competitiontribunal
SOUTH AFRICA

# COMPETITION TRIBUNAL OF SOUTH AFRICA

**CR212Feb17**[1]

**In the consolidated exception and joinder applications**

***In re:* the complaint referral between:**

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| **THE COMPETITION COMMISSION OF SOUTH AFRICA** | Applicant |
| **AND** | |
| **BANK OF AMERICA MERRILL LYNCH INTERNATIONAL LIMITED** | First Respondent |
| **BNP PARIBAS** | Second Respondent |
| **JP MORGAN CHASE & CO** | Third Respondent |
| **JP MORGAN CHASE BANK N.A.** | Fourth Respondent |
| **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED** | Fifth Respondent |
| **STANDARD NEW YORK SECURITIES INC** | Sixth Respondent |
| **INVESTEC LIMITED** | Seventh Respondent |
| **STANDARD BANK OF SOUTH AFRICA LIMITED** | Eighth Respondent |

[1] These reasons deal with the various applications under Tribunal case numbers: CR212Feb17/EXC036May17; CR212Feb17/EXC040May17; CR212Feb17/EXC032May17; CR212Feb17/EXC029May17; CR212Feb17/EXC034May17; CR212Feb17/EXC035May17; CR212Feb17/EXC042May17; CR212Feb17/EXC033May17; CR212Feb17/OTH121Jul17; CR212Feb17/EXC030May17; CR212Feb17/EXC031May17; CR212Feb17/EXC037May17; CR212Feb17/EXC028Apr17; CR212Feb17/EXC032Mar18; CR212Feb17/OTH270Jan18.

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| **NOMURA INTERNATIONAL PLC** | Ninth Respondent |
| **STANDARD CHARTERED BANK** | Tenth Respondent |
| **CREDIT SUISSE GROUP** | Eleventh Respondent |
| **COMMERZBANK AG** | Twelfth Respondent |
| **MACQUIRE BANK LIMITED** | Thirteenth Respondent |
| **HSBC BANK PLC** | Fourteenth Respondent |
| **CITIBANK N.A.** | Fifteenth Respondent |
| **ABSA BANK LIMITED** | Sixteenth Respondent |
| **BARCLAYS CAPITAL INC.** | Seventeenth Respondent |
| **BARCLAYS BANK PLC** | Eighteenth Respondent |
| **HSBC BANK USA, NATIONAL ASSOCIATION INC.** | Nineteenth Respondent |
| **MERRILL LYNCH PIERCE FENNER AND SMITH INC.** | Twentieth Respondent |
| **BANK OF AMERICA, N.A.** | Twenty-first Respondent |
| **INVESTEC BANK LIMITED** | Twenty-second Respondent |
| **CREDIT SUISSE SECURITIES (USA) LLC** | Twenty-third Respondent |

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| Panel | : Norman Manoim (Presiding Member) |
| | : Yasmin Carrim (Tribunal Member) |
| | : Mondo Mazwai (Tribunal Member) |
| Heard on | : 30 July- 03 August 2018 |
| Order and Reasons issued on | : 12 June 2019 |

## REASONS FOR DECISION AND ORDER

### Introduction

[1] The Competition Commission ('Commission') has indicted 23 banks – some local, some foreign – for fixing the rand-dollar exchange rate. They are alleged to have contravened sub-sections 4(1)(b)(i) and (ii) of the Competition Act, no 89 of 1998, (the Act), which prohibits competitors from engaging in agreements or concerted practices to fix prices and divide markets.

[2] All the banks have raised objections to these charges. Some of the Banks' objections relate to whether the Commission has jurisdiction over them, others relate to whether the case has prescribed, and all complain that the complaint referral lacks particularity.

[3] To add to the complexity that surrounds this case, five of the respondents, (HSBC Bank USA, National Association Inc ('HBUS') (19); Merrill Lynch Pierce Fenner And Smith Inc. ('MLPFS') (20); Bank of America, N.A. ('BANA') (21); Investec Bank Limited ('Investec') (22); and Credit Suisse Securities (USA) LLC ('Credit Suisse Securities')(23)) were not part of the original referral and the Commission seeks to join them as respondents in these proceedings; of these, four object to the application for joinder which we must also decide.[2]

[4] The Commission rejects all these objections and seeks their dismissal so that the case can continue. It is worth noting that although the case was referred to the Tribunal on 15 February 2017, none of the respondents has filed an answer. The respondents feel justified in not having done so, given the centrality of objections they have raised; conversely, the Commission feels frustrated with the slow pace of this litigation and accuses the respondents of foot dragging.

