

**THE INVESTIGATIVE POWERS OF THE COMPETITION COMMISSION WITH
SPECIFIC REFERENCE TO CARTELS: WHEN JUSTICE IS NOT ON BOARD**

Submitted in partial fulfilment of the requirements for the LLM degree

By

Tshepiso Rebecca Mnguni

s23510499

Prepared under the supervision of

Prof: C van Heerden

At the University of Pretoria

12 December 2012

DECLARATION

I Tshepiso Rebecca Mnguni hereby declare that “The Investigative Powers of the Competition Commission with specific reference to Cartels: When justice is not on board” is my 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.

T.R Mnguni

ACKNOWLEDGEMENTS

To my Lord and Saviour Jesus Christ, thank you for your mercy, grace and love. Without which I could not be here today.

To my supervisor Prof C. van Heerden, thank you for your guidance and patience and most of all for understanding the pressures of a working student.

To my Husband Nico Mnguni, you are the best support system in the universe for me.

TABLE OF CONTENTS

| CHAPTER | PAGE |
|---|------|
| 1) CHAPTER 1 | |
| 1 Introduction..... | 1 |
| 1.1 Historical Background..... | 2 |
| 1.2 Competition Law in Developed countries | 7 |
| 1.2.1 United States of America | 7 |
| 1.2.2 European Union..... | 8 |
| 1.2.3 Canada..... | 10 |
| 1.2.4 England | 11 |
| 1.3 The Development of s4 (1) (a) & (b) of the Act..... | 13 |
| 1.4 Disadvantages of Cartel Activities | 15 |
| 1.5 The Aims of this study | 15 |
| | |
| CHAPTER 2 | |
| 2 Introduction..... | 18 |
| 2.1 The Woodlands Case | 18 |
| 2.1.1 The facts..... | 18 |
| 2.1.2 The argument | 19 |
| 2.1.3 The Tribunal decision | 20 |
| 2.1.4 Comments on the Tribunal decision | 21 |
| 2.1.5 The CAC case | 21 |
| 2.1.6 Comments on the CAC decision..... | 22 |

| | |
|--|----|
| 2.1.7 The SCA decision | 25 |
| 2.1.8 Comments on the SCA decision | 26 |
| 2.2 The Yara case | 26 |
| 2.2.1 The facts | 27 |
| 2.2.2 The argument | 28 |
| 2.2.3 The Tribunal decision | 28 |
| 2.2.4 Comments on the Tribunal decision | 28 |
| 2.2.5 The CAC case | 29 |
| 2.2.6 Comments on the CAC decision..... | 30 |
| 2.3 The Netstar case | 30 |
| 2.3.1 The facts..... | 31 |
| 2.3.2 The Tribunal decision | 31 |
| 2.3.3 Comments on the Tribunal decision | 32 |
| 2.3.4 The CAC case | 32 |
| 2.3.5 Comments on the CAC decision..... | 33 |
| 2.4 The Loungefoam case | 34 |
| 2.4.1 The facts..... | 34 |
| 2.4.2 The argument | 35 |
| 2.4.3 The Tribunal decision | 36 |
| 2.4.4 Comments on the Tribunal decision | 37 |
| 2.4.5 The CAC case | 38 |
| 2.4.6 Comments on the CAC decision..... | 39 |
| 2.5 Comprehensive overview and discussion..... | 39 |

CHAPTER 3

| | |
|--|----|
| 3 Introduction..... | 43 |
| 3.1 Formation of the Cartels division | 44 |
| 3.2 Investigative powers of the Commission | 44 |
| 3.2.1 The Complaint process under the Act | 45 |
| 3.2.2 The Summons under the Act..... | 49 |
| 3.2.3 The Referral process under the Act..... | 54 |
| 3.2.4 Amending a referral | 59 |
| 3.3 A practical application of the higher courts decisions | 62 |
| 3.3.1 The Woodlands decision | 62 |
| 3.3.2 The Yara decision..... | 64 |
| 3.3.3 The Loungefoam decision | 66 |
| 3.4 Final conclusion..... | 67 |

CHAPTER 4

| | |
|---|----|
| 4. Introduction..... | 71 |
| 4.1 Executive summary of the study..... | 71 |
| 4.2 Findings | 73 |
| 4.3 Recommendations..... | 74 |
| 4.4 Final comments | 75 |

CHAPTER 1

1. Introduction

In the History of Competition Law enforcement around the world some focus has always been on Cartel investigation, a segment in competition law that has rippling effects on the economy of a country and affects the end consumer often even without them knowing. A cartel is an agreement between businesses not to compete with each other.¹ There are three main cartels outlawed by most legal systems namely: Price Fixing: wherein competitors agree to directly or indirectly fix a purchase or selling price or any other trading condition; Market allocation: arises in instances where competitors divide markets amongst each other by allocating customers, suppliers, territories, or specific types of goods or services and lastly Collusive tendering: wherein competitors agree to fix prices of their tenders by either sharing tender prices, adding inflated margins to their bid prices or adding loser's fees to the final tender price. Legislation in each country that regulates competition has put in place strict laws to discourage, deter and punish cartel activities yet the same legislation in some countries has failed to put in place the necessary tools capable of achieving this goal. In South Africa the Competition Commission has dedicated a new division to Cartel Investigation, which is covered by section 4(1) a & b of the Competition Act No: 89 of 1998 (hereinafter referred to as the Act). The division will use as a tool the Act to exercise its powers with specific reference to Chapter 5 thereof and this would flow from investigations set in motion by section 49B of the Act.

The process as dictated by section 49B deals with the initiation of a complaint by the Commission upon receipt of information from an outside source. Through the years the commission has been drafting the initiation statement and summons in a manner prescribed by the Act and common practice. However the method of drafting the initiation statement and summons and the scope of coverage was questioned and discredited by the *Woodlands Dairy (Pty) Ltd & another v Competition Commission [2010] JOL 26108 (SCA)*; decision (hereinafter referred

¹ Cartels and the Competition Act 1998: A guide for purchasers; OFT435 Page 3

to as the *Woodlands case*) and other cases that followed thereafter. The question that comes to mind with regards to the *Woodlands case* is how practical would its application to the initiation statement and summons be given the contents of Rule 14(1) (c) (i) of the Act and the powers of the Commission to investigate anti-competitive behaviour. Does the decision undermine the already limited powers bestowed by the Act and if so to what extent?

1.1 Historical Background

To understand the state of competition law in South Africa, it is essential to analyse the historical development of this area of law.² Why was competition law developed in South Africa? When was it developed and how was this done? Answers to these questions provide a better understanding of the studied subject matter. The history of South Africa's Competition legislation development stems from as far as the Regulation of Monopolistic Conditions Act 24 of 1955 and has developed over the years to its current state of the Competition Act 89 of 1998. In this chapter I will look into the development of competition Law in South Africa and compare that development with other established countries while outlining any changes made to the legislation that governs competition thus far.

The first signs of Competition law enquiry by government in South Africa can be traced back to 1923 when the Board of Trade and Industry was formed and given the powers to advise the government on Competition matters,³ thus marking the first sign of regulation of competition in South Africa. The Board was mandated with enquiring into and advising the government on competition policy⁴ and it developed various reports regarding competition over the years at the direction of the Minister of Economic Affairs. The 1951 report by the Board criticized the Undue Restraint of Trade Act;⁵ it outlined the many shortcomings of this Act and outlined the international trends with regards to competition law and analysed the

² Sutherland and Kemp: Competition Law of South Africa (LexisNexis, Durban 2000) in chapter 2 par 2.1

³ Sutherland and Kemp in chapter 3 par 3.2.1

⁴ Sutherland and Kemp in chapter 3 par 3.2.1

⁵ 59 of 1949; this Act was enacted in anticipation of the board's report on competition matters and policy in the country.

state of competition law in the country.⁶ The critique of existing laws by the report brought about the first legislation that was dedicated to regulation of competition in South Africa namely the Regulation of Monopolistic Conditions Act 24 of 1955; which came into effect on 1 January 1956.⁷ The Regulation of Monopolistic Conditions Act established a Board of enquirers which would look into the competition policies of the country; it provided that the Trade and Industry minister's office would order investigations and the Board would provide reports to the minister regarding the said investigations.⁸ The minister had limited powers to sanction anti-competitive behaviour so fewer investigations were conducted and no-one was punished criminally for contravening the Regulation of Monopolistic Conditions Act.⁹ It seems that at that stage the "most fundamental problem with Competition Law in South Africa was that regulatory institutions and enforcement bodies remained weak".¹⁰ The Regulation of Monopolistic Conditions Act had a number of shortcomings and because of those shortcomings; such as weak sanctioning and enforcement powers, lack of merger control and an ill-equipped investigatory board, it produced very little results and even less noteworthy deterrence outcomes.¹¹

The South African government decided to appoint a commission of enquiries into the Competition policy state of the country and this commission after considering various aspects of the economic state of affairs suggested that the existing Regulation of Monopolistic Conditions Act was not sufficient to regulate competition in the country's concentrated economy.¹² The commission's report gave rise to the Maintenance and Promotion of Competition Act 96 of 1979 which came into effect on 1 January 1980.¹³ The Maintenance and Promotion of Competition Act regulated to some extent mergers and also included instances of exemptions and enforcements.¹⁴ Cartel activity was again outright illegalised and a new competition board was established which had wider powers than the

⁶ Sutherland and Kemp chapter 3 par 3.2.1

⁷ Sutherland and Kemp chapter 3 par 3.2.1

⁸ *ibid*

⁹ *Ibid*

¹⁰ *Ibid* at par 3.2.1

¹¹ Sutherland and Kemp chapter 3 par 3.2.1

¹² Sutherland and Kemp chapter 3 par 3.2.2

¹³ *Ibid* at par 3.2.2

¹⁴ Sutherland and Kemp chapter 3 par 3.2.2

previous Board under the Regulation of Monopolistic Conditions Act.¹⁵ This new Board could initiate investigation on its own even where the minister had not given directive to investigate. The minister however still had to make the final decision as to whether action was to be taken or not in instances where the Maintenance and Promotion of Competition Act was contravened.¹⁶

Over the years that followed it seemed that all Boards of enquiries into Competition law were merely there for compliance purposes and no strict Competition law was in place to properly regulate Competition in South Africa. Due to this attitude towards competition in South Africa it was largely accepted that the new competition Board would not produce significant results if any.¹⁷ This state of affairs was actually justified as being highly probable given the state of the economy of the country.¹⁸

However, in 1994 the political structure of South Africa changed and when the African National Congress came into power it reiterated in its White Paper Review that “competition law was to promote traditional economic goals.¹⁹ It had to reform market structures that underpin high prices, break down barriers to entry, and control anti-competitive practices such as market domination, collusive practices and abuse as well as exploitation of markets or customers.²⁰ But it also had to serve a broader social and political purpose, it had to promote the interests of small and medium enterprises and thus transform gender relations; it had to discourage conglomerates and pyramids”.²¹ It was further decided that the institutions that oversaw competition policy had to be reviewed.²²

The political change demanded an even stronger and stricter economic change, which could only be achieved once law reform took place.²³ The department of Trade and Industry after research, various drafts and numerous consultations

¹⁵ Ibid

¹⁶ Ibid at par 3.2.2

¹⁷ Ibid at par 3.2.1

¹⁸ Sutherland and Kemp chapter 3 par 3.2.2

¹⁹ Competition law and policy in South Africa: An OECD Peer Review page 14

²⁰ Sutherland and Kemp chapter 3 par 3.2.3

²¹ Ibid

²² ibid

²³ Sutherland and Kemp chapter 3 par 3.2.3

with business, the public and the legal fraternity (just to name a few) published the Competition Bill of 1998 in the Government Gazette.²⁴ The Bill led to the formation and promulgation of the Competition Act 89 of 1998 which was put in place to address various economic and social ills created over the previous years by the concentrated economy and inadequate legislation.²⁵

The new Act which came into effect on the 30 November 1998 with other sections of the Act commencing on the 1 September 1999²⁶ established the Competition Commission which had wider investigative powers than the previous Board of enquiries into Competition matters²⁷ and did not have to await approval or directives from the Minister of Trade and Industry with regard to its investigation. The Commission could also look vigorously into the state-owned enterprises which all its predecessors did not have the powers to do.²⁸ The Act further established the Competition Tribunal²⁹ and the Competition Appeals Court³⁰ which had exclusive jurisdiction in Competition matters. Stricter merger controls were put in place under the new Act, enforcement and exemptions were no longer placed in the mandate of the Trade and Industry Minister.³¹ The Competition Act repealed all the previous Acts and was amended on numerous occasions due to various problems including interpretation.³²

In developing Competition laws in South Africa the legislation acknowledged that in some instances there might be a need to protect competitors against each other.³³ This acknowledgement led to the concept of unlawful competition which is not governed by competition legislation; this is captured in essence by Van Heerden as follows “it is clear that the competitive relationship brings about a struggle for the favour of the client, a struggle in which the benefit that the one

²⁴ Sutherland and Kemp chapter 3 par 3.2.3

²⁵ Ibid

²⁶ Competition Act 89 of 1998 page 1

²⁷ Sutherland and Kemp chapter 3 par 3.2.3

²⁸ Ibid

²⁹ Chapter 4 Part B, section 26 established the Competition Tribunal

³⁰ Chapter 4 Part C, section 36 established the Competition Appeals Court

³¹ Sutherland and Kemp chapter 3 par 3.2.3

³² The 1998 Act was amended by the Competition Amendment Act 35 of 1999, which was amended by the Competition Act Amendment Act 15 of 2000 and further amended by the Competition Second Amendment Act 39 of 2000

³³ Van Heerden-Neethling: Unlawful Competition second edition page 3

obtains, finds its correlate in the prejudice or potential prejudice that the other suffers”.³⁴ The law then recognised a need to intervene in such situation and protect interests of those prejudiced by undue infringements.³⁵ The concept of Unlawful Competition addresses a different form of infringement; this portion of law regards a situation where competitors are infringing each other’s rights to compete fairly in the market by methods of “sabotage”.³⁶

The South African Competition law has had many influences in its development and the role of foreign laws with regard to its Competition law system has been addressed by the current Act in section 1(3) which determines that “any person interpreting or applying this Act may consider appropriate foreign and international law”.³⁷ It is however important to note that foreign law is not binding to our courts and they often prefer to limit its consideration when faced with decisions.³⁸ Because of the influence of foreign laws in the development of South African laws it is however important to look into these foreign systems. Much of the law about property, sales, and contracts can be traced to the Dutch-Roman law that European settlers brought with them in the seventeenth century.³⁹ Company, financial and intellectual property law derives more from English sources, a connection with the 19th century development of large-scale undertakings related to mining.⁴⁰ Because of this influence it may be noted that there are far more established systems than South Africa’s legal system in the European and Western worlds and it’s from these systems that we draw a higher understanding of where the branch of Competition law comes from.

