not mean that it is precluded from determining complaints brought to its attention during the course of a referral.³⁵⁶

Brand JA then goes on to infer that if the Tribunal may consider a complaint that had not been raised in the referral, it must logically follow that a referral is not confined to the parameters of the original complaint and accordingly, the judgment in *Senwes* appears to be wholly destructive of the CAC's formulation of the referral rule.³⁵⁷

In making its determination *in casu*, the Constitutional Court is said to have applied a broad purposive approach "which returned to the foundations of South African competition law by examining the background to the promulgation of the Act, the objectives of the Act and the roles and powers of the Commission and Tribunal that are envisaged by the Act".³⁵⁸ Staples J and Masamba M argues that realisation of the objectives of the Act is being hampered by procedural irregularities, and in this context the *Senwes* decision is a watershed judgment that highlights the importance of the these underlying objectives.³⁵⁹

The Constitutional Court largely ignored the decisions of the lower courts in deciding *Senwes*, instead taking a purposive approach in examining the provisions of section 27 of the Act.³⁶⁰ With its focus on the powers of the Tribunal, the CC commented that the SCA's interpretation *in casu*, which is submitted here to be similar to its approach in *Woodlands*, was at odds with the scheme of the Act read in its entirety. As the Tribunal is given the power to adopt an inquisitorial approach to a hearing, confining a hearing to matters raised in a referral only serves to undermine this power.³⁶¹

What is evident from the CC's landmark decision in *Senwes*, the first competition law case to make its way to this court, is that a purposive approach to interpreting the powers of the Tribunal, and by inference also the Commission, and the provisions of the Act as a whole should be the basis from which any competition law matter proceeds. By deciding an issue related to the link between a complaint initiation in the one and the referral of the complaint on the other, the CC also appeared to have paved the way for the SCA's so called 'turn around' in its review of the *Omnia* appeal.

I would have to agree that the *Senwes* judgment does appear to put the final nail in the coffin of the future use of the referral rule and its strict application by mainly the CAC. It must be said however that besides possibly highlighting the incorrect application of a restrictive approach in *Woodlands*, this judgment does not explicitly invalidate the SCA's findings in the latter matter as a whole.

³⁵⁶ *Competition Commission v Yara (SA) (Pty) Ltd (784/12)* [2013] ZASCA107 (13 September 2013), at para 27.

³⁵⁷ *Ibid* at para 27.

³⁵⁸ Staples J & Masamba M, 'Fourteen Years Later: An Assessment of the Realization of the Objectives of the Competition Act 89 of 1998', *Sibergramme* 3/2012 ISSN 1606-9986, at 3.

³⁵⁹ *Ibid* at 3.

³⁶⁰ *Ibid* at 15.

³⁶¹ *Ibid* at 15. Mention is made that the CC's judgment in *Senwes* provides much-needed clarity on the scope of the Tribunal's powers which should reduce the scope for future procedural disputes.

It is submitted that procedure remains important in effective competition law enforcement and this must be borne in mind by the Commission and Tribunal in exercising their powers, however it seems that the days of an excessive reliance by an accused firm on technical disputes to derail a matter against it are over.

Prior to the *Senwes* decision, recent prohibited practice investigations, such as *Woodlands* and *Omnia*, appeared to show that the effective enforcement of the Act in this respect has been clouded by disputes over the failure to follow due process on the part of competition authorities.³⁶² The *Senwes* case is however said to represent a turning point in that it “returns focus to the core ideology of the Act”, which provides an opportunity for the Competition and Tribunal on the one hand, and the appeal courts on the other, to regain a clear sense of the underlying objectives of the Act and to work towards these objectives in future matters that come before them.³⁶³

What is interesting to note is that in his minority judgment on the matter, Froneman J suggested that a restrictive approach may be more appropriate to the investigative powers of the Commission, but not to the adjudicative powers of the Tribunal.³⁶⁴ This would in some way suggest that the core discussion around procedural formalities highlighted in the *Woodlands Omnia* debate in recent years is far from over.