[2] HBUS (19), MLPFS (20), BANA (21), and Credit Suisse Securities (23).

[5] Investec Limited (7) and Investec Bank Limited (22) (collectively 'Investec') consider that the Commission only has itself to blame for this procedural inertia and, unusually, asks us to grant an order of censure as a mark of disapproval of the Commission's conduct in this litigation.

[6] The objections took five days to argue. This may seem a long time, but it may have taken even longer, had not all parties agreed in advance to having time limitations placed on them for reasons of efficiency. We appreciate that all parties respected this request.

[7] This decision is divided into several parts. The first part contains a chronology of the history of the litigation. This while seemingly tedious is necessary for two reasons – to understand the exceptions raised and the context for the declaratory order of censure sought by Investec.

[8] Next, in Part 2, we consider the objections raised by some of the respondents to our jurisdiction to hear this complaint, as they allege they are *peregrini* i.e. firms that are neither domiciled nor carry on business in the Republic. We have, as the argument before us went, distinguished between those respondents who are 'pure' *peregrini* i.e. those neither domiciled nor carrying on business in the Republic and those who are 'local' *peregrini* i.e. those firms with some presence in the country. We explain these terms and their legal significance later.

[9] Next, in Part 3 we deal with a range of objections, which raise issues around the adequacy of the pleadings and, also, another jurisdictional challenge, this however based on prescription.

[10] Finally, in Part 4 we deal with the declaratory order of censure sought by Investec.

**Part 1**

**Chronology**

[11] The Commission referred this complaint to the Tribunal against the first 19 respondents on 15 February 2017. The referral contained a notice of motion and an affidavit of 26 pages (the February affidavit).

[12] One respondent, Citibank N.A, the fifteenth respondent, has settled with the Commission by way of a consent agreement and paid an administrative penalty.[3] It has not participated any further in the current proceedings. The Commission states that it does not seek a penalty against the sixteen to eighteenth respondents, respectively, ABSA Bank Ltd, Barclays Bank Inc. and Barclays Bank PLC.[4] It is understood these firms may have applied for leniency. They have also not participated in these proceedings.

[13] By 3 March 2017 most of the remaining respondents had either filed an exception to the referral or sought further particulars from the Commission.

[14] On 10 March 2017 the Tribunal convened a pre-hearing at which a timetable for the further conduct of proceedings was agreed to. Mr Maenetje, who at the time was acting for the Commission, indicated that the Commission wished to supplement its papers to address a number of the concerns raised by the respondents in their exception applications.[5] The timetable made provision for the Commission to file a supplementary affidavit by no later than 31 March 2017.

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[3] This consent agreement (CR212Feb17/SA220Feb17) was approved by the Tribunal on 26 April 2017.

[4] See *Referral of Complaint by the Commission of 15 February 2017* CT Case Number CR212Feb17 (February affidavit) para 25.

[5] Transcript of Pre-hearing 10 March 2017 p31 line 10 - p32 line 3:

> "ADV Maenetje: *So, what we decided with the leave of the Tribunal is that instead of the parties submitting exceptions upfront, what we will do is we will first supplement, which will be by the 31st of March. We will supplement the referral, addressing those of the complaints that we are able to address or we believe have merit addressing. Then the parties will consider the supplemented referral and decide whether to file exceptions or to answer and if they file exceptions, they will file them by the 3rd of May 2017 and that date looks longer, but that is because of the many public holidays in April and some in May."*

Thereafter the respondents were given the opportunity to revisit their exception applications. A further pre-hearing was scheduled for 23 June 2017. The exception applications were set down to be heard on 21-23 July 2017.