³⁴ Ibid page 3

³⁵ Ibid

³⁶ Van Heerden-Neethling: Unlawful Competition second edition page 3-4

³⁷ Ibid at par 3.3.2 page 27-28

³⁸ Sutherland and Kemp chapter 2 par 2.2

³⁹ Ibid at par 2.3

⁴⁰ Competition Law and Policy in South Africa: An OECD Peer review May 2003 page 11

1.2 Competition Law in Developed Countries

1.2.1 United States of America

The United States of America established Competition law in its basic form however that form of Competition law was not directly copied into the South African system.⁴¹ The American Competition law is known as Anti-trust law which was put in place to deal with business that established trusts as a means of controlling various economic structures.⁴² The first Act established to deal with anti-competitive behaviour by business in post-civil war era was the Sherman Act⁴³ in 1890; this Act established a highly refined, workable system of law which was sensitive to social and economic changes at the time.⁴⁴ The Sherman Act established fines and imprisonment for contraventions, the main purpose of the Act was to protect and establish economic freedom⁴⁵ and as Senator Sherman put it *“if we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity”*⁴⁶

The American system further developed when the Clayton Act⁴⁷ was passed in 1914, which was put in place to address the short-comings of the vaguely drafted Sherman Act. The Federal Trade Commission Act⁴⁸ was also established with that purpose, while the Clayton Act introduced civil claims for damages to the Anti-trust dimension, the FTC Act established the Federal Trade Commission which was mandated with enforcing Anti-trust laws.⁴⁹ This independent regulatory body along with the department of justice was given powers to regulate Competition in the American system of Anti-trust law, one

⁴¹ Sutherland and Kemp chapter 2 par 2.4

⁴² Ibid

⁴³ The Sherman Anti-Trust Act (1890)

⁴⁴ Sutherland and Kemp Supra

⁴⁵ Ibid

⁴⁶ Sutherland and Kemp chap 2 par 2.4

⁴⁷ The Clayton Anti-Trust Act (1914)

⁴⁸ Federal Trade Commission Act (1914)

⁴⁹ Sutherland and Kemp chap 2 par 2.4

body dealing with the civil aspect of the sanctions and fines while the other dealt with the criminal side of the contravention punishment.⁵⁰

The establishment of Anti-trust laws in the U.S untangled when the First World War and the Great Depression set in.⁵¹ The U.S government changed its approach towards regulations of competition and opted for approaches that favoured economic survival via co-operative relationship in business instead of vigorous competition.⁵² This approach changed when it became clear that stability was attainable in the economy, thus bringing about various legislations that regulated Anti-trust laws again.⁵³ The current state of Anti-trust laws in America is a result of influence and amendments of the original legislations that established Anti-trust laws and although the current law is the strongest and most established in the world today it is still faced with some challenges when it comes to implementation.⁵⁴ The Anti-trust laws interpretations and method of implementation have over the years been subject to instability due to the change of presidency from a Democrat to a Republican whose mandates are often different and priority regarding the Anti-trust section of the law varying from high to low depending on who is at the helm of the government.⁵⁵ Various states in the US have their own Anti-trust laws which are to some extent different thus causing jurisprudential nightmares.⁵⁶ However despite these problems the American Anti-trust law remains the most established and sophisticated of its type in the world to date and many systems stem from it.

1.2.2 EUROPEAN UNION (EU)

One of the main impacts of the Second World War was the decision by various European states to unite on an economic level with the intention of

⁵⁰ Ibid

⁵¹ Sutherland and Kemp chap 2 par 2.4

⁵² Sutherland and Kemp chap 2 par 2.4

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Ibid

bringing about a more peaceful Europe.⁵⁷ This unity brought about the Treaty of Paris which came into force on the 25th of July 1951;⁵⁸ this treaty to a large extent introduced Competition laws to Europe and determined to what extent various governments had the powers to interfere in free movement of goods in the market.⁵⁹ Further treaties were concluded amongst the European countries, the most noteworthy of them all being the treaty that established the formation of the European Economic Community (hereinafter referred to as the EEC Treaty⁶⁰). One of the EEC Treaty's goals was "*to establish a common market and that common market would promote economic and social goals and would lead to closer relations between the states that were members of it*".⁶¹

The European Competition laws provides for

There are three main differences between the EU version of Competition law and the American Anti-trust law, namely:

- a) In Europe there has been much less of an ideological debate about the nature and goals of competition law than in the US.⁶²
- b) The European Competition law system operates supra-nationally. This allows the Commission to address anti-competitive practices of governments to a much greater extent than in the United States.⁶³
- c) Thirdly, European competition law is much more bureaucratic and regulation based than its US counterpart. The courts have often applied competition law rules in a legalistic manner.⁶⁴

These fundamental variances mark the difference between two of the biggest Competition Law founders and regulators of the current age,⁶⁵ each having

⁵⁷ Sutherland and Kemp chap 2 par 2.5

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Sutherland and Kemp chap 2 par 2.5

⁶² Sutherland and Kemp chap 2 par 2.5

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Sutherland and Kemp chap 2 par 2.5

evolved in its own right and bringing about major changes and setting jurisprudential precedents which the other systems of the world including South Africa, follow.⁶⁶

1.2.3 CANADA

The relevance of the Canadian Competition law comparison to the South African legal structure is that the South African current system of merger control has been copied entirely from the Canadian system.⁶⁷ “The Canadian Competition Act⁶⁸ is the oldest anti-trust statute in the western world, enacted in 1889 which is a year before the Sherman Act”.⁶⁹ The Act regulates business relationship in Canada and has provisions for prohibited criminal offences and non-criminal prohibited offences. The body that regulates Competition in Canada is called the Competition Bureau and like all Competition bodies in the world its powers are set out in the Competition legislation of the country in which it operates.⁷⁰ The same Act has established the Competition Tribunal and set out its powers.⁷¹

There are some similarities between the South African Act and the Canadian Act. However the Canadian Competition regulation is far wider than in South Africa because Canada has within its Act criminal prohibitions and the investigative powers of Canadian Competition Bureau extends further than what is allowed to the South African Competition Commission.

“The Canadian Competition Act has also been recently amended to provide for a regime for international cooperation in the administration of civil competition law, allowing the gathering of evidence for and from foreign jurisdictions in a manner that mirrors existing arrangements in criminal

⁶⁶ Sutherland and Kemp chap 2 par 2.5

⁶⁷ Sutherland and Kemp chap 2 par 2.6

⁶⁸ Competition Act 1889: The current Act is Competition Act R.S.C 1985, c. C-34

⁶⁹ Y Beriault & O. Borgers: Overview of Canadian Anti-trust law 2004 page 76

http://www.mccarthy.ca/pubs/antitrust_overview.pdf

⁷⁰ Ibid

⁷¹ Ibid

matters”.⁷² Further amendments were made to the Act and the most recent amendment is was 12 March 2009 amendment which came into force on the 12 March 2010 and brought about major changes to the Canadian competition law system.⁷³ It has become apparent that major changes in Canadian laws have been dependent on which government is in charge at the time the change is called for and implemented.⁷⁴ This might mean the oldest competition regulators in the western world is still likely to go through further changes in the future, changes which might not be bringing about a newer method of investigation or prohibition but a stricter version of what already exists.⁷⁵

1.2.4 ENGLAND

The English law system is one of the oldest systems in the world, extending as far as the so called “medieval periods”.⁷⁶ For the purposes of this study it is only relevant to consider the evolution of English Competition law from the Monopolies and Restrictive Practices (Inquiry and Control) Act,⁷⁷ which was more restricted than the American Competition laws in its application at the time.⁷⁸ Over a period of time a need for change was recognised and this led to The Restrictive Trade Practices Act⁷⁹ which promised stronger treatment of restrictive practices, while leaving the coverage of monopolies as it had been under the 1948 legislation.⁸⁰ The English Competition law further developed and this resulted in the Monopolies and Mergers Act⁸¹ and the Monopolies and Restrictive Trade Practices Act.⁸² It is important to understand that although regulation of Competition in UK started earlier than in most countries

⁷² Y Beriault & O. Borgers: Overview of Canadian Anti-trust law 2004-
http://www.mccarthy.ca/pubs/antitrust_overview.pdf

⁷³ http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03036.html

⁷⁴ Overview of Canadian Anti-trust law 2004 supra

⁷⁵ Ibid

⁷⁶ Sutherland and Kemp Chap 2 par 2.3

⁷⁷ Monopolies and Restrictive Practices (Inquiry and Control) Act 1948

⁷⁸ Andrew Scott: The Evolution of Competition Law and Policy in the United Kingdom page 9

⁷⁹ The Restrictive Trade Practices Act of 1956

⁸⁰ Andrew Scott: The Evolution of Competition Law and Policy in the United Kingdom page 9

⁸¹ Monopolies and Mergers Act 1965

⁸² the Monopolies and Restrictive Trade Practices Act 1969

the Acts in place were never sufficient to bring about the change needed to make an impact on the economy.⁸³ It is only when the current Competition Act came into operation in 2000 that the journey of Competition law development took off.⁸⁴

The current Competition Act⁸⁵ was introduced in 1998 and came into operation in 2000. It encompasses the legislative intention of dealing with Competition matters holistically without leaving any business practises to the wayside as its predecessors did.⁸⁶ There exist some similarities between the two Competition Acts (South African and English) because there are influences of English law in the South African legal system however these similarities are limited to what is generally regulated by both Acts as the methods of regulation are different and in some parts investigative powers are also different. The South African merger control is entirely different from the merger control used under the UK Act and as indicated the investigative powers of the English authorities are to some extent different from South Africa because the UK like the Canadians and Americans also have criminalised certain prohibited conduct.

The English Competition Act established the Fair Trade Commission, which is the body mandated with enforcing the Act. The Fair Trade Commission is commonly known as the Office of Fair Trade and it makes decisions regarding complains and should a complainant disagree with the decision then the complainant has to appeal the decision to the Competition Appeals Tribunal which was also established by the Act.⁸⁷

⁸³ Andrew Scott: The evolution of Competition Law and Policy in the United Kingdom page 9

⁸⁴ Ibid

⁸⁵ Competition Act 1998 (U.K)

⁸⁶ The Evolution of Competition and Policy in the UK: Supra page 15

⁸⁷ OFT Publication No: 447, Competing fairly: An introduction to the laws of anti-competitive behaviour; Competition Law 2005 page 22. Available on www.oft.gov.uk

1.3 The Development of section 4(1)(a) and (b) of the Act

“The detection and prosecution of cartels is one of the foremost priorities of the South African Competition Authorities”.⁸⁸ The mandate of the Commission to investigate cartels is set out under section 4 (1) (a) and (b) of the Competition Act⁸⁹ deals with horizontal practices between competitors. Under the Competition law perimeters; a cartel is defined as “an unlawful arrangement, agreement or understanding, in terms of which competitors agree to: fix prices (whether directly or indirectly) and/or restrict supply by limiting sales or production; and/or divide markets by allocating customers, suppliers, territories or specific types of goods or services; and/or engage in collusive tendering”.⁹⁰

The provisions of section 4 (1) (a) and (b) of the Act are 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 technical, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
 - b. It involves any of the following restrictive horizontal practices:
 - i. Directly or indirectly fixing a purchase or selling price or any other trading condition
 - ii. Dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or
 - iii. Collusive tendering

Tracing back the formation of this section leads back to the Regulation of Monopolistic Conditions Act of 1955. It has always been considered that agreements between competitors that resulted in competition in the market being

⁸⁸ A Norton 2011 Cartels: The South African Cartel Handbook page 1

⁸⁹ 89 of 1998

⁹⁰ Cartels handbook p3-4 supra

lessened and/or eliminated were prohibited.⁹¹ The Regulation of Monopolistic Conditions Act was considered the first comprehensive legislation in South Africa that was dedicated to Competition law.⁹²

The Regulation of Monopolistic Conditions Act was cautious and permissive.⁹³ It defined and controlled a number of “monopolistic conditions,” that is, potentially anticompetitive practices.⁹⁴

The Act that followed the Regulation of Monopolistic Conditions Act was the Maintenance and Promotion of Competition Act⁹⁵ and “the most important substantive action under the 1979 Act was a regulation issued by the Minister after a Competition Board investigation begun in 1984, that declared some practices to be *per se* unlawful: resale price maintenance, horizontal collusion about price, terms, or, bid rigging⁹⁶ and market share”.⁹⁷

The initial statute outlawed price fixing and dividing markets, the subsequent Act also emphasised that the above acts were illegal and now the Competition Act also outlaws these practices, it does so with more vigour and stricter punishment in place for those falling foul of the Act.⁹⁸

As indicated above this section of the Act has two subsections (a) and (b), the contraventions outlined in 4(1) (a) are rules of reason; these are prohibitions which contain a mix of pro and anti-competitive behaviour, the competition Act put in place methods to measure the impact these types of agreements have in lessening competition. If the conduct meets the requirements set out by the Act then it can be a justifiable conduct which under different circumstances such conduct would be a prohibited contravention. The contraventions as set out in 4(1) (b) are *per se* prohibitions which are the type of contraventions that are considered harmful to the consumer because of the anti-competitive nature, such

⁹¹ Sutherland and Kemp chapter 3 par 3.2.3.

⁹² Ibid at para 3.2.1

⁹³ Competition Law foundation paper review page 12

⁹⁴ Ibid

⁹⁵ Ibid at page 13

⁹⁶ Bid rigging is when competitors agree to manipulate the outcome of the tender process by fixing prices and adding margins to their tender prices in order to inflate their tender prices.

⁹⁷ Market share occurs when companies agree not to compete against each other in a certain area of the market they operate in.

⁹⁸ Penalties under s59 of the Competition Act

conduct is ruled as outright illegal and no justification can be made for its existence in the market.⁹⁹

1.4 Disadvantages of Cartel Activities

Cartel activities have far reaching effects in a country's economy. It is not only the single client who suffers when tenders are rigged or markets are divided and prices are fixed by competitors; the results reach down to the pockets of the needy and poor. A cartel deprives the consumer of the right to make an informed decision regarding its purchases.

As noted above it is clear that the American Anti-trust law, the European Competition law, the Canadian and United Kingdom Competition laws; these laws have stern measures to deal with cartel activities in the market. Although these cited authorities have laws stricter than South Africa's. South Africa as a developing country is learning from its short comings hence the amendment to 73A of the Competition Act which is currently on the cards. The amendment will bring about criminal liability of directors and managers when they are involved in cartel activity.

1.5 The aims of this study

- The objective of this study is to assess the powers of the Cartels division within the Competition Commission in investigating Cartel activity in the country as envisaged by the Competition Act.
- The study further aims to measure and ascertain the effects of the *Woodlands* case with reference to the *Yara South Africa (Pty) Ltd v Competition commission and others*,¹⁰⁰ *Netstar (Pty) Ltd, Matrix Vehicle Tracking (Pty) Ltd and Tracker Network (Pty) Ltd v The Competition*

⁹⁹ A Practical Guide to the South African Competition Act: Neuhoff, *et al* page 16

¹⁰⁰ [2010] CAC 93/CAC/Mar10

*Commission and Tracetec (Pty) Ltd*¹⁰¹ and the *Loungefoam & others v The Competition Commission*¹⁰² decisions to the Commission's initiation statement, summons stage, referral and amendment process which all follow the said statement.

- Give a critical analysis of the said court decisions with particular reference to the practical applications of those decisions and their effects on the cartel investigation process.
- Determine the Commission's approach to the intentions of the Legislature when enacting the Competition Act.

The recent amendment to the Competition Act addresses the criminalisation of Cartel activities under section 4(1) (b) of the Act; which will bring about a drastic change to the manner in which the Commission and more specifically the Cartels division investigates and refers complains to the Tribunal.

Because of the major court decisions made over the past 10 years namely *Woodlands*,¹⁰³ *Yara*,¹⁰⁴ *Netstar*¹⁰⁵ and *Loungefoam*¹⁰⁶ regarding the manner in which the Commission can execute its powers under the Act. One is inclined to wonder why the Legislature has not come forward to bring about clarity to the issues raised by both the Legal fraternity and the Competition Commission. Is it really wise for the law makers to leave the burden of unravelling this debacle of "what was the real intention of the legislature" to the Court without even intervening to provide some form of clarity?

Does the fact that the Legislature has left the matter to the helms of the courts mean that it (the legislature) is of the opinion that the Act is clear and its interpretation should not be such an issue of concern?

¹⁰¹ [2010] 97/CAC/May10

¹⁰² [2010] CAC 100,101,102/CAC Jun10

¹⁰³ supra

¹⁰⁴ supra

¹⁰⁵ supra

¹⁰⁶ supra

Is the Commission acting like an unruly teenager who despite knowing the rules set out by the parents (in this case the Legislature) still expects the courts and Legal fraternity to understand that it is after-all still a developing child with loads to learn? Or is the Commission constantly being dealt a heavy blow by the society under which it is supposed to operate all in an effort to maximise profit for their client at the unfortunate compromise of justice in this fragile and young economy?

This study will look into the issues as set out above and attempt to a large extent to answer the questions raised by the current *status quo*.

Chapter 2

2 Introduction

Law is shaped by legislation however its court decisions that develop the application of law and bring to the fore the intention of the legislature when drafting the law.