4.3 Moving Forward – A Suggestion

It can be argued that both the competition authorities and respondents in competition matters can be held responsible for the confusion surrounding procedural formalities when it comes to prohibited practice cases. Costly and time consuming litigation on procedural grounds often arise due to respondents raising a flurry of technical objections to avoid engaging with the merits of the case against them.³⁶⁵ In short, “prolonged disputes on procedural grounds prevent the speedy resolution of prohibited practice cases, delaying relief for consumers”.³⁶⁶

It is true that respondents under investigation have the right to raise any defence available to them, including technical objections; however more scrupulous action by the Commission and the Tribunal when it comes to procedure would go a long way towards minimizing the possibility for such disputes to arise.³⁶⁷

Proceeding from the premise that for the sake of effective competition law enforcement and uniform policy development a purposive interpretation to the nature and powers of the Commission and Tribunal is desirable, it is submitted that formal procedure will still play a vital role in achieving coherent results. The extent of formality required however, must be softened in order to achieve the Act’s objectives of creating free and fair markets, consumer welfare and promoting greater ownership and employment to address the economic injustices of the past.

³⁶² Ibid at 28.

³⁶³ Ibid at 28.

³⁶⁴ Prins D & Koornhof P, ‘Assessing the nature of competition law enforcement in South Africa: Law Democracy & Development’ Volume 18 (2014), at 148.

³⁶⁵ Staples J & Masamba M, ‘Fourteen Years Later: An Assessment of the Realization of the Objectives of the Competition Act 89 of 1998’, *Sibergramme* 3/2012 ISSN 1606-9986, at 16.

³⁶⁶ Ibid at 17.

³⁶⁷ Ibid at 17.

It is submitted that in an attempt to give some ‘form’ to purposive interpretation, the Land Claims Court provided a six step account of purposive legislative interpretation In *Minister of Land Affairs v Slamdien*³⁶⁸, which I would suggest, may also prove to be useful as a guideline to interpretation in the context of competition law when authorities are tasked with engaging with the Act itself.

These six steps entail that when interpreting a statute the interpreter should:

- (i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
- (ii) have regard to the context of the provision in the sense of its historical origins;
- (iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it;
- (iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated;
- (v) have regard to the precise wording of the provision; and
- (vi) where a constitutional right is concerned, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers.³⁶⁹

As has already been mentioned, the responsibility to adhere to proper procedure mainly lies with the competition authorities, as procedural litigation has been argued to impede enforcement in prohibited practice cases.³⁷⁰

The Act itself realises that effective enforcement is a crucial aspect for the effective promotion and maintenance of competition in the country, and insofar as technical disputes result from the failure by the Commission and Tribunal to follow proper procedure, these institutions are falling short in fulfilling their statutory mandates.³⁷¹

4.4 Conclusion

Following the SCA’s decision in *Omnia*, some in the legal fraternity has viewed the SCA’s judgment as a ‘relaxation’ of the “referral rule” which brings the rule in line with a more purposive interpretation of the provisions of the Act.³⁷² Others have commented that the *Omnia* judgment appears to reflect a reversion by the SCA towards both the handling and interpretation of initiation and complaint proceedings in terms of section 49B of the Act.³⁷³ It is submitted that the former, more cautious view is the more favourable.

³⁶⁸ 1999 (4) BCLR 413 (LCC).

³⁶⁹ Introduction to the Promotion of Administrative Justice Act, Chapter 1, at 14.

³⁷⁰ Staples J & Masamba M, ‘Fourteen Years Later: An Assessment of the Realization of the Objectives of the Competition Act 89 of 1998’, *Sibergramme* 3/2012 ISSN 1606-9986, at 18.

³⁷¹ *Ibid* at 18.

³⁷² Meijer J and Avidon C, ‘Bowman Gilfillan Competition Case Note – Competition Commission v Yara and Others [2013] ZASCA 107 (13 September 2013)’, at 2. (www.bowman.co.za accessed on 16 June 2015)

³⁷³ Mendelsohn L, Blignaut L and Seth J, ‘Have we come full circle with the procedural rules of initiation, investigation and referral of competition complaints?’, *Competition Newsflash*, 26 September 2013, ENSafrica News, at 1. (www.ensafrica.co.za accessed on 16 June 2015)