[15] On 31 March 2017 the Commission filed its first supplementary affidavit (the March affidavit). This affidavit was six pages long and addressed only the issue of jurisdiction, doing little else to address the plethora of exceptions raised by the respondents. On 7 April 2017, the Commission filed a second supplementary affidavit (the April affidavit). The April affidavit was limited to rectifying an omission contained in the March affidavit.[6]

[16] On 10 May 2018 the Commission wrote to the Tribunal requesting that the Commission set down the exceptions raised by Standard Bank South Africa (SBSA) on a separate and expedited basis. The Tribunal refused.

[17] On 23 June 2017 the Tribunal convened a second pre-hearing to establish the procedure for the hearing of the exception applications on 20 and 21 July 2017. At the pre-hearing, the Commission indicated that it would not provide any further particulars to answer the exceptions, insofar as they alleged that the referral was vague and embarrassing i.e. the Commission was indicating that it considered the pleadings were adequate and it would argue for the dismissal of the exceptions on this ground. However, in relation to those exceptions which raised issues around misjoinder, the Commission tendered to re-assess its position and provide further particulars. It also tendered to provide Investec and Standard Chartered Bank with the further particulars which they had requested.[7] In light of these tenders, the Tribunal removed the exception hearings from the roll for re-enrollment at the request of the parties.

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[6] In the March affidavit the Commission had repeated which respondents it did not seek a penalty from, omitting the eighteenth respondent- which had been an error.
[7] Transcript of Pre-hearing 23 June 2017 p31 lines 18-21.

[18] The attitude of the Commission changed after the June pre-hearing. It did not provide the tendered information to Investec and Standard Chartered Bank, nor did it provide further pleadings in relation to the misjoinder point. Instead, it wrote to the Tribunal requesting that the Investec and Standard Bank exceptions be set down on a separated and expedited basis. The Tribunal issued a directive setting a timetable for the Commission to bring a formal separation application which was set down for hearing in late August 2017. The timetable required the Commission to file its application by 24 July 2017.

[19] Before filing its separation application, the Commission filed applications for default judgement against six of the respondents.[8] The basis for these applications was broadly that the respondents had neither filed an answer to a referral nor had they filed 'formal' exception applications.[9] The Tribunal directed that the default judgment applications and the separation application should be heard on the same day, 24 August 2017.

[20] But on 24 August 2017, the Commission abandoned its default judgement applications.[10] However it persisted with its separation application.

[21] The Tribunal dismissed this application in an order dated 5 September 2017. The Tribunal further ordered that the exceptions were to be heard in a combined hearing, over three days, in January 2018, with heads of argument being filed by the respondents no later than 24 November 2017.

[22] On 6 November 2017, two weeks before the respondents were due to file their heads of argument, the Commission's representatives, at 19:05 in the evening, filed a further supplementary affidavit. The covering email read:

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[8] These respondents were BNP Paribas (BNP Paribas) (2); JP Morgan Chase and Co. ('JP Morgan') (3); JP Morgan Chase Bank N.A ('JP Morgan Bank') (4); Australia and New Zealand Banking Group Limited ('ANZ') (5); Nomura International PLC ('Nomura') (9); and Standard Chartered Bank ('SCB') (10).

[9] Note that these respondents had not ignored the referral. Rather they had filed their objections in the form of a letter rather than a pleading. In substance, if not in form, the letter served the same purpose.

[10] Transcript of Separation Application Hearing 28 August 2017 p57 lines 3-4.

*"Kindly take notice that the Competition Commission's further supplementary affidavit is served and filed of record evenly herewith. Due to its size, the attachment will be sent in 9 batches, this is batch 1 and 2."*

[23] The documents attached to the email comprised a 60-page supplementary affidavit and 100 pages of annexures. To emphasise - this supplementary affidavit (November affidavit) was submitted without any forewarning from the Commission, in a context where it had expressly stated on the record that it would not supplement its papers further. Moreover, this occurred two weeks before the respondents were required to file their heads of argument in their exception applications.

[24] The matter was made all the more extraordinary, when the next morning, at 08:46, the Commission's representatives sent an email to all parties which, without further explanation, simply stated: "*The Commission withdraws the correspondence below and all attachments forwarded*".