2.1 The *Woodlands Case*¹⁰⁷

It is my observation and opinion that this case has been the Pandora's Box of Competition law that was cracked open by unskilled hands, while the mess it caused was cleared away by rigid labourers who refused to consider any alternative to cleaning up except for swiping the dirt under the legislative carpet. The *Woodlands* case made it all the way to the Supreme Court of Appeal it is however necessary to first deal specifically with the Tribunal¹⁰⁸ and CAC¹⁰⁹ decisions before analysing the decision by the Supreme Court of Appeal.

2.1.1 The facts

The unfortunate aspect of the *Woodlands* case is that the merits were never even heard as the case was so riddled with technical errors and administrative misinterpretations that merits fell by the wayside while *points in limine* triumphed to bring about a precedent that brought immense changes to the manner in which the Competition Commission now deals with its initiations and summons.

¹⁰⁷ Competition Commission v Woodlands Dairy (Pty) Ltd & another 103/CR/Dec 2006

¹⁰⁸ Competition Tribunal is a court of first instance for all competition matters, thus established by the Competition Act 89 of 1998.

¹⁰⁹ Competition Appeals Court is the appeals court that deals with Competition matters and is also established by the Competition Act.

The case involved a referral by the Commission to the Tribunal of a case against Woodlands Dairy (Pty) Ltd¹¹⁰ (hereinafter referred to as Woodlands) and Milkwood Dairy (Pty) Ltd¹¹¹ (hereinafter referred to as Milkwood) (both firms are hereinafter referred to as the respondents). The case brought against the two firms regarded possible contraventions of Section 4(1) (a) and (b) of the Act which in essence was cartel activity.

2.1.2 The argument

The applicants challenged the Commission's case on various procedural grounds namely:

- The validity of the initiation¹¹² made by the Commission against *Woodlands* on 06 December 2006
- The validity of the summonses and ensuing interrogations of witnesses from *Woodlands* and *Milkwood*
- The legality of the methods used by the Commission to obtain documents from *Woodlands* with regards to the case against it.¹¹³

The argument by *Woodlands* that the initiation against it was invalid was based on “the allegation that the Commission is obliged under law to have a validly initiated complaint before it, or prior to it utilising its powers to investigate in terms of section 49A of the Act”.¹¹⁴ The respondents argued that the summonses were issued under false pretence by the Commission as they were too broad and vague and were thus not compliant with section 49A of the Act.

¹¹⁰ Woodlands Dairy is one of the largest manufacturers of UHT milk in South Africa, marketed under the FIRST CHOICE® brand name.

¹¹¹ Milkwood Dairy (Pty) Ltd is a manufacturer of UHT milk based in the Eastern Cape.

¹¹² The process of initiation is the first step taken by the Commission in its investigative process, without this step being complete the Commission cannot refer matters to the Tribunal for hearing.

¹¹³ Competition Commission v Woodlands Dairy (Pty) Ltd & another 103/CR/Dec 2006 Para 6 page 5

¹¹⁴ Tribunal judgement ibid

2.1.3 The Tribunal decision

The Tribunal reached a decision that “the summonses were void on the grounds of their being vague and overbroad”.¹¹⁵ It however held that the information gathered as a result of the summonses was to be preserved. It is noted that the Tribunal held that “historically, the remedy for a summons that was void would have been to order the return of the material obtained. However recent jurisprudence of our courts suggests that in these circumstances a preservation order is competent in terms of section 172(1) (b) of the Constitution”,¹¹⁶ this was the view of the Tribunal.¹¹⁷ The Tribunal’s decision to grant the Commission a preservation order indicated that the documents obtained from the parties were to be kept safe by the Tribunal registrar.

“The registrar must keep the copied documents in the registry in safe custody until:

- “Notified by the Commission that the copied documents or some of them may be returned to the applicant/s
- The conclusion of the proceedings under case number CT 103/CR/Dec06; or
- The date upon which the Commission decides to abandon such proceedings; in which event the documents must be returned forthwith to the applicants”¹¹⁸

The decision to grant a preservation order was thus purely for administrative reasons and the Tribunal indicated that the invalidity of the summonses

¹¹⁵ Tribunal judgement page 8 par 15

¹¹⁶ The Constitution of South Africa Act 108 of 1996 section “172. Powers of courts in constitutional matters-(1) When deciding a constitutional matter within its power, a court -

(a)...;

(b) may make any order that is just and equitable, including

(i) an order limiting the retrospective effect of the declaration of invalidity;

(ii) an order suspending the declaration of invalidity for any period

and on any conditions, to allow the competent authority to correct the defect”.

¹¹⁷ Tribunal judgement at par 82 page 28

¹¹⁸ Tribunal judgement at par 3 of the Order, page 44

should not interfere with the mandate of the Commission to carry out investigations where possible contraventions existed.

2.1.4 Comments on the Tribunal decision

It appears that the Tribunal, although well-meaning, overlooked the proverb of the “a bad tree cannot produce good fruits”.¹¹⁹ The Commission failed to draft a proper summons and in doing so it overlooked the legislature’s intention on how a proper summons ought to be drafted. This failure by the Commission should not have a result of prejudicing the respondents to a case; however a preservation order would have that effect of prejudice.

The amicable manner in which the Tribunal approached this matter creates the impression that the Commission can at whim overlook the very Act that gives it power and produce inferior work with the hope that the Tribunal will see past the errors and consider the main intention of the investigations by the Commission. The Commission has over the years prior to the final SCA *Woodlands* decision argued against the strict interpretation of section 49B, 50 and 51, appealing to the Tribunal to condone any technical irregularity necessary to ensure the successful prosecution of anti-competitive behaviour.¹²⁰ This attitude has given the impression that the Commission has no regard for rights to a fair hearing and other aspects of procedural fairness.

2.1.5 The CAC case¹²¹

The *Woodlands* Tribunal decision was taken on appeal to the Competition Appeals Court (hereinafter CAC) by *Milkwood* and *Woodlands* in respect of the preservation order granted by the Tribunal. The CAC had to look into only two aspects of the Tribunal decision; whether the summonses were valid; and

¹¹⁹ The book of Luke 6: 43 (NIV) bible

¹²⁰ *Senwes limited v The Competition Commission of South Africa* [2011] ZASCA 99

¹²¹ *Woodlands Dairy (Pty) Ltd & another v Competition Commission* 88/CAC/Mar09

if they were not valid, then how the evidence, which was procured pursuant thereto should, be treated.”¹²²

The CAC had to re-analyse the points made by the Tribunal with regard to the invalidity of the Woodlands and Milkwood summonses as indicated. The Tribunal had held that the summons were vague and overbroad, and did not meet the requirement of section 49A.¹²³ The CAC agreed with this approach in as far as the Woodlands summons was concerned but dismissed the argument with regard to the Milkwood summons, indicating that the latter summons met the requirements of section 49A and was thus not void on the basis of vagueness and over broadness.¹²⁴ The court further made a finding regarding the powers of the Tribunal to craft a preservation order. It found that according to the precedent set by the Constitutional Court in the matter of *Thint v NPA and Others; Zuma and Other v NDPP*¹²⁵ only a court is given powers under section 172 (1) (b) of the Constitution¹²⁶ and because “the Tribunal is not a court as envisaged in section 172 of the Constitution, accordingly it was not competent for it to have made such a preservation order”.¹²⁷

The decision by CAC to invalidate one summons and validate the other although both documents were riddled with errors begs the understanding of what exactly is the yard stick for a summons under section 49A of the Competition Act.

2.1.6 Comments on the CAC decision

The CAC judgement in the *Woodlands* case had a rippling effect in the “Milk Industry” this decision meant that the Commission could not rely on any information it obtained in the investigation initiated in 2006 as the matter had

¹²² The CAC decision page 13 par 24

¹²³ The Tribunal decision page 43 par 130

¹²⁴ Page 30 of the CAC decision par 54 continued from page 29

¹²⁵ *Thint (Pty) Ltd v National Director of Public Prosecution and others; Zuma and other v NDPP* 2009 (1) SA 1 (CC)

¹²⁶ Act 108 of 1996 supra

¹²⁷ The CAC decision at par 56 page 30

prescribed and that it had to start its proceedings over again if it still wanted to pursue the allegations of cartel activities into the “milk industry”.

The *Woodlands* case brought to the fore two contending approaches regarding the interpretation of the Competition Act. Some commentators were of the opinion that “the Commission views law as a tool for the achievement of investigative ends while, for legal practitioners, the rule of law directs the manner in which investigative ends are to be achieved”.¹²⁸ If this is the current state of mind for both the Commission and the legal fraternity then there will forever be a tug of war with regards to the interpretation of the Act between the two sides.

The decisions by the CAC regarding the manner in which the Commission approached the *Woodlands*-case altered the method in which the Commission had to produce its initiations and summons. The SCA in its decision on *Woodlands* indicated that an Initiation had to meet the intelligibility and legality tests before it could be passed on to the Tribunal at referral.¹²⁹

The fact is that the Commission in the *Woodlands*-case failed to draft a proper initiation and a proper summons and ultimately failed to properly execute its powers under the Act to investigate prohibited practices in economic markets. When one analyses the *Woodlands* and *Milkwood* summonses with direct reference to the requirements of the Act; specifically section 49A it is clear from the outset that the document is purporting to grant the Commission far wider powers than the Legislation intended to give. It is submitted that the Tribunal clearly erred in its findings that despite the void summons the need to carry out its mandate outweighed the Commission’s obligation to adhere or comply with the objectives set out by the very statute it derived its powers from.

¹²⁸ Of Cows, chemicals, cartels... and geese: Cron D & Marumo T page 46 Without prejudice, July 2011

¹²⁹ *Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2010] JOL 26108 (SCA)

It is incredible that the CAC reached a decision that one summons was vaguer than the other despite both summonses not fully complying with the requirements of section 49A. The CAC used the intelligibility test and indicated that the scope of the searches must be defined with sufficient particularity to render the warrants intelligible to the person being searched.¹³⁰ Given the above elaboration of the requirement set out by section 49A it is necessary to question the understanding the CAC has of its own test: how is it that the *Milkwood* summons managed to pass the intelligibility test?

A look at the alleged vagueness of the *Woodlands* summons by the Tribunal and CAC begs the analysis of comparison with the decision on the *Milkwood* summons by both authorities. The decision taken by the Tribunal that the *Milkwood* summons was as void as the *Woodlands* summons is in my opinion the correct decision; there is no room for vagueness and ambiguity when section 49A requirements were set out and the Commission was vague and ambiguous in both summonses.

The CAC should have taken a strict approach when looking into the summons for *Milkwood* as the Competition Act gives the Commission its powers to act and those powers do not extend beyond the ambit of the Act. It is my opinion that when the Commission casts its net wider than the river it's allowed to fish in, the courts have a duty to "call it to order" by proper interpretation of the Act.

It is important to understand the logic used by the Tribunal in its decision to grant a preservation order despite it finding that the methods used to obtain the evidence or documents were in fact irregular and therefore illegal. The Tribunal sought to balance the element of public interest and that of companies rights to privacy as envisaged by the Constitution; in the Tribunal's view the intention of the legislature in drafting the Competition Act was to provide a free and fair economy for all and this intention indicates public

¹³⁰ The CAC decision at par 45 page 25

interest should outweigh all other interests, although it is not specifically referred to in the Act in such precise words.

2.1.7 The SCA Decision¹³¹

The CAC's *Woodlands* decision was taken on by both *Milkwood* and *Woodlands*; it was not satisfied with the finding of the CAC regarding the validity to the summons served to it. The SCA held that the Commission cannot go on fishing expeditions into industries all in an effort to exercise the powers given by the Act.¹³² The court set a precedent regarding the manner in which the Commission ought to initiate complains, which would affect the manner in which summonses are drafted and investigations are carried out. It required that the Commissioner needed to have reasonable suspicion of a contravention of the Act before he could launch an investigation into a particular market.¹³³

With regards to the summonses the court made a comment that section 71 and 72 of the Act had compelled the respondents to submit to the Commission's questioning because failure to do so would have resulted in the parties being guilty of a criminal offence.¹³⁴ It would then follow that the implications of criminal liability far outweighed the parties concerns with the validity of the summonses; hence despite them submitting to interrogations they challenged the validity of the summonses in another more appropriate forum. The court set aside both the *Woodlands* and *Milkwood* summonses and all information obtained through those summonses. The court also set aside the initiation against *Woodlands* because the information obtained by the Commission to initiate the case was done so illegally.¹³⁵

¹³¹ *Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2010] JOL 26108 (SCA)

¹³² *Ibid* at par 20 page 7

¹³³ *ibid*

¹³⁴ As outlined by section 74 of the Act

¹³⁵ SCA Decision *supra* at par 47, page 14

2.1.8 Comments on the SCA decision

The decision by the SCA as indicated above set precedents that are now followed by the Competition Commission. The court has thus influenced the manner in which the Commission now drafts its initiation statements and its summonses. This approach has been welcomed generally by the legal fraternity as a step in the right direction with regard to interpretation of the Competition Act. It has been noted that prior to the SCA 's decision on this matter "it appeared permissible for the Commission to rely on broad, sweeping statements of conduct, formulated as a catch-all initiation for any manner of anti-competitive behaviour, as the basis for a referral to the Tribunal".¹³⁶ As unfortunate as this statement is, it rings true to the manner in which the Commission interpreted the Act in the *Woodlands case* and it was necessary for the courts to provide clarity.

2.2 The Yara case¹³⁷

The decision reached by the higher courts on the case of Competition Commission v Yara South Africa (Pty) Ltd and other has been a source of concern for the Commission which has resulted in the Commission taking the matter further to the Constitutional Court for a clearer decision. The main point of argument is what exactly constitutes a complaint by a third party according to section 49¹³⁸ and under what instance can it be said that a third party has submitted a complaint under section 49 or further information to the Commission under section 50.¹³⁹

¹³⁶ Competition law SG 4/2011: Crossing the 'T's and dotting the 'I's: A return to formalism by the Competition Authority; Ann Boniwell August 2011 page 5

¹³⁷ Competition Commission v Yara South Africa (Pty) Ltd and other 31/CR/May05

¹³⁸ Section 49B(2)(b) of the Act states: "Any person may submit a complaint against an alleged prohibited practice to the Competition Commission, in the prescribed form"

¹³⁹ Section 49B (2) (a) states: "Any person may submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form."

2.2.1 The facts

The Commission referred a complaint against Yara and others to the Tribunal for adjudication after it received a complaint from Nutriflo.¹⁴⁰ The complaint was regarding a section 8 abuse of dominance¹⁴¹ conduct by Sasol in that it was abusing its dominance in the fertiliser market by imposing price increases in respect of raw material it supplied to Nutriflo. In the complaint Nutriflo further indicated that Sasol was involved in a violation of section 4(1) (b) with *Omnia Fertilizer (Pty) Ltd* a company in the business of producing, importing, distributing and supplying fertilizer and *Yara South Africa (Pty) Ltd* a company in the business of producing, importing, distributing and supplying fertilizer.¹⁴²

The matter was referred to the Tribunal. *Sasol* and *Omnia* excepted to the allegation of a contravention under section 4(1) (b) and required more particulars in order to be able to meet the case against them.¹⁴³ The exception brought by the two firms led the Commission to request leave to amend its referral in November 2006 which leave was granted.¹⁴⁴ The Commission further amended its referral in March 2008 in order to include more particularity regarding the section 4(1) (b) allegation against *Yara*, *Sasol* and *Omnia*.¹⁴⁵

The Commission in October 2009 again approached the Tribunal and requested another opportunity to amend its referral after it had reached a settlement with *Sasol* and had received further information regarding the contravention of section 4(1) (b).¹⁴⁶

¹⁴⁰ Nutriflo is a firm in the business of producing and distributing fertilizer.

¹⁴¹ Abuse of dominance occurs when a firm that enjoys market power either charges excessive prices or refuses its competitor access to essential facilities amongst other acts.

