



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR006May05/ DSC206Dec15

In the matter between:

OMNIA FERTILIZER LIMITED

Applicant

And

COMPETITION COMMISSION OF SOUTH AFRICA

First Respondent

In re: complaint referral between:

COMPETITION COMMISSION OF SOUTH AFRICA

Applicant

And

SASOL CHEMICAL INDUSTRIES (PTY) LIMITED

First Respondent

YARA (SOUTH AFRICA) (PTY) LIMITED

Second Respondent

OMNIA FERTILIZER LIMITED

Third Respondent

Panel : N Manoim (Presiding Member)

A Wessels (Tribunal Member)

M Mazwai (Tribunal Member)

Heard on : 9 February 2016

Decided on : 2 March 2016

REASONS AND ORDER

- [1] This is an interlocutory matter brought at the instance of the third respondent in the main matter, Omnia Fertilizer Limited ("Omnia"). In the main proceedings the Competition Commission ("Commission") alleges that Omnia and the two

other respondents have contravened section 4(1)(b) of the Competition Act of 1998, as amended ("the Act").¹

- [2] In this interlocutory matter we are called upon by Omnia to order the production of documents from the Commission.
- [3] The relief has two components to it, the Notice of Motion in Part A calls for the production of documents, Part B calls for a review of the Commission's initiation and referral decision on the basis of legality. We are not called upon to decide Part B in the present application.
- [4] Under the Part A request counsel for Omnia distinguished between documents required for the purpose of filing a supplementary answering affidavit and those required for the review with the latter being more extensive. As we explain, the latter has now been pended therefore the distinction need not be discussed further for purposes of this order. The nub of the request is for the Commission to produce documents described as follows:
- (a) *the record of any decision by the Commission, as referred to in the Commission's letter to Norton Rose Fulbright dated 13 February 2015 (the "13 February 2015 letter"), to initiate a new complaint or open a new case (in addition to the complaint lodged by Nutri-Flo CC and Nutri-Fertilizer CC in October/ November 2003), in relation to any of the causes of action contained in the referral under CT case No. 31/CR/May05 (the "initiation decision");*
 - (b) *the record of any decision by the Commission to refer complaint(s) to the Tribunal under Case No. 31/CR/May05 (the "referral decision");*
 - (c) *without limiting the ambit of the foregoing, the following documents previously mentioned by the Commission as being relevant to those decisions:*
 - i. *the Commission EXCO Round Robin table dated 27 February 2004;*

¹ Act 89 of 1998.

- ii. *the Final Report from the Enforcement and Exemptions Division dated 1 December 2003;*
- iii. *the Commission resolution dated 29 April 2005;*
- iv. *any portions of the Commission's minutes or other documents referred to in the second sentence of paragraph 14 of the 13 February 2015 letter, which might be relevant to the complaints or the complaint referral...²*

- [5] The main matter has a long, complicated and regrettably at times, convoluted history. This decision is simply another interlocutory decision adding to that history.
- [6] The key issue is this, the present referral as amended, comprises a number of separately initiated complaints. Omnia seeks the documents to determine when the various initiations took place as this is relevant to a possible plea of prescription it may raise when it files its answer. Why this has come about requires a brief reprise of the facts of this case.³
- [7] A dispute has raged in various adjudicative bodies, including this one, as to who originated which aspect of the case. A complaint referral must be preceded by a complaint initiation. An initiation can be at the instance of a complainant or the Commission or in some cases, as in this one, both.⁴
- [8] Up until recently, the view had been taken that an initiation, if it had taken place needed to manifest itself in some documentary form. That changed when this matter, as we go on to explain, reached the Supreme Court of Appeal ("SCA") who held that the Act laid down no such requirement. It concluded that an initiation could be tacit.⁵

² Notice of Motion, record page 2-3.

³ We have mostly relied on the summary contained in the SCA's *Yara* decision. However where events have travelled beyond that decision we rely on the events as set out in the papers *in casu*.

⁴ For an explanation on the referral procedure refer to paragraph 15 and 16 below.

⁵ *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA) at para 28.