[25] The representatives of the respondents, understandably concerned, wrote to the Commission to seek clarity on the nature of the submissions and whether the Commission still intended to make use of the supplementary at a later stage. No clarity was forthcoming from the Commission.

[26] The respondents still submitted their heads of argument by 24 November 2017. Since the purported November affidavit from the Commission had been withdrawn, most respondents confined their submissions to the extant referral (February) and its two amendments (March and April). In terms of the timetable, the Commission was due to file its heads of argument, which were meant as a response to those of the respondents, by 8 December 2017. It did not do so. Instead, on 10 December 2017, the Commission submitted a letter in which it indicated that it:

*"Has decided to file a supplementary affidavit to provide additional particularity to the initial referral and to dispose of a number of the vague and embarrassing*

*exceptions raised by the respondents. It does so without any concession that such further particularity is required or necessary."*

[27] The Commission thereafter submitted a further supplementary affidavit on 20 December 2017 (the December affidavit). The supplementary not only sought to further particularise the claims of its February referral, but also sought to join five new parties: HBUS (19); MLPFS (20); BANA (21); Investec (22); and Credit Suisse Securities (23). The five new parties were all allegedly part of the corporate family of some existing respondents and the Commission's intention through the joinder application was to ensure that the correct party was before the Tribunal.

[28] The December affidavit was, unlike its two predecessors, a substantial document. Since the exceptions had been based on the original February affidavit the December affidavit had potentially rendered them moot or at least might have changed the criticism originally levelled. Accordingly, the Tribunal issued a direction postponing the hearing set down on 24-26 January 2018. Instead on the first of those days a pre-hearing was held when further directions were issued.

[29] The exceptions of all the respondents would be heard at the same time and also the Commissions' application to join the five new respondents. Five days were set down for this hearing from 30 July 2018- 3 August 2018. Despite the fractured history of this case, this time the matter ran to plan on those dates.

## Part 2

## Jurisdiction

[30] As mentioned in the introduction, several respondents argue that the Tribunal has no jurisdiction over them.

[31] The 23 respondents before us can be classified into three categories. The first are *incolae* of South Africa meaning that they are South African firms with registered offices in South Africa, and conduct business in South Africa. These are Standard Bank of South Africa Limited ('Standard Bank') (8) and Investec.[11] These respondents have not challenged the Tribunal's jurisdiction over them.

[32] The second category of respondents are what everyone during the hearing termed 'pure *peregrini*' meaning foreign firms with no local presence or business activity in South Africa. Of the 19 firms which excepted to the referral, nine are 'pure' *peregrini*. These firms are: Bank of America Merrill Lynch International Limited ('BAMLI') (1); JP Morgan Chase & Co ('JP Morgan') (3); Australia and New Zealand Bank Limited ('ANZ') (5); Standard New York Securities Inc ('SNYS') (6); Nomura International PLC ('Nomura') (9); Macquarie Bank Limited ('Macquarie') (13); HBUS (19); MLPFS (20) and Credit Suisse USA (23).

[33] The third category of respondents are seven firms which are also *peregrini*, but which have a representative or branch office in South Africa. To distinguish them from the category of pure *peregrini* we have referred to them as 'local *peregrini*'. These are BNP Paribas (2); JP Morgan Chase Bank N.A ('JP Morgan Bank') (4); Standard Chartered Bank (SCB) (10); Credit Suisse Group (11); Commerzebank AG ('Commerzebank') (12); HSBC Bank PLC ('HBEU') (14); and BANA (21).

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[11] For the purposes of our analysis, we consider Investec Limited (7) and Investec Bank Limited (22) to be the same entity.

[34] The respondents argue that for the Commission to succeed it must establish that the Tribunal can exercise both personal and subject matter jurisdiction over them. The pure *peregrini* argue that the Commission has established neither. The local *peregrini*, except for one, base their objection on lack of subject matter jurisdiction. We go on to explain these terms and how they apply to the respective categories of respondents.

**Personal jurisdiction: General**

[35] There was general agreement on the present state of the common law governing personal jurisdiction over a *peregrinus.* The guiding principle here is that of effectiveness. For that reason, personal jurisdiction over a *peregrinus*, which has not submitted to the forum's jurisdiction, can only be achieved either where the firm has a physical presence in the country or if not, where there has been an attachment of the *peregrinus*' property in the country where jurisdiction is being asserted.