¹⁴² Tribunal decision par 2 page 2

¹⁴³ Ibid at par 5 page 3

¹⁴⁴ Ibid at par 6 page 4

¹⁴⁵ Ibid at par 7 page 5

¹⁴⁶ Ibid at par 13 page 5

2.2.2 The argument

Omnia and *Yara* were of the opinion that by amending its referral the Commission was now adding new charges against them that did not form part of the Nutriflo-complaint.¹⁴⁷ The two respondents indicated that Nutriflo never made a complaint against them regarding a contravention of section 4(1) (b); therefore the Commission was referring beyond the complaint it received.¹⁴⁸ *Omnia* also argued that the intentions of the Commission to amend its referral at that stage of the proceedings were questionable.¹⁴⁹

2.2.3 The Tribunal decision

The Tribunal granted the Commission leave to amend its referral once more to add more information regarding the section 4(1) (b) contravention.¹⁵⁰ It was held by the Tribunal that the alleged section 4 contravention was set out in Nutriflo CC1¹⁵¹ and supporting affidavit.¹⁵² It is submitted that clearly the Tribunal could recognise a link between Nutriflo's complaint of a cartel and its complaint against Sasol of abuse of dominance hence the amendment was granted.

2.2.4 Comments on the Tribunal decision

In this matter the Tribunal had to consider what exactly constitutes a complaint by a third party and whether the attachment to the CC1 form part of the complaint. The respondents were of the opinion that the manner in which the CC1 is to be completed is a clear indication of how particular the complainant has to be when tabled; hence an objection was raised against

¹⁴⁷ Ibid par 20 page 6-7

¹⁴⁸ Ibid par 46.2 page 16

¹⁴⁹ Ibid par 46.3 page 16

¹⁵⁰ Ibid par 60.2 page 21

¹⁵¹ An internal form used by the Commission to outline the complaint briefly it is accompanied by an initiation statement which elaborates on the information outlined in the CC1

¹⁵² The initiation statement is the supporting affidavit attached to the CC1.

the Commission's intention to amend.¹⁵³ It is obvious that the Commission favoured the decision by the Tribunal and was of the view that the Nutriflo complaint did encompass the contraventions by both *Yara* and *Omnia* even if these were dealt with briefly in the attached affidavit to the CC1.

2.2.5 The CAC case¹⁵⁴

The appellants in this case before the Competition Appeal Court were *Yara* and *Omnia*, and the basis of their appeal was that the Tribunal had erred in granting the Commission the chance to amend its referral against them.¹⁵⁵ It was further argued that the Commission in its amendment had misinterpreted the Nutriflo complaint.¹⁵⁶ The CAC indicated that its task was to decide whether the Tribunal was correct in its finding that the complaint and/or referral is capable of amendment in the manner that the Commission sought to have it amended.¹⁵⁷

The CAC held that given the wording of section 49B(2)(b) there was in actual fact no complaint by Nutriflo of section 4 contraventions against *Yara* and *Omnia* and that the Tribunal was wrong in finding that there was such a complaint against the two appellants.¹⁵⁸ The CAC was of the view that the allegations of a contravention against the appellants were merely in support of the initial complaint against *Sasol* and not meant to be a new complaint by Nutriflo.¹⁵⁹ The lack of mention of the appellants in the CC1 and the fact that in the supporting affidavit the deponent Bruce Lyle indicated that the appellants were only mentioned because they had a legal interest in the matter induced the CAC to believe that Nutriflo had no intentions to complain about the cartel involving the two appellants.¹⁶⁰

¹⁵³ Tribunal decision on *Yara* par 11 page 4

¹⁵⁴ *Yara South Africa (Pty) Ltd v Competition commission and others* [2010] CAC 93/CAC/Mar10

¹⁵⁵ *Ibid* at par 2 page 2

¹⁵⁶ *Ibid* at par 10 page 9

¹⁵⁷ The CAC decision case par 16 page 11

¹⁵⁸ *Ibid* at par 25 page 16

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid* at par 29 page 18

The CAC upheld the appeals by both *Omnia* and *Yara* and this decision had the effect that the cartel case against the two parties was dismissed.

2.2.6 Comments on the CAC decision

The *Yara* matter contained two aspects in law that the courts had to provide clarity on: one was when is it permissible for the Commission to amend its referral? And what really constitutes a complaint by a third party?

The CAC considered the civil court's approach with regards to allowing amendments, looking into the issue of prejudice against the respondent to the case and coming to the conclusion that because the amendment proposed by the Commission were bringing about new allegations not covered by the CC1 it would have prejudiced the appellants.¹⁶¹ The decision it made regarding what constitutes a complaint is perplexing; given the fact that it was indicated in the CAC judgement the Act does not provide a definition of what a complaint is, it is only described in the Rules of conduct of Proceedings¹⁶² in the Competition Commission.¹⁶³

2.3 The Netstar case¹⁶⁴

Although the case of *Competition Commission v Netstar and other*¹⁶⁵ does not deal with a per se prohibited cartel, the issues raised by the parties were again challenged on the basis of technical shortcomings instead of the merits of the case itself. The matter was before the Tribunal and went all the way to the CAC as a result of disgruntled respondents.

¹⁶¹ Ibid at par 25 page 16

¹⁶² The Rules were published on 1 February 2001 in government gazette vol: 428, notice no: 22025

¹⁶³ The CAC decision par 21 page 13

¹⁶⁴ *Competition Commission v Netstar and other* 17/CR/Mar05

¹⁶⁵ *ibid*

2.3.1 The facts

In the mid-1990's, when the SVR industry was in its infancy in this country, a large number of businesses were offering to provide SVR systems. Short-term insurers were concerned about the quality and reliability of their offerings. Their concern was two-fold. Firstly, if the system did not work or the supplier proved unreliable or went out of business, the insured, which had been compelled or induced to fit the system, would complain to and possibly seek compensation from the insurer. Secondly, if the system did not work or the supplier proved unreliable, the anticipated benefits by way of a reduction in the amount that would have to be paid in respect of theft claims would not materialise.¹⁶⁶

This case was regarding a question as to whether the standards set by an industry association created barriers to entry that prevented competitors of members of the association from competing in the market.¹⁶⁷ The Commission was of the opinion that the standards set by The Vehicle Security Association of South Africa, an industry association for firms engaged in the vehicle security industry (hereinafter referred to as VESA) were exclusionary and made it almost impossible for competitors who were not VESA members to compete in this industry.¹⁶⁸

2.3.2 The Tribunal decision

The Tribunal indicated that the relief sought by the Commission and Tracetec¹⁶⁹ were purely declaratory.¹⁷⁰ The Tribunal concluded that the standards of VESA¹⁷¹ had an exclusionary effect, and that the allegations that they were self-serving and irrational have been convincingly made. It further

¹⁶⁶ CAC decision, par 6 page 4

¹⁶⁷ Tribunal decision par 1 page 1.

¹⁶⁸ Tribunal decision par 14 page 5.

¹⁶⁹ Tracetec (Pty) Ltd had obtained leave to intervene in the Commission's referral in order to pursue a case against VESA.

¹⁷⁰ The Tribunal decision at par 1.

¹⁷¹ The standards are outlined in the Tribunal decision at par 60 page 18.

held that the agreement led to a substantial prevention and lessening of competition in the SVR market which was in contravention of section 4(1) (a). VESA was also found to have contravened the Act as an association and it was held that the parties' actions had failed to meet the rule of reason standards therefore the concerted practise could not be justified under the Act.¹⁷²

2.3.3 Comments on the Tribunal decision

A decision by an association is by its very nature a decision made by a collective of firms and whilst constitutionally, depending on the nature of the association, this may manifest itself as a decision of a single entity, the point of significance for competition law liability is that it has been arrived at by the aggregation of interests of individual firms who compete.¹⁷³ This statement captures the essence of the Tribunal's decision, namely that the Tribunal was of the opinion that VESA as an association made up of SVR competitors could not have been said to have made its decision regarding its standards of approval outside the guidance of its members who were competitors in a horizontal relationship.

2.3.4 The CAC case¹⁷⁴

The three respondents to the Tribunal's case were *Tracker*, *Netstar* and *Matrix* and they collectively appealed against the judgement of the Tribunal to give a declaratory order that they were guilty of contravening section 4(1) (a) of the Act.¹⁷⁵ The CAC had to decide whether the three appellants had actually contravened section 4(1) (a) in their capacity as members of the VESA SVR committee.¹⁷⁶ In arriving at its decision the CAC made the

¹⁷² Tribunal decision par 301 page 82

¹⁷³ The Tribunal decision par 304 of page 83

¹⁷⁴ *Netstar (Pty) Ltd v Competition Commission 97/CAC/May10*

¹⁷⁵ *Ibid* at par 3 page 2

¹⁷⁶ *Ibid* at par 29 page 20

following observations regarding the standards of approval by VESA from the documents provided by parties in the Tribunal case:

- a) They were the product of a process in which not only the three appellants but also other SVR and tracking companies were involved as well as representatives of VESA and SAIA.
- b) The standards were created before the establishment of a vehicle tracking committee, much less a SVR committee, within VESA and were accordingly not the product of the deliberations of that committee.
- c) The workshop process culminated in parties being invited in November 1998 to become members of VESA and the vehicle tracking committee.
- d) The applications that were submitted were submitted to VESA, which dealt with the approvals.
- e) The decision that there should be two committees, namely, a fleet management committee and a SVR committee was a decision by the Board of VESA taken at some time shortly before the launch of the committees.¹⁷⁷

The CAC held that the decision by the Tribunal that the standards were set as a result of the agreement between the three appellants could not stand¹⁷⁸ because the facts of the case could not support this rationale. It was further held that the approach taken by the Tribunal was wrong because it took a theoretical basis instead of a factual one.¹⁷⁹

2.3.5 Comments on the CAC decision

In reaching its decision the CAC criticized the approach the Tribunal took when coming to the decision to grant a declaratory order against the appellants. It noted that the Tribunal failed to differentiate between an agreement and a concerted practice despite the Act indicating that these two aspects were different. The Tribunal was further criticised for failing to probe

¹⁷⁷ The CAC decision par 12 page 8

¹⁷⁸ The CAC decision par 40 page 27

¹⁷⁹ The CAC decision par 59 page 39

the alleged difficulty of entering and surviving in the SVR market without VESA approval.

It is quite clear from the manner in which the CAC dissected the Tribunal's decision that it was not impressed with the approach the Tribunal took when it handled the matter. It is implied in the judgement that the Tribunal chose to apply the ambit of section 4(1) (a) as an umbrella to the agreement that gave rise to the VESA approval standards.¹⁸⁰

The Tribunal is often found guilty of being too favourable towards the Commission in its judgment not because the Commission proved its case but because a decision against the Commission means another contravener of the Act walks away unpunished. The Tribunal has taken upon itself the difficult task of balancing the intentions of the legislature and public interest, often ending up attempting to protect the purpose of the Competition Act despite its regulators lack of thoughtfulness when applying the rules set out by the said Act.

2.4 The Loungefoam case¹⁸¹

The merits of the matter between the *Competition Commission v Loungefoam and other* were never heard as the Tribunal was once more faced with a case that was being argued on purely technical issues and not on the merits of the matter.

2.4.1 The facts

The Commission brought an application to the Tribunal seeking to amend its founding affidavit in respect of a complaint it had initiated against the respondents.¹⁸² The proposed amendment by the Commission was in four parts however the Commission was of the view that the first two parts of the

¹⁸⁰ The CAC decision par 41 page 28

¹⁸¹ The Competition Commission v Loungefoam and other 103/CR/Sep08

¹⁸² Ibid at par 1 page 2

proposed amendment were more important to clarify its case against the respondents.¹⁸³ The first amendment related to the so called “chemical cartel”¹⁸⁴ while the second amendment related to the adding of respondents to the Commission’s referral. These two main amendments were captured by the Tribunal as follows:

- a) The Commission wanted to extend the charge of the chemical cartel to Feltex, intending to add Feltex to the allegations regarding the joint purchasing of chemicals, or similar conduct, which had so far only been made against Loungefoam and Vitafoam.
- b) Loungefoam and Vitafoam alleged that they were part of the same entity and because of this defence the Commission wished to amend its referral by inserting an alternative charge. In the event that it was found that Steinhoff enjoyed sole control over both Loungefoam and Vitafoam the Commission wished to allege in the alternative, a charge of a broader or wider collusion between the Steinhoff group of companies (“Steinhoff”) and the Kap group of companies (“Kap”).¹⁸⁵

2.4.2 The argument

With regards to the amendment relating to Feltex the respondent argued that the Commission had not initiated the chemical cartel complaint against it as required by section 49B (1) and that should the Tribunal grant the proposed amendments Feltex would raise an exception on the grounds that the Tribunal lacked jurisdiction and should not have granted the request to amend.

The respondents objecting to the second amendment raised a similar argument in that it was submitted that the Commission had not initiated a

¹⁸³ Ibid at par 17 page 7.

¹⁸⁴ The Commission had brought a case against Loungefoam and Vitafoam alleging that the parties had formed a cartel in relation to the procurement of certain chemicals which are primary inputs in the manufacture of polyurethane foam, the Tribunal called this conduct “the chemical cartel”.

¹⁸⁵ The Tribunal decision at par 16 page 5

complaint against the Steinhoff and the Kap respondents. The parties were of the view that the Commission had only initiated its complaint against Loungefoam and Vitafoam and it could therefore not refer a complaint against Steinhoff and Kap which it had not initiated.

2.4.3 The Tribunal decision

The Tribunal indicated that its approach was informed by the fact that it sought to promote the public interest by ensuring a full ventilation of issues in a complaint.¹⁸⁶ The Tribunal considered the meaning of section 49B (1) and 49B (2) and indicated that distinguishing between initiations under section 49B (1) and those under 49B (2) could undermine the purpose of the Act.¹⁸⁷ It was found that the Commission is not required to initiate a complaint against each and every respondent that it may, after its investigation, wish to prosecute, nor is it required to state at that time with any degree of precision which subsidiaries or firms it intends to prosecute.¹⁸⁸

The Tribunal held that the argument by *Feltex* that it (the Tribunal) lacked jurisdiction to hear the matter because it was not initiated properly was not supported by the fact that it was common cause amongst all the parties that an initiation had been made against the chemical cartel.¹⁸⁹ The Tribunal was of the opinion that jurisdictional ground for extending the complaint to *Feltex* has been met.¹⁹⁰ The application to include *Feltex* in the chemical cartel was therefore granted on that basis.¹⁹¹

With regards to the second material amendment the Tribunal also granted the leave to amend on the grounds that a complaint had in fact been initiated regarding alleged collusion between *Steinhoff* and *Kap* and the jurisdictional

¹⁸⁶ Tribunal decision, par 18 page 7

¹⁸⁷ Ibid at par 47 page 18

¹⁸⁸ Ibid at par 49 page 18

¹⁸⁹ Ibid at par 61 page 22

¹⁹⁰ Ibid

¹⁹¹ Ibid at par 66 page 24

requirement for a referral against *Feltex*, and *Steinhoff* and *Kap* respectively, has been satisfied.¹⁹²

2.4.4 Comments on the Tribunal decision

The Commission had requested leave to amend and been so granted on numerous occasions in this case; the documents referred to the Tribunal for hearing were less than impressive. It is noted in the Tribunal judgment that “*In the hearings it also became apparent that a few “housekeeping” amendments needed to be made. For example Vitafoam ought to be replaced by GommaGomma as a second respondent; GommaGomma ought to be removed as sixth respondent; and the citation of some entities had to be clarified*”.¹⁹³

The decision of the Tribunal was given prior to the judgment of the SCA on the *Woodlands case*¹⁹⁴ which discouraged the Commission’s approach of initiating industry wide investigations without reasonable suspicion of a contravention.¹⁹⁵ It is necessary to acknowledge that although the Tribunal lacked the guidance of the precedent set by the SCA on the *Woodlands* matter; it (the Tribunal) interpreted the wording of section 49B(1) to mean that the Commission had no obligation to specify respondents and it only had to indicate the prohibited conduct.¹⁹⁶

It is submitted that the Tribunal’s interpretation of section 49B (1) is correct as one cannot insert words into sections and interpret those words as the intention of the legislature. The SCA in the *Woodlands* decision seems to have done exactly that, namely inserted words into section 49B (1) and interpreted those words as the legislature’s intention. It is clear from the wording of section 49B (1) that there is no duty on the part of the Commission

¹⁹² Ibid

¹⁹³ Tribunal decision at par 13 page 5

¹⁹⁴ Supra

¹⁹⁵ The SCA *Woodlands* decision supra at par 20 page 7

¹⁹⁶ The Tribunal decision par 35 page 14

to indicate at the initiation stage of the investigation who the respondent to the case is.