It can be said that in future, to the extent that complaints are informally or tacitly initiated by the Commission, such an initiation will have to be pointed out in the referral to the Tribunal as parties to competition disputes will most likely continue to challenge the Commission's exercise of this procedural power which could result in various implications for an 'accused' firm.³⁷⁴

From a practical standpoint, greater emphasis could be placed on the scope of an investigation and its parameters, to the extent that where conduct falls outside of the initial complaint, the Commission will have to take care to initiate a complaint (even if informally) before proceeding to investigate same to avoid evidence gathered during an investigation later proving to be inadmissible.³⁷⁵

It has been said that the Act was "a response to a specific set of historical and economic circumstances and was designed to encompass a wide range of objectives, including certain objectives that speak to public interest and developmental aspects".³⁷⁶ As such, an interpretation of the powers of the competition authorities that is too formal or restrictive will arguably not assist in achieving the Act's aims. This is submitted, will be the primary reason why a purposive and somewhat relaxed approach to competition law enforcement should be favoured in the future.

Again, it must be stressed that implementing a purposive approach does not grant the Commission or even the Tribunal free reign to disregard procedural formalities and exercise their powers arbitrarily. Proper procedure must still be followed, specifically when it comes to adjudication, albeit in a less restrictive manner that focuses less on the principle of legality and elements of administrative justice and more on achieving the goals the legislature intended in drafting a uniquely South African piece of competition legislation.

The obiter by Froneman J in *Senwes* rings true in light of the objectives of this study, suggesting that due to the potential invasive nature of the Commission's powers of investigation a more formal approach may be suitable when dealing strictly with challenges to the exercise of its investigative powers. However, as stated earlier in this dissertation, the argument has also been made, correctly in my view, that the principles of administrative justice will be observed before the Tribunal during adjudication of a particular dispute, so hence such a restrictive approach could be somewhat superfluous.

Whichever view is favoured by an appeal court when reviewing competition law findings by lower institutions, it would be prudent to acknowledge that the SCA's findings in *Woodlands* may still, at the very least, serve as a warning to the Commission to adhere to a higher level of care and diligence when investigating complaints, whether initiated by itself or through a third party complainant.

In conclusion, Garden and Hlatshwayo interestingly remarks that the emergence of the constitutional era in South Africa brought with it an active, yet somewhat controversial, inquiry

³⁷⁴ Meijer J and Avidon C, 'Bowman Gilfillan Competition Case Note – Competition Commission v Yara and Others [2013] ZASCA 107 (13 September 2013)', at 2. (www.bowman.co.za accessed on 16 June 2015)

³⁷⁵ Ibid at 2.

³⁷⁶ Staples J & Masamba M, 'Fourteen Years Later: An Assessment of the Realization of the Objectives of the Competition Act 89 of 1998', *Sibergramme* 3/2012 ISSN 1606-9986, at 18.

into the relationship between the exercise of power and the procedural framework tasked with constraining such power.³⁷⁷ This dilemma, it is submitted, finds specific application in the complaint initiation and referral steps implemented in enforcing competition law in the country.

The extent to which procedural formalities constrain the exercise of a statutory power by specialist enforcement bodies, has even had the SCA confused as the *Woodlands Omnia* debate clearly illustrates. The arguments advanced in the *Senwes* case appears to bring to the forefront the complexities to be found in balancing competing, but equally important, legal concerns in the development of a country's jurisprudence.³⁷⁸ The central question, evident in the *Woodlands Omnia* debate, therefore remains, namely "can the principle of legality be compared to a legal safety net which parties to a matter may employ to sift abuses of power, leaving credible and legitimate rulings of law? Or does the principle of legality act as a stifling restraint on the control of unlawful practices by administrative authorities?"³⁷⁹

It appears from the discussion above that the appeal courts in South Africa, when dealing specifically with competition law enforcement, still have a long way to go in attempting to perfect this precarious balancing act to best serve the development of competition policy in our country's unique setting.

Word Count: 31 451

³⁷⁷ Garden M and Hlatshwayo R, 'A Powerful Dilemma – The Struggle Between Power and Procedure in Administrative Law', 23 March 2012, Legal Times First Publication, at 1.

³⁷⁸ Ibid at 2.

³⁷⁹ Ibid at 2.

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