[36] Since it is common cause that there has been no submission or attachment of the property of any of the pure *peregrini* this point does not need to be considered any further. The debate that remains over personal jurisdiction is whether there is some other basis for personal jurisdiction to be asserted over them, or indeed whether it is required in terms of the Competition Act.

[37] It is best to start with the arguments advanced by the Commission on this aspect. The Commission first argued that the common law on this aspect should not be viewed as static and was evolving to meet the needs of our constitutional dispensation and a modern economy. Noting that notions of attachment had their roots in a nascent market economy where trade was typically associated with the physical movement of goods, it is not surprising that attachment was seen as a prerequisite for jurisdiction over a *peregrinus* with no presence in the forum. However, the advent of a modern economy suggests that these concepts need to be revisited. Commercial actors, as in this case, are able to trade

instantaneously with counter parties situated in other countries using electronic communications. Payments subsequent to these trades, if necessary, can also be effected through cyberspace. In short, traders can contract with one another in other jurisdictions without having at any stage to leave their own. Yet the trades may still have an effect on the other jurisdiction. Put another way the internet has made trading possible across borders without the need for the one trading party to have any physical presence or tangible asset situated in the jurisdiction of its counterparty. Accordingly, the Commission argued the principle underlying attachment to secure jurisdiction, which is premised on effectiveness has ceased to have any economic rationale. Moreover, even if there was attachment in the forum, there may be no reasonable relationship between the amount a plaintiff seeks to enforce, and the property sought to be attached. Put differently, the invocation of attachment to found jurisdiction is now more driven by historic ritual rather than any credible claim to its effectiveness.[12]

[38] The logic of this argument is very appealing. However, there is nothing to suggest that at this point in time the common law has yet evolved to recognize this. Certainly, we were not referred to any case where this had been decided.

[39] To get around this problem, the Commission argued that some recent court decisions indicate that the common law on personal jurisdiction is in the process of change; moving away from the strict adherence to orthodox common law requirements, to a more flexible approach to asserting personal jurisdiction over *peregrini.*

[40] However, there is nothing in the cases to which we were referred, to suggest that the courts have yet reached that stage in relation to attachment requirement. In

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[12] See for instance the sources cited by Prof CMJ Ryngaert who observes after noting that states still continue to consider territoriality as the basis for delimiting competences between them that: *"As a result, jurisdictional analysis remains centred on territorial connections even where such connections become increasingly artificial, e.g. in the case of essentially non-territorial cyberspace, or global climate change."* CMJ Ryngaert '*The Concept of Jurisdiction in International Law*' in Orakhelashvili, Research Handbook on Jurisdiction and Immunities in International Law (Edward Elgar Publishing Limited) 2015 p52-53.

*Strang*,[13] a decision by the Supreme Court of Appeal (SCA), the court found that the arrest of a person to found jurisdiction was unconstitutional. The court was thus, in this respect, altering one aspect of the common law. But the court made it clear that this finding on arrest did not alter the law on attachment as the following passage illustrates:

> *"Why that is important is because if arrest were unconstitutional and it were further held that in this case, and cases like it, jurisdiction can competently be established without arrest, the necessary corollary would be that it can also be established without attachment despite the need for attachment not having been an issue and despite attachment, generally not being unconstitutional. I do not mean to say that where attachment is possible it is no longer a jurisdictional requirement."*[14]

[41] In *Strang* the court also repeated the rationale for the principle of effectiveness:

> *"... jurisdictional principles have originated because courts have always sought to avoid having to try cases when their judgments will, or could prove hollow because of the absence of any possibility of meaningful execution in the plaintiff's jurisdiction."*[15]

[42] However, in *Strang* the court also stated, and this is what the Commission sought to rely on, that jurisdiction would be sufficiently established if the foreign *peregrini*:

> *"were served with the summons while in South Africa, and in addition there were an adequate connection between the suit and the area of jurisdiction of the South African court concerned from the point of view of appropriateness and convenience of its being decided by that court."* [16] [Our emphasis]

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[13] *Bid Industrial Holdings (Pty) Ltd v Strang and Others* (615/06) [2007] ZASCA 144 (*Strang*).
[14] *Strang ibid* para 47.
[15] *Strang ibid* para 55.
[16] *Strang ibid* para 56.