Reading section 49B (1) with 49B (3) one is able to infer that the legislature acknowledged that at the stage of initiation the Commission might not be in possession of all necessary information to narrow down its investigation, hence the need to appoint an inspector to investigate the initiated prohibited practice. This inference is supported by the Commission's approach to the *Loungefoam case* and the Tribunal's decision.

2.4.5 The CAC case¹⁹⁷

The respondent took the matter on appeal to the CAC and the court indicated that it was faced with the following questions regarding the appeals before it:

- a) Was the Tribunal correct in permitting the chemical cartel complaint to be extended to include *Feltex*?
- b) Was the Tribunal correct to permit the Commission to allege co-operation or collusion between the *Steinhoff* group of companies and the *KAP* group of companies directed at enabling *Loungefoam* and *Vitafoam* to take advantage of the provisions of s 4(5)(b) of the Act?¹⁹⁸

In answering the abovementioned questions the CAC considered firstly the rule the Commission relied on when requesting leave to amend namely Rule 18(1) of the Tribunal Rules. The court indicated that this rule only referred to the amendment of a prescribed form; namely form CT (1) and not the founding affidavit attached to the said form.¹⁹⁹ The court was of the opinion that an affidavit attached to the CT (1) was like any other affidavit as required by law and did not have any special elements to it.²⁰⁰

¹⁹⁷ Yara South Africa (Pty) Ltd v Competition commission and others [2010] CAC 93/CAC/Mar10

¹⁹⁸ The CAC decision at par 7 page 5

¹⁹⁹ Ibid at par 11 page 7

²⁰⁰ Ibid at par 12 page 7

The court indicated that the Commission was aware of the process to be followed as indicated in the Act as one of initiation, investigation and referral and that if the Commission properly follows these steps it would not find itself in the predicament where initiation and referrals have to be amendment at a later stage.²⁰¹

The Court granted the appeals of both *Feltex* and *Steinhoff*. However it indicated that the Commission still had the available remedy to approach the Tribunal by way of a supplementary affidavit regarding the argument that Loungefoam and Vitafoam were a single entity under the control of Steinhoff.²⁰²

2.4.6 Comments on the CAC decision

In coming to its decision the CAC considered a number of aspects of the Act and the interpretation provided by the Tribunal with regards to section 49B (1) was scrutinised and criticized.

It is unfortunate that the *Feltex* appeal was upheld as the process of initiation is one that according to the Act and the Tribunal does not place a duty on the Commission to indicate at first glance who the parties to the investigation are. It is noted that this approach of interpreting the initiation process can fall prey to “fishing expeditions” by the Commission; however interpreting this section in such a formal manner as done by the CAC in *Loungefoam* and the SCA in *Woodlands* puts the Commission in a very rocky boat when it comes to investigations.

2.5 Comprehensive overview and discussion

The abovementioned cases have had a huge impact on the manner in which the Commission executes its mandate. The decisions reached by the CAC and the

²⁰¹ Ibid at par 53 page 29

²⁰² The CAC decision par 68 page 37.

SCA have to large extent left a bitter taste in the Commissions' mouth. From the wording of the Act it clear that the legislature expects that when the Commission initiates a complaint it does so with limited information at its disposal. The reason for this is obvious; the Commission may have received some information from third parties, it may have been asked to look into a particular industry or it may out of its own accord have observed that a particular sector warrants investigation.²⁰³ Hence the Commission cannot be expected to know the details about an alleged prohibited practice at the point of initiation which it would know after its investigation. Even in instances where the Commission initiated the complaint itself, the only way to guarantee a proper initiation statement according to the recent judgments would be to first investigate exhaustively then initiate. However this approach is likely to lead to matters prescribing at the hands of the appointed investigator.

The Tribunal had indicated in the *Loungefoam* decision that to require the Commission to go back and initiate a fresh complaint every time it uncovered a new potential respondent or discovered that it had cited a party incorrectly would render the scheme unworkable and would undermine the very purpose of the Act.²⁰⁴ Despite this reality the higher courts are still of the opinion that these short comings can be circumvented if the Commission applies its mind when drafting the first initiation.

The higher courts have indicated that although the Commission is of the opinion that the courts approach specifically the approach of the SCA in the *Woodlands* decision hampers the Commission in uncovering anti-competitive conduct; they still hold the position that if the Commission encountered difficulties over the issues of initiating properly and referring properly it is because the Commission had not been following the requirements of the Act properly.²⁰⁵

The problem the Commission seems to have with the approach of the higher courts is that their method of interpreting the Act is highly restrictive and technical

²⁰³ Tribunal's Loungefoam decision at par 48 page 18

²⁰⁴ Tribunal's Loungefoam decision at par 50 page 19

²⁰⁵ CAC's Loungefoam decision at par 53 page 29

thus impeding the Commission in executing its mandate properly. This was also indicated by the CAC in the *Loungefoam* decision where it was said that “Implicit in this is a suggestion that this court and the SCA are being unduly technical in contrast to the informality of the approach of the Commission and the Tribunal; that is an unfortunate and incorrect view of matters.”²⁰⁶

The decision of the SCA in the *Woodlands*²⁰⁷ matter has had a major impact on the powers of the Commission and how those powers are to be executed. It is submitted that the effects of the *Woodlands* decision have been such that the Commission is left wondering “are we now at “an us versus them” situation where the courts and the legal fraternity will single out instances of procedural discrepancy and diminish the cases on that basis. It is also important for the Commission to remember that it cannot go beyond the ambits of the very Act that gives it powers to act, the society cannot afford a situation where regulatory bodies although well-meaning bypass the correct procedure and prejudices the right of the so called “accused”.

What is clear from the approach of the higher courts is that as much as it is important for the Commission to execute its mandate it should do so holistically, embracing and balancing the public interest to have prohibited conduct investigated with the procedural need to not prejudice the rights of anyone involved in the investigation.

The courts are not necessarily saying that the Commission should not exercise their powers as envisaged by the Act, the courts are simply saying the Commission should not nit-pick which parts of the Act it will adhere to fully when exercising its powers.

It is necessary to note that the *Loungefoam* and *Yara* CAC decisions were taken on appeal by the Commission to the Constitutional court. With regards to the *Loungefoam* appeal the Constitutional court dismissed the appeal and indicated

²⁰⁶ CAC *Loungefoam* decision at par 40 page 22

²⁰⁷ supra

in its media summary of the case²⁰⁸ that “the majority of the court identified two possible interpretations of the provision in the Act concerning leave to appeal from the CAC. On the first interpretation, a litigant may appeal to the Supreme Court of Appeal or the Constitutional court only after having sought leave and having obtained a decision from the CAC. On the second interpretation, a litigant must first seek leave of the CAC, unless the interests of justice permit a direct approach to the Constitutional court. The court held that it was not necessary to determine the correct interpretation, as the Commission would fail on either.”²⁰⁹

With regards to the Yara decision the Constitutional court also dismissed the case and indicated in its media summary of the case²¹⁰ that “the majority of the court held that the Commission’s delay in lodging its application was excessive and that its explanation for its delay was so manifestly poor as to amount to almost no explanation at all. Further, the majority found that it was preferable that this matter should first go the SCA if leave to appeal to that court was granted”.²¹¹

On both matters there were dissenting judgments that were of the view that the leave to appeal directly to the Constitutional court should have been granted because of the importance of the Commission’s public role, the significance of the issues it raised, its prospects of success on appeal and the fact that the matter does not lie at the complex intersection of law and economics”.²¹²

The decision by the Commission to approach the Constitutional court directly with regards to these two cases was based on its opinion that the approach taken by the CAC was a restrictive and formalistic interpretation of complaints and will have a chilling effect on the proper investigation and ventilation in the Tribunal of complaints lodged with the Commission by members of the public and undermines the policy objectives of the Competition Act to uproot anti-competitive conduct

²⁰⁸ The Constitutional court media Statement regarding its Loungefoam decision

²⁰⁹ Ibid

²¹⁰ The Constitutional court media Statement regarding its Yara decision

²¹¹ Ibid

²¹² This is the position indicated in the minority judgement by the Constitutional court on both the Yara and Loungefoam matters.

CHAPTER 3

3 Introduction

The need for competition regulation in most countries was recognised more clearly after tragic events: in America the First World War indicated that the only way for the country to rebuild its economy was through regulation of the method used by businesses in relation with each other,²¹³ in actual fact the American competition law is called Anti-trust law because business used to organise themselves into trusts that manipulated the running of business in the country.²¹⁴

The European system was developed after the devastating effects of the Second World War were felt by many countries in the now Euro-zone.²¹⁵ The different states decided to combine their sources in order to lessen the devastation and allow for a smoother transition of the manner in which the countries did business with each other.²¹⁶

For South Africa the need for Competition Law reform came at the end of the Apartheid era.²¹⁷ The new government met with the purpose of bringing about change in the manner in which the country operated, various laws changed during that era, new laws were implemented and for the purpose of this study the Maintenance and Promotion of Competition Act²¹⁸ was repealed in its entirety and after consultation with business and the legal fraternity the Competition Act was born.²¹⁹

In this chapter this study focuses on the investigative powers of the Competition Commission under the current Competition Act. A further analysis of recent case law will also be factored in; in order to provide a broader spectrum of the said investigative powers. The four major cases considered in this study have centred

²¹³ Sutherland and Kemp Chapter 2 par 2.4

²¹⁴ Ibid

²¹⁵ Ibid at par 2.5

²¹⁶ Ibid

²¹⁷ Competition Law and Policy in South Africa: An OECD Paper review page 14

²¹⁸ supra

²¹⁹ OECD paper review supra at page 16

on cartel activities and it is therefore necessary to give an overview of the division within the Commission that is tasked with investigating such contraventions.

3.1 Formation of the Cartels division

The Commission has always been mandated with investigating Cartel activities under section 4(1) of the Act and the Act further put in place the manner in which these prohibited practices could be investigated, under Chapter 5²²⁰ of the Act.

In order to understand the formation of the Cartel Division within the Competition Commission's structure it is important to conceptualise the said structure as it was initially until its current form. Prior to the cartels division being formally and officially formed in 2011 cartel matters were dealt with and investigated by the Enforcement & Exemption division.²²¹ The division was formed when the Commission recognised the need to deal with cartel activities in South Africa on a more exclusive basis and noticed that in order for the Commission to make an impact in the economy of South Africa it was necessary to equip a dedicated and designated team with the skill and expertise needed to combat cartel activity. The division has a current staff component of 25, made out of 1 divisional manager, 4 principals, 4 senior investigators, 5 investigators and 5 junior investigators and admin staff. All the investigators are duly appointed inspectors under section 24 of the Act.²²²

3.2 Investigative powers of the Commission

The powers of the Competition Commission to investigate prohibited conduct under the current Act, are outlined under Chapter 5 of the Act and interpretation of the said powers by the different authorities have led to an influx of varying

²²⁰ Investigation and Adjudication Procedures, this Chapter was amended to its present form by section 15 of the Competition Second Amendment Act of 2000

²²¹ Competition Commission's internal structure

²²² Internal structure of the Cartels division; this information is not available on the Commission's website; it is simply the composition of the current internal structure as determined by the Commission and the Divisional Manager of the Cartels Division.

decisions that have only managed to add confusion within the regulatory body. In order to understand the reasoning of the different courts in arriving at their decision one has to look at the wording of the relevant sections that have been under the microscopic light of the courts.

3.2.1 The Complaint process under the Act

The Act deals with the process of lodging a complaint against a prohibited practice under section 49B which reads as follows:

“Section 49B Initiating a complaint

(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*
- b. Submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form.”*

The interpretation of this section was dealt with intensively in the *Yara*²²³ case and to some extents in the *Woodlands*²²⁴ and *Loungefoam*²²⁵ case. The are two instances wherein a third party may approach the Commission and the legislature differentiated between these two instances by using the wording in 49B(2). The Commission has had a difference of opinion with the CAC in interpreting this section but unfortunately it is a matter that needs clarity from the higher courts and cannot be left as it is currently.

The Act is clear in stating that when a third party wishes to submit information to the Commission regarding prohibited practices that person may do so in

²²³ Supra

²²⁴ Supra

²²⁵ Supra

any manner or form.²²⁶ One has to consider the words of the legislature when dealing with section 49B (2).²²⁷ Obviously the intention of the legislature was to differentiate between instances when the third party has the intention of complaining about an alleged prohibited practice and when that third party only wants to inform the Commission that there might be such practices in a particular market.

In the *Yara*²²⁸ matter the CAC looked into the issue of prejudice against an opponent when an application for an amendment is brought by the other party.²²⁹ The issue raised by Yara and Omnia was that the proposed amendments by the Commission were not part of the complaint brought forth by Nutriflo.²³⁰ When one looks into the CC1²³¹ and accompanying affidavit by Nutriflo and considers the circumstances under which Nutriflo mentioned both Yara and Omnia in the alleged contravention of section 4(1) (b) it is clear that there is a link between Nutriflo's main complaint against Sasol²³² and the alleged contravention of section 4. Nutriflo contended that a consequence of Sasol's abuse of dominance is the contravention of section 4 in that it is able to manipulate prices with other competitors, namely Yara and Omnia.²³³

The SCA in the *Woodlands*²³⁴ matter indicated that "the Commission is not empowered to investigate conduct it generally considers to constitute anti-competitive behaviour and that a complaint can relate only to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complainant".²³⁵ Applying this statement by the SCA which the CAC clearly endorses I am inclined to believe that the CAC quoted the SCA out of context in this regard; it is true and important to note that the Commission's powers are purely based on what the Act states, that the

²²⁶ Section 49B (2) (a)

²²⁷ Section 49B(2)(a) states that Any person may submit information concerning an alleged prohibited practice to the Competition Commission, in any manner or form

²²⁸ supra

²²⁹ CAC decision on Yara supra at par 17-20 page 12

²³⁰ Ibid at par 10 page 9

²³¹ The prescribed form used to outline a complaint during the process of initiation

²³² The initial complaint by Nutriflo being that Sasol was contravening section 8: Abuse of Dominance.

²³³ The Tribunal decision on Yara supra at par 2 page 2

²³⁴ Supra

²³⁵ The SCA Woodlands decision supra at par 19 page 6

Commission cannot go around investigating anti-competitive behaviour in the markets which the Act does not cover is not in dispute. Nutriflo alleged that Sasol, Omnia and Yara were engaged in a cartel that controlled and fixed prices of the fertiliser KCL and Urea.²³⁶ The particular conduct that Nutriflo was referring to is covered by the Act as a prohibited practice in direct contravention of the Act.²³⁷

The accompanying affidavit to a CC1 forms part of the complaint and in this matter Nutriflo's error was to not mention Yara and Omnia on the CC1 with specific reference to the alleged contravention of section 4(1) (b). The Commission cannot then ignore a clear indication that one contravention of the Act has had further consequences of leading to another contravention of the Act. The allegation of the section 4 contravention by Nutriflo was another cause of action and this was indicated in the interim relief application that Nutriflo brought against Sasol, Omnia and Yara. It is clear that Nutriflo had a problem with the cartel that the three firms were involved in hence it wanted Sasol interdicted from increasing prices.

The Tribunal recognised the link between Sasol's abuse of dominance and the cartel Sasol had formed with Omnia and Yara. The Act indicates that when a third party wishes to provide information to the Commission regarding possible contravention that party may do so in any manner or form: however when that party wishes to lodge a complaint regarding a particular prohibited practice there is a prescribed form and manner to do so. The complaint brought by Nutriflo was done in the prescribed manner and form and it is common sense to accept that the entire contents of the prescribed form is a complaint brought forth by the third party.