- [9] The matter started when on 3 November 2003 two private firms Nutri-Flo CC and Nutri-Fertiliser CC (referred to collectively as “Nutri-Flo”) lodged a complaint against Sasol Chemical Industries (Pty) Ltd (“Sasol”). That aspect of the complaint does not concern us here. However in their complaint mention is made of a cartel involving *inter alia* Sasol and Omnia.⁶
- [10] The Commission referred the case on 4 May 2005 (“the May 2005 referral”). The respondents were Sasol, Omnia and Yara South Africa (Pt) Ltd (“Yara”)⁷. Since that date the referral was amended on several occasions. Two of these are pertinent to Omnia. The first took place in November 2006 when the Commission brought an application to replace its Notice of Motion and founding affidavit in the May 2005 referral.⁸ That application was granted unopposed, on 18 April 2007. For Omnia the significance was that the referral as amended now included allegations against it of market division and collusive tendering. As Omnia submitted in their affidavit in this matter the charges against it now included the whole of section 4(1)(b).⁹
- [11] In March 2008 the Commission applied to replace its founding affidavit in the matter. That application was granted again unopposed on 9 July 2008.¹⁰
- [12] The case took a dramatic turn in May 2009. Sasol who prior to that date opposed the referral had on 18 May 2009 entered into a consent order with the Commission in which, *inter alia*, it settled the section 4(1)(b) issues, paid a large administrative penalty, and agreed to co-operate with testimony against Yara and Omnia. The significance of the consent agreement was that it referred to allegations concerning a pricing agreement reached in 2001 and which was allegedly monitored in meetings between 2001 and 2005.¹¹ This consent order was confirmed on 20 May 2009 by the Tribunal, despite Omnia’s opposition.

⁶ The complaint referral was initiated against Nitrochem, a wholly-owned subsidiary of Omnia but we will for convenience refer to it as Omnia.

⁷ Following a take-over, Yara was previously known as Kynoch Fertilizer (Pty) Ltd.

⁸ November was the date of filing of the application from our copy of the record. We cannot tell when the affidavit was attested to although presumably it was a date earlier than the filing date.

⁹ See Founding affidavit of Celeste Appolis, record page 11, paragraph 9.

¹⁰ Founding affidavit, *supra*, paragraph 10.

¹¹ Founding affidavit, *supra*, paragraph 11.

- [13] The matter was due to be heard by the Tribunal in December 2009 against Omnia and Yara. However prior to the hearing, Omnia objected to the Commission's filed witness statements and further particulars on the basis that they contained evidence gleaned from Sasol which extended beyond the scope of the terms of the referral as it then was. The Commission responded by bringing an application to amend the referral on 30 October 2009. Yara and Omnia opposed this amendment. Omnia also brought a counter-application that the case be dismissed as it contended that the amendments contained allegations not contained in the Nutri-Flo referral and since the Commission had not initiated its own referral it was not competent for it to do so.
- [14] At this juncture, it is necessary to digress briefly in order to explain how the process of complaint procedures works in terms of the Act. Complaints can be generated either by private parties, referred to as complainants, who bring a complaint concerning a restrictive practice to the Commission or by the Commission directly.¹² The Commission may decide to refer the complaint; or refer it, but add particulars to it; or non-refer it. In the latter case the Act allows the complainant to bring the complaint directly to the Tribunal itself. The Commission is also entitled to initiate a complaint *mero motu*.
- [15] The act of initiation of a complaint should not be confused with the act of referral of a complaint. They are two separate juristic acts and the initiation must always precede the referral or put differently a referral must be consequent upon a prior complaint that serves as its foundation.¹³
- [16] Just how closely aligned the two need to be and how the Commission interacts with the subject matter of a private party's complaint are not matters on which there has been clarity. The history of this case serves as an exemplar of this problem, as we go on to discuss.

¹² The Commission in terms of section 49B(1) and the private party in terms of section 49B(2)(b) of the Act.

¹³ Sections 50(1) and 50(2).