The SCA statement quoted above is covered well in the Nutriflo complaint, in that the complainant (Nutriflo) alleged a contravention (cartel activity contravening section 4(1) (b)) which is covered by the Act as a prohibited practice, in a prescribed manner and form (the CC1 and accompanying

²³⁶ Tribunal decision supra at par 2 page 2

²³⁷ Section 4(1) (b)

affidavit). It is therefore puzzling why and how the CAC held in this matter that the information regarding a possible contravention of section 4(1) (b) was merely a section 49B (2)(a) instance on the part of Nutriflo. The problem with this analogy is that it is impractical to narrow down the intention of Nutriflo simply because it did not mention Omnia and Yara in the CC1.

It makes little sense for the CAC to arrive at a decision that Nutriflo did not have the intention of complaining about a cartel between Omnia and Yara, when Nutriflo was saying that Sasol used this cartel as a tool to abuse its dominance in the market.²³⁸ It cannot be considered simply as information when it is so closely related to the main complaint against Sasol of abuse of dominance. Nutriflo genuinely believed that Sasol manipulates prices through the cartel it has with the two respondents.

The question that arose in the *Yara* case is what really constitutes a complaint by a third party and that referred by the Commissioner.²³⁹ The Tribunal considered the contents of the abovementioned section and indicated that there was a causal link between the abuse of dominance allegation and that of the price fixing; one was a direct result of the other.²⁴⁰ The Act has clearly differentiated between the two instances regarding a complaint when a third party is involved and this cannot be deviated from simply because the third party did not comply with the said sub-section word for word.

The Commission argued that “intelligibility, rather than narrow legalistic definitions, should be the guiding principle behind complains brought to the Competition Tribunal”.²⁴¹ The CAC mentioned the civil procedure consideration of prejudice when amendments are brought however it did not consider prejudice against the Commission in the manner in which it chose to interpret section 49B.²⁴² One is inclined to wonder if the CAC is of the opinion that companies should be protected against prejudice while the regulator is a

²³⁸ The CAC decision on *Yara* supra at par 3 page 2-3

²³⁹ This issue was exhaustively discussed in both the Tribunal and CAC decision on the *Yara* matter

²⁴⁰ Tribunal decision on *Yara* supra at par 44 page 13

²⁴¹ Watchdog fights court-imposed muzzling: *Business Day*, 28 April 2011 Michael Bleby page 2

²⁴² The CAC decision on *Yara* supra at par 17 page 12

“big boy” that can take care of himself even under prejudicial circumstances? When a third party brings about a complaint under section 49B (2) (b) it is possible that that person may include information that indicates a clear contravention of another section of the Act, apart from the one the third party quoted. When this section is narrowly interpreted it means the Commission cannot broaden the complaint and modify it to include the entire allegation that that third party indicated thus bringing it within the ambit of the Act. The decision taken by CAC means even if the Commission sees that a third party in its complaint indicates further contraventions and respondents not covered in the CC1 it should either initiate a new complaint or inform the third party to elaborate on its initial complaint. This analogy is clearly defeating the reasons why the legislature saw it necessary to differentiate between sections 49B (2) (a) and (b).

The matter of *Yara* was taken to the Constitutional court for adjudication and although the Commission’s appeal was dismissed on the basis of it being premature, it is a strong indication that there is a need for the higher courts to provide clarity regarding the proper interpretation of the complaint process and the manner in which the Commission is allowed to exercise its investigative powers under this section.

3.2.2 The Summons under the Act

Once an investigation has been initiated the Commission has the investigative powers of summoning any person it believes will provide the required information and this process is covered under section 49A which reads as follows:

“Section 49A Summons

(1) At any time during an investigation in terms of this Act, the Commissioner may summon any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or

control of any book, document or other object that has a bearing on that subject-

- a. To appear before the Commissioner or a person authorised by the Commissioner, to be interrogated at a time and place specified in the summons; or*
- b. At a time and place specified in the summons, to deliver or produce to the Commissioner, or a person authorised by the Commissioner, any book, document or other object specified in the summons.”*

The above section was scrutinised in the *Woodlands* case wherein the Tribunal indicated that “the *Woodlands* summons was a too broad and vague”.²⁴³ The court looked into the interpretation of section 49A and examined how the Commission not only interpreted this section but a further look into the application of the section was done. The main question regarding this part of the Commission’s investigative powers is “how vague is too vague?” Is the Commission supposed to indicate word for word what documents are necessary in its investigation? Is it obliged to inform the company/person summoned that they are in actual fact under investigation? Would the case of the Commission not be compromised if it required at the stage of the initiation to inform the respondents that they are being investigated?

The wording used by the legislature in the above section is that any person can be summoned if the Commissioner is under the impression that that person can provide information whether verbally or in documentary form in a particular investigation. It is submitted that there lies no duty from the Commission to inform that person of the merits of the investigation the Commissioner called them for. The legislature does not impose a rule that only people being investigated can be summoned; it is the discretion of the Commission to inform the summoned party why they are being called.

Is it trite that the interpretation of a particular section cannot be done with that section being read in a vacuum: there is a need to look into other factors that influence the application of this section? One must also look at the limitations

²⁴³ Tribunal decision on *Woodlands* supra at par 15 page 8.

of the Constitution and the intention of the legislature when this section was drafted.²⁴⁴ There is a right under the Constitution to a fair trial and one of the ways a person can be guaranteed a fair trial is when that person is clear and sure of the facts of the case brought against them. It is submitted that the *Woodlands* initiation and subsequent summons to *Woodlands* and *Milkwood* was not clear. The initiation referred to the milk industry and as correctly noted by the SCA prohibited practices are acts involving firms in particular markets not industries, the referral of “industry” is too broad for *Woodlands* and *Milkwood* to draw a real inference that it applies to them.

There might not be an implied or written duty for the Commission to inform the person being investigated that they are in actual fact subject of the investigation however it is submitted that the constitutional right to a fair trial imposes this duty on the Commission. For the Commission to simply produce a broad and vague document and call it a proper summons not only fails the test of the Constitution but also that of the very section the Commission relies on to issue the said summons. *Woodlands* and *Milkwood* argued in their Tribunal case that “section 49A requires, if not by express language then by necessary implication, that a summons be issued in respect of an investigation whose subject matter must be a prohibited practice which is stipulated in the summons”.²⁴⁵ When one considers a summons in civil court proceedings it is clear that a person summoned will be able to know from the wording of the summons what allegation are brought and if the said allegation are brought against them personally; they will also know what cause of the action is brought against them. It is submitted that there is no reason in law why a competition law summons should be any different from a civil suit summons.

The Tribunal indicated in their judgement that section 49A required that the information sought in the summons relate to a subject matter of an investigation;²⁴⁶ the Act narrows down the types of prohibited practices that the Competition Commission is allowed to investigate and prosecute and it is

²⁴⁴ Section 36 of the Constitution of the Republic of South Africa Act 108 of 1996

²⁴⁵ The Tribunal decision on *Woodlands* supra at par 21 page 10

²⁴⁶ Ibid at par 32 page 13

clear from the wording of the Act that any other practice that seems anti-competitive but not covered by the Act is not to be investigated by the Commission. The SCA did state that the Commission does not have powers to simply investigate acts it considers anti-competitive therefore it is only allowed to investigate prohibitions under the Act.²⁴⁷

It is submitted that the use of the word anti-competitive practices is too broad in that the Act covers different types of anti-competitive practices, from price fixing, collusive tendering, market division, abuse of dominance and resale price maintenance to name just a few. Therefore when a person receives a summons that relates to anti-competitive behaviour in the milk industry obviously such person is not sure which part of the Act he is alleged to have contravened and under which market that contravention falls in the milk industry (considering there is a market for selling, producing, distributing and processing, just to name a few).

The CACs approach to the *Woodlands case* was puzzling as the two summonses were drafted by the same regulatory body.²⁴⁸ How does a bench of judges justify finding one summons to be vaguer than the other? Again we return to the question of how vague is too vague? Do the judges believe that because Milkwood was not requested to provide any documents its summons is not required to be as precise and clear as that of Woodlands which was requested to provide documents? This approach brings about more questions and uncertainty than answers and I believe the only reason the Commission never took this matter on appeal was because it was certain that both summons were in fact vague and too broad. All the CAC managed to do with this decision was to give the SCA a chance to further embarrass the Commission regarding how far below-par their overall work on the *Woodlands* matter was.

It seems that the judgement of the SCA regarding the *Woodlands* matter has brought about mixed reactions in the legal fraternity. It has been referred to as the tightening of procedural boundaries of South African Competition law and

²⁴⁷ SCA decision on *Woodlands* supra at par 26 page 8

²⁴⁸ It is also most likely that they were drafted by the same investigator dealing with the *Woodlands* matter with the same motive and intention.

seen as a strong commitment from the courts to ensure that due process is adhered to in Competition proceedings.²⁴⁹

The *Woodlands* decision is said to have “sent a strong message to the Commission and Tribunal that the Competition Act has to be interpreted and applied in a manner that is consistent with the Constitution and reconfirmed the importance of the rule of law, the democratic values of dignity and freedom, the right to privacy, the right to a fair trial and just administrative action”.²⁵⁰

The major setback suffered by the Commission regarding this matter is that although some firms had acknowledged being involved in cartel activities, the matter was abandoned and the firms are off the hook. Although the Commission did err in its approach however one has to wonder why the courts are constantly favouring procedure over application of law. It may be asked whether it serves the purpose of the Act to not prosecute prohibited practices where such evidence exists simply because the documents requesting that evidence are not properly drafted.

One of the purposes of the Act is to “promote the efficiency, adaptability and development of the economy”,²⁵¹ it is important for the Commission to be able to not only investigate but to prosecute and bring to book all prohibited practices within the ambit of the Act that undermine this purpose of the Act. There is a need to balance public interest and rights to a fair trial; a person or company cannot simply be denied the right to a fair trial especially when the reason for denying this right is because the regulator blundered in drafting.

As indicated above, although this section does not specifically oblige the Commission to be precise and clear in drafting its summonses, it is a rule of law that an accused in any matter has to be able to understand what charges are brought against them.²⁵² In competition matters the summons is usually the very first document a party receives informing them that there is a case to

²⁴⁹ Procedural boundaries bring about competition certainty: Blignaut and Frank, Times supplement, Page 1, June 2011.

²⁵⁰ Ibid at Business Day supplement page 9

²⁵¹ Section 2(a) of the Act

²⁵² Section 85 of the Criminal Procedure Act 51 of 1977, indicates that a person may object to a charge sheet if it does not meet the requirements of the Act or it fails to outline a proper charge

answer for at the Commission. The Commission has to issue a summons in cases when they ought to know what information they seek, for which contravention and from which person. The process of a summons is different to that of a search and seizure process.²⁵³ wherein the Commission is investigating a particular prohibited conduct but it is not certain what type of documents it will retrieve at the premises to be searched.

Since the summons is the first document an accused firm receives regarding a particular matter, it may be asked whether it should not follow that that document has to be a clear and precise as possible without necessarily compromising the integrity of the Commission's case. It is submitted that indicating which person is being investigated and why would not undermine the case of the Commission, it would only make the investigative process much more simpler in that the investigated party will know what documents to look for when answering the allegation brought against it.

It appears that the only good that came out of the *Woodlands* matter on the side of the Commission is that the regulator has since improved its procedures, practices and administrative capabilities. The court's decision exposed a number of problems within the Commission that needed thorough house-keeping and it is reassuring to see the regulator picking itself up and getting the proper work done.²⁵⁴

3.2.3 The Referral process under the Act

Another process that has come under scrutiny by the courts specifically in the *Loungefoam* case is that of referral to the Tribunal: the courts and litigants have questioned the manner in which the Commission uses the process of referral and when is a matter said to be ripe for referral to the Tribunal.²⁵⁵ There has also been a question of amending the referral under the Act and to

²⁵³ Section 48(1) of the Act: explain search and seizure process

²⁵⁴ The Commission has over the years paid more attention to its procedural and administrative sides, fewer cases referred after the *Woodlands* decision have been turned away on a procedural issues.

²⁵⁵ The CAC decision on *Loungefoam* supra at par 7 page 5

what extent that referral can be amended.²⁵⁶ The Act states the following with regards to the referral process:

“Section 50 Outcome of complaint

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

(2) Within one year after the 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;”

The process of referral is done once the Commission is satisfied that it has investigated a case fully and it is certain that the respondent does have a case to answer before the Tribunal. When the Commission refers a matter it is so done after the processes of initiation and investigation (through the various methods outlined by the Act) have been completed.²⁵⁷ When the matter is initiated by the Commission there is no time limit set for the referral to go to the Tribunal and if the complaint was from a third party then the Commission has to refer its matter to the Tribunal within one year of receiving the initiated

²⁵⁶ Ibid at par 9 page 6

²⁵⁷ The process of initiation and referral as explained in chapter 2 supra.

complaint.²⁵⁸ The above section allows the Commission to add particulars to the complaint in its referral and gives the Commission options regarding the manner in which it can refer matters to the Tribunal.

The Commission in the *Loungefoam* matter referred various allegations to the Tribunal against Loungefoam (Pty) Ltd, Vitafoam (Pty) Ltd and Feltex Automotive (Pty) Ltd. During the course of hearings various defences were raised by the respondents which led the Commission to apply to the Tribunal for leave to appeal its referral regarding various charges brought against some of the respondents. The Commission is bound by the wording of section 50 when referring matters to the Tribunal implying a matter can only be referred once it has been initiated and that the process of referral cannot substitute that of initiation nor can it supersede it.

The *Loungefoam* case considered the instances under which the Competition Commission can amend its initiation and referral statement. Another question that arose regarding amendments was whether there is a time limit to when the Commission can bring about an amendment.²⁵⁹ The argument brought by *Omnia and Yara* was that the Commission's intention to amend the referral was in actual fact brought *mala fide*, and should not be allowed on those grounds.²⁶⁰ Would the Commission really benefit anything by bringing an application to amend under bad faith? I think not.

The issue of amendments always leads to a number of procedural red-tape in court proceedings as amendments always raises the issue of prejudice against the other party. The Tribunal dealt with the issue of prejudice in the case of *Commission v Omnia and Yara*²⁶¹ and stated that "The approach taken by our courts in the civil law context towards amendments has been a permissive one. In deciding whether or not to grant an application for an amendment the court exercises discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them. Applications for amendments will not

²⁵⁸ This is outlined in section 50 of the Competition Act 89 of 1998

²⁵⁹ The Tribunal decision on Yara supra at par 46 page 15

²⁶⁰ Ibid

²⁶¹ Supra

be granted if they result in prejudice to the other party which cannot be cured by an order of costs or postponement. The fact that an amendment introduces a new cause of action or may result in a loss of tactical advantage or even defeat of the other party does not constitute prejudice and will not outweigh the concern to determine the real dispute between parties”.²⁶²

It is apparent from this passage that the Tribunal does not consider material amendments prejudicial if they can be cured in some way by providing the prejudiced party with some form of relief. Cases are brought to court in order for merits to be argued and adjudicated upon and where a need arises to amend, the court cannot simply deny the amendment because it is prejudicial. It is imperative however to measure the amount of prejudice to be suffered by the person who is likely to be affected negatively, and consider all other options available to avoid the prejudice.

The amendment proposed by the Commission was material mainly because it according to the appellants had the intention of introducing a cause of action that was never initiated against Feltex. Given the Woodlands decision from the SCA it is apparent that the Commission has to draft its initiation in such a manner that all parties are able know what case they have to answer to; and it is the interpretation the court (SCA) gave to the initiation section that narrows the process. The Commission gathered information at a later stage in its investigation that led it to believe that Feltex was part of the “chemical cartel” and initiating afresh always raises the issue of prescription, so the Commission decided to take the approach of amending its referral instead.²⁶³

As outlined previously the section regarding initiation does not require the Commission to initiate against a particular person or firm. It simply requires the Commission to initiate against a prohibited practice. The “chemical cartel” initiation was against a prohibited practice in that the respondents were alleged to have been engaged in forming a cartel in relation to the procurement of certain chemicals which are primary inputs in the manufacture

²⁶² The Tribunal Loungefoam decision par 18 page 7-8

²⁶³ Hence the Commission applied to the Tribunal to amend its referral against the respondents.

of polyurethane foam.²⁶⁴ The Commission had met the requirement of the Act and it is submitted that for the courts to expect the Commission to widen its initiation to include each and every person it suspects of the prohibited practice is quite restrictive. The approach or rather interpretation taken by the Commission regarding the manner in which initiations should be drafted gives the Commission room to add respondents as and when it discovers them during its investigations without falling prey to the sword of prescription.

The chemical cartel initiation was not industry-wide and it is submitted that it was not vague regarding the alleged prohibited conduct therefore it did meet the legality and intelligibility test. As the Commission found information that indicated that Feltex was part of the said cartel after it had already referred it is submitted that it is only reasonable to allow it to amend its documents so that Feltex does not fall through the cracks simply because of a technicality raised in the initiation documents.

The issue that arose with the *Loungefoam* initiation was that a third party had complained in a prescribed manner and form, the complaint CC1 was sent to the respondents and they alleged that the CC1 did not mention them specifically therefore the case was not against them.²⁶⁵ This brings us to the argument raised above regarding how precise the initiation statement has to be and the Commission's options when dealing with a third party complaint. The fact of the matter is that the legal fraternity will always raise technical issues against procedural mishaps in order to avoid having to have the matter decided purely on merits. The Commission in this matter opted to initiate a complaint which was clearer against Loungefoam and Vitafoam.

The Act does indicate that the Commission must initiate before it can execute its powers of investigation in prohibited practices, therefore it is submitted that it should be clear to the courts that often at the time of initiation the Commission does not have all the information regarding the alleged conduct, all the implicated or involved parties and the extent of their involvement. The courts also have to appreciate that the investigative process is sometimes

²⁶⁴ The initiation statement was paraphrased by the Tribunal in its decision.

²⁶⁵ The Tribunal's decision on Loungefoam supra at par 21 page 9

hampered by respondents when they attempt to avoid prosecution therefore some information might take longer to uncover than others.

The Commission had in this matter issued a CC1 which included Feltex after it had launched an investigation that included looking into Feltex as a party to the alleged prohibited practices. It is a jurisdictional requirement²⁶⁶ that only initiated matters can be referred to the Tribunal therefore it is only logical to demand that the Commission meets its obligations regarding initiations. There is no rule or subsection in the Act that indicates that the parties to a particular conduct have to be cited word for word or that the said parties have to be linked word for word to a particular prohibited practice. It is a trite law that he who alleges must prove and it can be asked whether it does not then follow that once the Commission has alleged that a particular respondent is involved in a number of prohibited practices it should be given the chance to prove its case in the Tribunal, instead of its case being dissected piece by piece to check if certain allegation were actually raised against particular respondents.

3.2.4 Amending a referral

The process of amending a referral is outlined in Rule 18 of the Tribunal Rules of conduct which states the following:

Rule 18 Amending documents

- (1) The person who filed a complaint referral may apply to the Tribunal by Notice of Motion in Form CT6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their form CT 1 (1), CT 1 (2) or CT 1(3), as the case may be, as filed.*
- (2) If the Tribunal allows the amendment, it must allow any other party affected by the amendment to file additional documents consequential to those amendments within a time period allowed by the Tribunal*

²⁶⁶ Rules 14 and 15 of the Rules for the conduct of proceedings in the Competition Tribunal

Rule 18 regarding amendment of documents speaks of “any time before the end of the hearing” and it is submitted this indicates that it cannot be said that the Commission intentionally took its time in the *Loungefoam* matter to amend the referral in bad faith. The CAC in their judgment indicated that the Tribunal and the Commission considered the supporting affidavit as part of the CT 1 form that is actually capable of being amended according to Rule 18.

The Commission’s request was made in accordance to an application in terms of Rule 18(1) of the Tribunal Rules. The Commission asked for the following relief:

1. Granting the applicant leave to amend the Notice of Motion, the founding, supplementary and replying affidavits in the complaint referral in the respects set out in the founding affidavit which is attached to this Notice of Motion;
2. Permitting and directing the applicant to file the Amended Notice of Motion, the founding, supplementary and replying affidavits within a time period stipulated by the Tribunal;
3. Directing the respondents to file such additional documents as they are advised to file consequential to the amendments, within a time period stipulated by the Tribunal.²⁶⁷

The reference to the three different types of form arises from the different ways in which a complaint may be referred to the Tribunal. In terms of Rule 15: ‘(1) A complaint proceeding may be initiated only by filing a Complaint Referral in Form A; complaint proceeding may be initiated only by filing a Complaint Referral in Form CT 1(1), CT 1(2) or CT 1(3), as required by Rule 14. (2) Subject to Rule 24(1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs:-

- (a) a concise statement of the grounds of the complaints; and
- (b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be.

²⁶⁷ The CAC’s decision on *Loungefoam* supra at par 8 page 6.

(3) A Complaint Referral may allege alternative prohibited practices based on the same facts.”²⁶⁸

The CAC indicated that there are different methods under which the Commission may refer a matter to the Tribunal and that Rule 15 (2) requires that the prescribed form be accompanied by an affidavit.²⁶⁹ The Commission did refer the matter to the Tribunal and attached an affidavit that was outlining the statement of the complaint grounds, material facts and points of law that the Commission was relying on. It appears from the reading of this section that any attached documents to the CT1 ought to form part of the referral and cannot be said to be “alien” documents.

The CAC disregarded the above argument and indicated that “Assuming this reflects the general stance of the Commission it is labouring under a fundamental misconception as to the nature of the affidavit required by Rule 15(2). It treats it as if it is a type of pleading, subject to amendment from time to time as the case develops. That is incorrect. An affidavit in competition proceedings has precisely the same character as it has in any other circumstances”.²⁷⁰ The Commission obviously does not consider the affidavit attached to the CT1 as a separate affidavit, it is submitted that the fact that this affidavit is meant to provide further more precise information regarding the charges levelled in the CT1, as required by Rule 15, makes the affidavit part and parcel of the CT1 thus rendering it a status different from that of an ordinary affidavit in civil proceedings.

The CAC conceded that the affidavit attached to the CT1 in support of the referral is not used in the course of judicial proceedings, so that the deponent is not potentially liable to a charge of perjury.²⁷¹ Does this not mean that the legislature intended for this particular affidavit to be different from the conventional affidavit?

Needless to say the CAC dismissed the ruling of the Tribunal and as always did it in such a manner that fully criticised and undermined the thinking of the

²⁶⁸ Ibid at par 9 page 6

²⁶⁹ Ibid

²⁷⁰ The CAC decision on Loungefoam supra at par 12 page 7

²⁷¹ Ibid at par 15 page 9

Tribunal and their understanding of how to properly interpret the contents of the Competition Act. The dismissal does not really provide a clear indication as to what makes the CT1 affidavit the same as the conventional affidavit despite it being different on the face of it.

3.3 A practical application of the higher courts decisions.

3.3.1 The *Woodlands* decision

The SCA in this case held that “there is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility. There are reasons for this; the first is that any interrogation or discovery summons depends on the terms of the initiation statement. The scope of a summons may not be wider than the initiation.”²⁷² It is submitted that the initiation in competition matters plays the role of a charge sheet in criminal matters, once an investigation is launched the charge sheet guides how that investigation will go. The charge sheet is the point of departure for all paths the investigation will follow and the process of the investigation cannot go beyond the realms of the charge sheet. When a complaint is initiated it is important for the initiation document to be clear and precise so that the summons follows in that path of being clear and precise in as far as the conduct is concerned.

The Commission has the powers to restrict access to information on the initiation statement until it referred the matter to the Tribunal and considering the fact that the summons will always come before referrals it means the party to the investigation might only see the wording of the initiation statement when the Commission refers the matter for hearing at the Tribunal. It is submitted that the respondent would have been labouring under the impression that the Commission’s initiation statement is clear and unambiguous thus guiding the investigative process properly.

²⁷² The SCA decision on *Woodlands* supra at par 35 page 11.

The Commission cannot expect the courts to exempt it from providing clear charges. The Act speaks of a prohibited practice therefore the Commission is obliged to clearly outline what is it investigating and who it is investigating. Although there is a need for room to add further respondents to the charge, the charge itself in as far as it relates to the conduct should be clear.

The Commission has since the *Woodlands* judgement endeavoured to comply with the reasoning of the SCA and ensured that its initiations meet the intelligibility and legality test as outlined in the judgment.²⁷³ Ensuring that the documents the Commission drafts are meeting acceptable standards has not hampered the work of the Commission in any manner or form. It has in fact allowed the Commission to avoid situations untangling the red tape arguments brought on by respondents.

The SCA indicated that the difficulty of the Commission's task to prove the existence of prohibited practices does not mean the Commission may simply by-pass the procedural rights of the respondents in order to prove its case.²⁷⁴ Ann Crotty stated that if something is not done by the parliament's portfolio committee regarding the consequence of the SCA *Woodlands* ruling, the chances of successful prosecution of cartel activities will be considerably reduced.²⁷⁵ This stance indicates that the court's strict approach to the initiation statement will jeopardise the works of the Commission. However as rightly indicated by one scholar that; "despite the rumblings of the competition authorities, these decisions reflect not a systemic erosion of the investigative powers afforded to the Commission, but rather the need for procedural compliance in order to avoid the impermissible encroachment of a respondent's rights".²⁷⁶

The issue raised in *Woodlands* was regarding a flawed summons that is a direct result of a flawed initiation which led to an even more flawed

²⁷³ SCA *Woodlands* decision supra at par 35 page 11

²⁷⁴ Ibid at par 11 page 5

²⁷⁵ SCA ruling on watchdog helps cartels, not public. Page 18 the star, business report, 22 September 2010.

²⁷⁶ Of cows, chemicals, cartels... and geese; without prejudice publication by Dylan Cron and Tladi Marumo

investigation. The rights of a respondent cannot be side-lined simply because the regulator has a mammoth task before it to prove a case. It is therefore my submission that the ruling of the SCA does not encroach on the powers of the Commission to investigate. It simply stands up for the rights of those investigated by the regulator. After all, the well-known principle of innocent until proven guilty should apply to competition matters as well.

3.3.2 The *Yara* decision

The decision of the CAC in this matter is confusing and does not at all indicate any clarity regarding the approach the Commission should take with third party complains. As exhaustively argued above on this point, the Act does differentiate between a third party complaint and when a third party simply provides further information to the Commission regarding prohibited practices. It is submitted that the Nutriflo complaint regarding Sasol's abuse of dominance cannot be logically separated from the cartel complaint.

The CAC held that the Commission could not amend an initiating document as there was no procedure in the Act providing for this.²⁷⁷ This decision is a clear contrast to what the SCA seemed to hold in *Woodlands*. In terms of the *Yara* decision the court is of the opinion that an initiating document cannot be amended, however the SCA indicated that it can be amended.²⁷⁸

For the CAC to expect the Commission to dissect each third party complaint that it receives into various mini complains that covers each aspect of the alleged contravention is expecting the Commission to go beyond the duties the Act imposes on it. The Commission has been mandated with accepting complains from third parties and can only add or elaborate on the complaint when it initiates the charges itself. It seems that the CAC is not aware of the fact that in most cases the third parties who approach the Commission to

²⁷⁷ The CAC decision on *Yara*, supra at par 39 page 23

²⁷⁸ The SCA decision on *Woodlands*, supra at par 36 page 11-12

lodge complains are not legally educated people and that they rarely use the services of a lawyer at the beginning of their complaint process.²⁷⁹

The *Woodlands* case was initiated as a result of a third party complaint, however the Commission had chosen to initiate its own complaint instead of relying on the complaint of the third party. The *Loungefoam* matter was also based on an initial complaint by a third party. Thus it is logical to adduce from these facts that the majority of the initiations by the Commission emanate from third party complaints that may have either been taken at face value or amended by the Commission and submitted as such. The *Woodlands* decision called for the Commission to have a reasonable suspicion of a contravention of the Act before it can initiate matters and since the provisions of market enquiries are not yet enacted into law it is almost certain that the reasonable suspicion will most of the time arise from information from third parties. It is submitted that the only time the Commission can be in a position to draft a near perfect initiation with information submitted by a third party is when it has received a CLP application regarding an alleged prohibited practice.

The impact of cartels are devastating and when a third party approaches the regulator with the intention of being a complainant as stipulated by the Act it is counter-productive for the courts to shoot down that process and favour a narrow, rigid and legalistic approach to a process the legislature designed to be simple. Applying the principles of the court in practice defeats the purpose of the Act and the intention of the legislature, matters should not be separated for formality's sake when it is clear they are part of the same issue. It is submitted that The *Yara* decision is bordering along the lines of reckless interpretation in that if a third party simply notes one conduct in its CC1 but in its attached statement elaborates about many other contraventions the Commission is supposed to now call that third party and request them to submit a CC1 for each complaint.

²⁷⁹ sometimes they do not use the services of a lawyer throughout the process of complaining

The Commission is a competent body established to deal with complains against contraventions of the Act and this is clearly outlined in the said Act. For the courts to now take up the role of nanny towards the Tribunal and the Commission undermines the very expertise the Commission and the Tribunal have that renders both authorities capable of executing the mandate as set out by the Act. The Competition Commission replaced a number of regulatory bodies which previous Acts had put in place to regulate competition law in the country and when the government saw a need to replace these Boards, it was apparent that the body that was to replace the previous boards had to have specific expertise and capabilities, which the Commission has.²⁸⁰

Applying the judgment of the CAC as it is overburdens the Commission and it is submitted that it cannot be considered practical to separate a complaint on the CC1 from another complaint in the attached statement simply because the latter is not mentioned along with the former in the CC1.

3.3.3 **The *Loungefoam* decision**

The approach adopted by the CAC in this matter is disappointing to say the least, as the regulator is mandated with investigating prohibited practices in markets as outlined by the Act. The initiation in this matter was originally brought by a third party whose wording did not give a clear indication of who the complaint is levelled against. The Commission modified the complaint and initiated the complaint yet the respondents played the “technical glitches”-approach thus undermining the contents of the Act and focusing their argument on technical and procedural errors alleged to have been made by the Commission.

It is submitted that amending documents to simply close a technical gap is not the same as bringing about completely new evidence and charges at a late

²⁸⁰ The Competition Commission has replaced the Board of Enquiries that was established by the Department of Trade and Industry, which had far less power and expertise than the current Commission.

stage of the case before the Tribunal. The Tribunal indicated that the prejudice to be felt by the respondents as a result of the amendment could be remedied and was not fatal as it did not affect the merits of the case. The *Woodlands* decision was that the Commission could not venture into “fishing expeditions” with industry wide investigations. In this matter the Commission had narrowed down its investigation, the conduct was outlined and the parties to the said conduct were indicated. It is submitted that the CAC could not simply overlook the *Woodlands* decision in order to discredit the judgment of the Tribunal in *Loungefoam*.

When a respondent's rights are undermined and prejudiced the courts in providing recourse for the respondent look into the extent of the prejudice and available remedies for the respondent. It is however submitted that prejudice is not a yardstick used to determine the validity of a case against a person or entity and the mere fact that an amendment prejudices the rights of one does not render that amendment invalid. The court in this matter seemed to be of the opinion that prejudice is a yardstick and once an amendment fails the “prejudice test” it is invalid despite any other underlying factors.

3.4 Final Conclusion

The powers of the Competition Commission to investigate prohibited practices are outlined by the Competition Act. These powers are set in such a manner as to enable the Commission to execute its mandate and further the purpose of the Act. It is the duties of the courts to interpret the wording of the legislature in such a manner that does not defeat the very purpose of the Act the courts are interpreting.²⁸¹ It is submitted that without the powers of investigation the Commission is just another advisory body put in place to simply window dress the economic need for a regulator. It is therefore important for the courts to not put the Commission in a situation where it (the

²⁸¹ Although the Act does not give a clear guideline as to how it is supposed to be interpreted it is common cause that interpretation of a statute should not be done in such a manner that will render the said statute useless to apply.