- [17] Returning to Omnia and Yara's objection to the amendment as well as Yara's counter-application, this matter came before a panel of this Tribunal in December 2009. It was common cause that insofar as the allegations against Omnia were concerned the Commission's referral and the initiation were not mirror images of one another, i.e. the Commission had added to the referral allegations not contained in the Nutri-Flo complaint. Omnia argued that these additional particulars required a separate initiation and since there was no allegation that there had been one, the amendment was not competent. The Tribunal decided against Omnia in its decision handed down on 24 February 2010. It came to the conclusion that the amendment was permissible as in terms of section 50(3)(a)(iii) of the Act the Commission may "*add to the particulars of the complaint as submitted by the complainant.*"¹⁴ The allegations added by the amendment, the Tribunal held, fell into this category.
- [18] Omnia appealed and the Tribunal's decision was overturned by the Competition Appeal Court ("CAC").¹⁵ The CAC found that; as a matter of fact the allegations concerning Omnia were not founded in the Nutri-Flo complaint; that from a proper reading of the complaint, Nutri-Flo had never intended to refer the supplementary allegations; and that as a matter of law section 50(3)(a)(iii) could not be used by the Commission to supplement allegations not founded in an initiated complaint. The CAC reversed the Tribunal's decision, the effect of which was to dismiss the case against Omnia.
- [19] The Commission took the matter directly to the Constitutional Court, however the majority of the Court declined to take the case. The Commission thereafter appealed to the Supreme Court of Appeal ("SCA") with the leave of the CAC.
- [20] The case thus ended up at the SCA in August 2013. In September of that same year it handed down its decision. The SCA upheld the CAC on two points – that the Nutri-Flo complaint could not be said to be the source of the supplementary allegations in the referral and that section 50(3)(a)(iii) could not

¹⁴ The Competition Commission and Yara South Africa(Pty) Ltd in re The Competition Commission and Sasol Chemical Industries and others 31/CR/May05

¹⁵ *Omnia Fertilizer Ltd v The Competition Commission in re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd and Others* 77/CAC/Jul08.

be used by the Commission to supplement allegations not founded in the referral.

- [21] Nevertheless the SCA overturned the CAC decision and upheld the Tribunal's decision to allow the Commission to amend its referral. Despite upholding the Tribunal it had a different basis for arriving at its decision. That novel approach is central to the present case before us.
- [22] The SCA observed that the Act provided for no formalities for an initiation. First it noted that it was thus possible for the Commission to 'tacitly' initiate a complaint. Second it recognised that several complaints could be incorporated in one referral document.¹⁶ This has a profound impact on the information contained in the pleadings. In the ordinary course, where an initiation is express, the Commission alleges the date of initiation as a fact. Typically, it also files a CC1 form with the referral which serves as the documentary evidence of this date.
- [23] However this case is not typical. First the SCA has recognised the concept of a tacit initiation - a concept not previously known in our case law. Second, given its novelty no such fact had been pleaded in the referral or in any amendment to it.
- [24] A complaint referral must in terms of the Tribunal rules set out the material facts or points of law relevant to the complaint.¹⁷ The date a complaint was initiated is such a material fact. This is because of section 67(1) of the Act, which states that "*A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.*" We commonly refer to this defence as the prescription defence.

¹⁶ See Paragraph 29 of SCA Yara decision where Brand JA held: *Moreover I can find nothing in the Act which prevents several complaints some submitted by the complainant and the others initiated by the Commission to be incorporated in one referral document.*"

¹⁷ See Rule 15(2)(b) of the Competition Tribunal Rules.

- [25] A respondent is entitled to plead prescription as a defence in its answer; without knowing the date of initiation, a fact peculiarly in the knowledge of the Commissioner, it cannot do so.¹⁸
- [26] For this reason we find that in a case where the Commission relies on tacit initiation it should rectify that lacuna by pleading the necessary factual averments.
- [27] Where it relies on a precise date it should state the date and the basis for such reliance. It may also decide not to rely on a specific date but an inferred date. For instance it may state that it infers that a tacit initiation must have occurred prior to or at the latest by a particular date. Where it adopts this approach it must do one of the following:
- a. It may rely for these other facts, on the referral itself, or an amendment to it, as the date from which the inference is to be drawn.¹⁹ Where it does the Commission needs to state this. Further, where the Commission has combined multiple complaints in one referral then it should state clearly which complaint has been initiated when; or
 - b. Where those other facts, from which the inference it seeks to draw are contained in document(s) not in the Tribunal record, the Commission must, in addition to pleading this fact, supply this document(s). This is a matter of fairness, because in the ordinary course where there is an express initiation the Commission attaches the Form CC1 to the referral.
- [28] Given the history of amendments in this case, as noted earlier, the pertinence of what happened, when, and how the complaint was initiated, is particularly apposite.
- [29] Omnia's attorneys asked precisely this question of 'when and how' in a letter to the Commission, dated 4 October 2013, shortly after the SCA decision in

¹⁸ In this particular case, counsel for Omnia was perfectly frank that such a plea is being considered by his client and thus what is highly pertinent is the date on which the tacit initiation is alleged to have taken place.