Commission) finds itself as a toothless barking dog that is held back by the chains of procedure.

It is unfortunate that the CAC has given an impression to the Commission that it (the CAC) simply regards the Tribunal as incompetent in carrying out its mandate. This impression is supported by the manner in which the CAC drafts its decisions especially when those decisions are overturning the Tribunal decisions. It is as though the Commission is caught between a mud-sling between the Tribunal and the CAC and unfortunately for the Commission all it gets is muddied water. The SCA will have to step in, in the *Yara* and *Loungefoam* matters to clear the air because whether it is appreciated or not, the effects of the CAC decisions on these two matters will have rippling effects on other cases the Commission has to bring for prosecution before the Tribunal, a case in point being the *SAB* matter as indicated below.²⁸²

In the *SAB* matter the Tribunal was asked to dismiss a complaint brought by the Commission against *SAB* and other parties because the alleged referral was not based on the initiation that alleged embodied the complaint²⁸³. The Tribunal made the following comment regarding the reasons why they agreed to dismiss the case: “We set out firstly our reasons for coming to that conclusion, based on existing jurisprudence from higher courts that is binding on us. In Part B, we indicate our concerns as to why this jurisprudence may need re-consideration to avoid injustice to complainants and the public interest as represented by the Competition Commission.”²⁸⁴

The Tribunal looked deeply into the *Yara* decision and noted some discrepancies in the manner in which the CAC approached this particular matter which was different from its approach of previous matters with the same or similar facts.²⁸⁵ It was earlier indicated in the *SAB* matter that the CAC had previously considered the “intention test” when attempting to

²⁸² Competition Commission v SAB and others 134/CR/DEC07

²⁸³ Ibid at par 1 page 2

²⁸⁴ Ibid at par 3 page 2

²⁸⁵ The Tribunal’s *SAB* judgement at par 51 page 12

determine if a third party had submitted a complaint or just information and this “intention test was applied in the *Clover*²⁸⁶ matter.

The Tribunal in explaining the “intention test” further noted that: “The court, as we explained earlier, decided they were not part of the complaint based on their interpretation of the complainant’s intention. But in this respect, in applying the intention test, the court was going further than it had in *Clover*. Whilst *Clover* used the intention test to decide identity; i.e. whether the person making the submission was a complainant or an informant, *Yara* applied the intention test to the content of what was common cause to the complainant’s submission, to determine in what respects parts of the document could be classified as constituting a complaint and what parts could be regarded as mere submissions of information. The former constituted part of an initiating document, the latter, since only information, did not.”²⁸⁷

The CAC was bound by the decision made in the *Woodlands* case and it went beyond that decision adding new analysis to the interpretative approach of the relationship between an initiation document and the referral document. The approach taken by the CAC in this decision was followed by the Tribunal in the *SAB* matter as it applied the *Yara* rationale to the facts of the *SAB* case.

The effects of the *Yara* case led to the dismissal of the *SAB* case and this means further miscarriage of justice because despite the Tribunal being of the view that the *Yara* decision was somewhat strange and deviated not only from the SCA *Woodlands* decision it also deviated from the principles laid down by the CAC in the *Clover* case, it was bound the said decision and had to follow the precedent. The problem with higher courts making erroneous decisions is that their precedents are binding on the lower courts and tribunals therefore the lower courts and tribunals find themselves in a situation that requires them to apply the said precedent whether they agree with it or not.

²⁸⁶ *Clover Industries Limited and another vs The Competition Commission and Others*, Case No: 78/CAC/Jul08.

²⁸⁷ The Tribunal *SAB* decision supra at par 59 page 16

The Tribunal noted that the approach taken by CAC in the *Yara* matter is strict and formalistic²⁸⁸ and the Commission cannot be expected to thrive and produce results that have a positive impact on the economy of the country if it is muzzled by such interpretations. The proper approach to follow in this regard is that which not only gives homage to the intentions of the legislature but also seeks to balance the interest of justice, the administrative rights of the respondent and the interest of the public. Failure to do this means the domino effect of a bad decision will trail down tripping every case along the way simply because the decision comes from a higher court.

²⁸⁸ Ibid at par 62 page 16

CHAPTER 4

4 Introduction

What makes a system great? What makes it work in such a manner that there is little doubt from the people of its efficiency? A combination of great drafting and precise interpretation; application of laws which does not rest on the type of people you employ to apply it; but rests on their ability to interpret the laws they are meant to apply. When the regulator fails to properly interpret the law, there are courts put in place to properly interpret such law. However what is the regulator to do once a problem arises when there is friction between the regulator and the courts due to the said interpretation?

It is submitted that the legislature has a duty to clarify the legal position in situations where there are major discrepancies not only between the courts and regulators but between the lower and higher courts. The approach taken by the Tribunal is one of permissible interpretation, which allows the Commission to investigate and refer matters without necessarily being too restricted by technicalities. The Competition Appeals Court approach is formalistic, which calls the Commission to order each time it moves from the lines laid out by the legislature.

4.1 Executive summary of the study

This study was an in-depth look into the investigative powers of the Competition Commission, a gaze into the practicality of applying the court decisions regarding the said powers. An analysis of the historical background of Competition law regulation and comparison of the various developed system was done with the purpose of understanding the backdrop upon which our country's Competition law is built. The interpretation of the Act with specific reference to section 49A, 49B and 50 have led to various opinions in the legal fraternity and within the regulatory body itself.

The further purpose of this study was to quantify the prejudice suffered by the Competition Commission with regard to applying its investigative powers. The Commission has been criticised by the courts for the approach it takes when interpreting the ambit of the Act and it is this criticism that was looked at in this study. A critical analysis of the justifications given by the courts in their judgment was carried out and it is submitted that it is clear from the argument and comments outlined throughout this study that some reasons or justifications given by both the courts and the Commission do not necessarily meet the logical and reasonable man test.

The Tribunal in the *Woodlands* matter indicated that it was important for a person reading a summons to be able to determine from the face of it what the charges were, who was being charged and by whom they were being charged. It is my opinion that the words of the Act with regard to initiations and referrals can be understood from simply reading the wording of the sections. The courts cannot simply interpret a section to require more than what the section says simply because the burden of proof lies with a regulator. Judge Davis stated that “while he accepts that the prosecution of competition law infringements are not entirely the same as criminal prosecutions, this did not mean that the Competition Commission’s wide powers could not have devastating consequences, which may flow from a complaint that lacks sufficient specificity. Further, an accused, even as a juristic person, has rights that are at stake and that need to be protected”.²⁸⁹

It is my submission that a proper interpretation of the Act would not result in the rights of a juristic person being infringed because the Competition Act was drafted with the Constitution in mind, remembering the obligations of all persons interpreting this legislation to not deviate from the contents and rights outlined by the Constitution.

²⁸⁹ Competition law colloquium; derebus publication Aug 2011 page 12

4.2 Findings

It is the findings of this study that the higher courts or the legislature need to provide clarity regarding the powers the Competition Commission has with relation to prohibited practices. It is important to balance public interest with rule of law. However it is submitted that the courts have indicated in their judgements that rule of law will triumph over public interest any day. One of the purposes of the Act is to promote the economic welfare of South Africans and it is therefore important that the courts consider the implications of their decision against public interest and the consequence those decisions have on furthering the purpose of the Act.

The courts have dismally failed to provide clarity as to what really constitutes a complaint by a third party and this has led to a situation that leaves the Commission tongue tied regarding interpreting third party complaints. The question at the beginning of the study was “Is justice on board the Commission’s regulatory bus?” Do the courts recognise the intention of the legislature and the purpose of the Act? Do the courts give homage to the efforts of the Commission in realising the stipulated purpose of the Act? It is apparent from the judgements and comments in the *Yara*, *Loungefoam*, *Netstar* and *Woodlands* cases that the courts are more interested in procedure than substance; thus not always on board.

The CAC’s interpretation of section 49B is submitted to be incorrect as it fails to recognise an act that clearly is a result of another. An example of the Nutriflo complaint coverage can be illustrated in a scenario where a person approaches the SAPS to report a murder and state in their reporting statement that the victim was killed as a result of a house-breaking. The SAPS in this regard will investigate the murder charge and the house-breaking charge, the prosecutor will prosecute the two crimes because of the “but-for test” which indicates that given the facts of the case it is likely that the crime of murder would not have materialised had the suspect not broken into the victim’s house. Why was it hard

for the CAC to see that the acts of Sasol in abusing its power is carried out in the cartel activities of fixing and controlling prices? There is a clear causal link between the abuse of dominance and the conduct of price fixing and it is because of the increased prices that Nutriflo complains to the Commission.

Another interpretation that falls short of correctness is that in the *Loungefoam* decision. As indicated in this study the initiation process requires initiations to be against prohibited practices and at the early stages of initiation the Commission cannot be expected to have full information regarding the case before it, hence the process of investigation follows that of initiation. There was a valid initiation in the chemical cartel and although it was not expressly indicated Feltex as information materialised proved to have been involved in the chemical cartel; it is logical for the Commission to want to include Feltex in this allegation and that it does so via an amendment is indicative of the Commission's desire not to bypass procedure thus infringing on respondent's right to administrative fairness.

In this matter the court denied the Commission the right to prove its case. This has been a trend with the CAC in its decisions against the Commission. The approach taken by the courts have led to a delay in prosecuting cartel activities and it is said that justice delayed is justice denied. Cartel activities deny consumers the right to a fair price and choice and the purpose of the Act is to prevent and prosecute cartels. However, the narrow interpretations followed by the courts only have the effects that it is becoming exceedingly difficult for the Commission to investigate and prosecute cartel activities.

4.3 Recommendations

It is my opinion that there is a need for legislative reform with regard to the Act and since we are made to wait for further court interpretation in the *Yara* and *Loungefoam* cases; I make the following recommendations regarding that reform:

- 4.3.1 The legislature should insert clearer wording to the Rule 15 referral process thus indicating the weight the courts are to attach to an affidavit under this Rule
- 4.3.2 There should be a clear indication from reading the Act that the attached affidavit to the CT1 is just as part of the CT1 as the founding affidavit in the initiation process is a part of the CC1. It should follow from the wording of the Act that the legislature intended for the two documents to go together and that the process of referral cannot be said to be complete when one is not accompanied by the other.
- 4.3.3 The Act should define the purpose and ambit of a referral affidavit, it should indicate whether this affidavit is exactly the same as the affidavit in civil processes and if it bears the same meaning thus falling under the same scrutiny as the civil affidavit;
- 4.3.4 Although I am of the opinion that it is unnecessary but for the sake of clarity the Act should add a definition of what really constitutes a complaint from a third party and to what extent is the Commission allowed to amend its referral when the said referral emanates from a third party complaint that was poorly drafted. There should be no confusion as to how to interpret a “Nutriflo” situation, whether by the courts or the regulator.

4.4 Final Comments

The government saw a gap in the regulatory legislation that was enacted for competition reform in the country; and in attempting to fill this gap the current Competition Act was drafted. This Act gave more powers to the competition watchdogs, spread out the fields in which the said powers could be exercised and although there is a limit to these powers the legislature drafted the Act in such a manner that interpretation should be reasonably easy.

The rule of thumb given the effects of the Constitution against any legislation in this country is that interpretation should not be done in such a manner that would limit the constitutional rights of others. The right to a fair trial demands that proper administration be carried out when prosecuting prohibited conducts; be it

in civil, criminal or competition matters. A regulator cannot escape this duty and hope to hide behind the protection of the intention of the legislature. That said, it should not be allowable to have the manner in which administrative procedures are carried out to hamper the mandate of a regulator. It should follow that only in cases where there is a gross discrepancy between what is procedurally acceptable and what the regulator has produced should the respondents be let off the hook because of the regulator's clear disregard for proper process. An example of this is properly indicated in the *Woodlands* matter, wherein the regulator simply disregarded proper procedure and ended up launching an investigation beyond the powers it is allowed to operate under.

When the prejudice suffered by the respondent due to a deviation from administrative process, can be measured and remedied there ought to not be a point when the courts sees it fit to throw out a case simply because the regulator needs to do some administrative house-keeping. The *Yara* case is a clear example of the courts over-reacting in favour of administrative process. The interpretation of the CAC in this matter is so far from the wording of the Act that it leads to an undesired result and further red-tape that other courts have to untangle since the CAC has failed.

The powers of the higher courts are, as indicated above, far-reaching and it is the duty of those courts to be thorough when interpreting the provisions of the Act, to do a diligent job that will be free of material errors that can change the manner in which lower courts arrive at their decisions.

There is a need for some amendments to the current Competition Act and these have not been expressly included in the upcoming proposed amendment,²⁹⁰ and since the proposed amendments regarding criminalisation and market enquiries are still not enacted into law; we are all made to wait and see just how far reaching the courts decisions will be in the economy and on the manner in which the Tribunal, the Commission and the legal fraternity will use the said decision

²⁹⁰ The proposed amendment to the Competition Act is regarding criminalising cartel activities and making it possible for directors of companies to be held personally liable for their involvement in cartel conduct.

when interpreting the powers of investigation. It is clear that until the amendments come into effect, firms will always look into administrative procedures in order to delay the process of investigation and prosecution in competition matters. This stance will to a large extent defeat the purpose of the Act and render the interpretation of the courts unqualified, thus undermining the intention of the legislature.

Word count: 24827

BIBLIOGRAPHY

1. Legislation

- The Competition Act 1998 (UK)
- The Competition Act No: 89 of 1998
- The Sherman Act No: 209 of 1890

2. Books

- A Norton *et al* (2011) *Cartels: The South African Cartel Handbook*
- Neuhoff M *et al* (2006) *A Practical Guide to the South African Competition Act: Durban Butterworths*
- P Sutherland and K Kemp (2010) *Competition Law of South Africa: Durban LexisNexis (2000)*
- Van Heerden-Neethling (1995) *Unlawful Competition: 2nd Edition Durban LexisNexis*

3. Journals, Article and other

- Bleby M (2011) "Watchdog fights court-imposed muzzling" 28 April 2011 Business Day 2
- Blignaut L & Frank K (2011) "Procedural boundaries bring about competition certainty" 17 June 2011 Times Supplement 1
- Competing fairly: An introduction to the laws of anti-competitive behaviour; Competition Law 2005 page 22. OFT Publication No: 447, Available on www.oft.gov.uk
- Competition Law and Policy in South Africa: An OECD Peer Review, May 2003
- Cron D & Marumo T (2011) "Of cows, chemicals, cartel and geese" 01 July 2011 Without Prejudice 46
- Crotty A (2010) "Ruling puts cartel cases in jeopardy" 20 September 2010 The Star, Business Report

- Marais J (2010) “Court clips commission’s wings” 14 November 2010 *Business Times* 7
- McCarthy Tétrault LLP (2004)
- Overview of Canadian Anti-trust law, Yves Bériault and Oliver Borgers
- Radebe H (2011) “Milk producers feel the price squeeze” 06 July 2011 *Business Day* 2
- The Evolution of Competition Law and Policy in the United Kingdom: Andrew Scott; Working paper 9/2009

4. Case Law

- *Clover Industries Limited and Another vs The Competition Commission and Others*, Case No: 78/CAC/Jul08
- *Competition Commission v SAB and others* 134/CR/DEC07
- *Loungefoam & Others v The Competition Commission* [2010] CAC 100,101,102/CAC Jun10
- *Netstar (Pty) Ltd, Matrix Vehicle Tracking (Pty) Ltd and Tracker Network (Pty) Ltd v The Competition Commission and Tracetec (Pty) Ltd* [2010] 97/CAC/May10
- *Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2010] JOL 26108 (SCA)
- *Yara South Africa (Pty) Ltd v Competition Commission and others* [2010] CAC 93/CAC/Mar10