¹⁹ The *Yara* SCA decision is authority for this approach. See paragraph 30 of SCA *Yara* decision *supra*.

Yara had been delivered, but had to wait until 13 February 2015 to receive a reply from the Commission.. The writer of the letter was from the Commission's legal department. He said the delay was attributable to a change in personnel dealing with the matter, as those originally involved had left the Commission.

[30] He had gone through the Commission's internal documents, and from what he could glean at the time of writing, the Commission had "*tacitly confirmed/initiated the Commission complaint on 29 April 2005, at the very latest*".²⁰ In a footnote he specifically mentions certain documents. Hence it is these documents that are, *inter alia*, sought, by Omnia in Part A of the Notice of Motion, quoted earlier. However the writer goes on to state the documents constitute restricted information in terms of Commission Rule 14(1)(d) and access could not be given to Omnia without the Commission waiving its rights. Nevertheless he undertook to request the Commission to provide Omnia access to a redacted version on a counsel-to-counsel basis.²¹ However subsequently in a letter dated 2 October 2015 the Commission took the view that Omnia was not entitled to these documents and was not forthcoming about when tacit initiation occurred.²² Hence the present application, which with the benefit of hindsight, given the long and litigious history of this matter, could have been avoided.

[31] For this reason the order that we have given in this matter, and whose terms were in principle canvassed at the hearing, takes the form that it does.

[32] Furthermore counsel for Omnia indicated during argument that if we were to grant an order in these terms then deciding on production of the wider class of documents for the purpose of their proposed review might be premature. For that reason we leave this open.²³

²⁰ Paragraph 14 of letter dated 13 February 2015, record page 194.

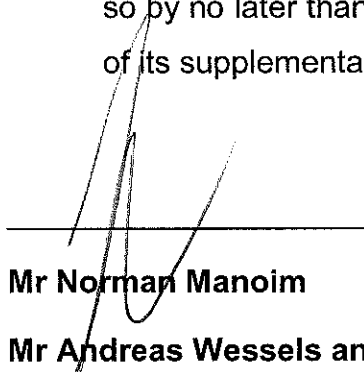
²¹ Letter dated 13 February 2015, *supra* paragraph 15.

²² Letter dated 2 October 2015, paragraph 8, record page 206.

²³ The review overlaps with the production request in that it seeks information on the date of the initiation. It goes further however in that it is also alleged that the Commission as opposed to the Commissioner may have initiated the complaints or some of them at least. We do not need to decide this point now.

ORDER

1. The Commission must file a supplementary affidavit in which it sets out the dates it relies on for any tacit initiation(s) in this matter. If more than one date is relied on for separate initiations, then the affidavit should make clear which allegations in the referral, relate to which specific initiation. Further, the Commission should indicate why it relies on a particular set of facts to infer the tacit referral. If the document is already part of the current pleadings this should be stated and include why, *ex facie* the document, the inference is to be drawn. If the Commission relies on other documents not already in the Tribunal record, from which the inferences are sought to be drawn, these should be produced with the affidavit, with, similarly, an explanation for why they evidence, *ex facie*, the inferences sought to be drawn.
2. The Commission must file the supplementary affidavit referred to in paragraph 1, and where relevant produce the accompanying document(s), within 14 (fourteen) business days of the date of this order.
3. If the respondent wishes to file a supplementary answering affidavit, it must do so by no later than 15 (fifteen) business days after service by the Commission of its supplementary affidavit.



Mr Norman Manoim

02 March 2016

DATE

Mr Andreas Wessels and Ms Mondo Mazwai concurring

Tribunal Researcher: Aneesa Ravat

For the Applicant: P.B.J Farlam S.C instructed by Norton Rose Fulbright

For the Commission: M.J Engelbrecht instructed by Cheadle Thompson and
Haysom