[43] The concept of an 'adequate connection' was further developed in the later case of *Multi-links*.[17] Here the *peregrinus* firm in question had no physical presence in the country and there had been no attachment of its assets in South Africa. Nevertheless, the court held it had jurisdiction over the *peregrinus* firm by applying a 'connecting factors' test. Apart from the fact that the *peregrinus* firm had accepted service on its legal representatives in South Africa the court identified eight connecting factors to the jurisdiction of a South African court.[18]

[44] There was much debate between the Commission and respondents as to whether *Multi-links* had altered the common law on attachment and replaced it with the connecting factors test.

[45] But none of these factors are present on the facts of this case to connect any of the pure *peregrini* to South African jurisdiction. This means it is not necessary for us to decide whether *Multi-links* has extended the common law on personal jurisdiction to dispense with the requirement of attachment if there are otherwise adequate connecting factors. Nor, unlike, in *Strang* was there service of a summons in the Republic on any of the pure *peregrini*.

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[17] *Multi-links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others, Telkom SA Soc Ltd and Another v Blue Label Telecoms Ltd and Others* [2013] 4 All SA 346 (GNP) (*Multi-Links*).
[18] The court found the following factors connecting the *peregrinus*, a firm called APSN, to the jurisdiction of a South African court, *inter alia* they were:

- APSN had concluded the agreement which was the subject of the litigation before the court, as an *incola* of South Africa – this is because the agreement was entered into by APS, a company incorporated in South Africa;
- APSN was a subsidiary of, and was at all material times controlled by APS and Blue Label who were both South African entities;
- APSN nominated a *domicilium citandi et executandi* within the court's area of jurisdiction;
- APSN agreed to an arbitration clause in the agreement, specifying that arbitration would take place in South Africa;
- APSN had itself invoked the arbitration clause in South Africa in pending arbitration proceedings that preceded the court action;
- Five of the six defendants (except APSN) resided within the court's area of jurisdiction;
- the defendants were sued jointly and severally meaning that any judgement in favour of Multi-Links would be capable of effective execution in South Africa;
- the factual events giving rise to the claim occurred mainly in the area of the jurisdiction of the court.

[46] Finally, the respondents emphasized that despite this appeal to a purposive approach by the Commission, the risk that a Tribunal decision could prove "hollow"- the problem referred to in *Strang* in the passage we cited earlier- would remain. They referred to the fact that the Commission's investigative powers could not be exercised against the pure *peregrini* because a summons could not be effected against them in the foreign jurisdictions. Not all these arguments were convincing as these problems would remain even if the Commission had been able to effect an attachment of property. They relate to the practicality of evidence gathering, a matter of prosecutorial discretion rather than personal jurisdiction.

[47] However, the respondents also made the point that in terms of the Act, a Tribunal order is enforceable *"...as if it were an order of the High Court"*.[19] If under common law a High Court would not have jurisdiction, it seems to follow that such an order would also be "hollow" if given by the Tribunal. At best the Tribunal's common law jurisdiction must at least be co-extensive to that of a High Court. Indeed, the latter would, because of inherent jurisdiction, have greater powers to assume jurisdiction than would a creature of statute such as the Tribunal.

[48] The Commission next relied on an argument that section 3(1) of the Act, the section that deals with jurisdiction, impliedly dispenses with the common law requirement for personal jurisdiction. This section states:

> *"This Act applies to all economic activity within, or having an effect within, the Republic, except..."*

[49] The Commission argued that if the requirements of this section are met then the Tribunal has jurisdiction. As we understood this argument, the Commission appeared to be contending that the statute ousts the requirement for personal jurisdiction. Cartels situated outside of our borders and with no property to attach

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[19] Section 64(1) of the Act which states that: "*Any decision, judgement or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court*".

in the Republic could harm our economy with impunity. For these reasons, invoking constitutional values, the competition authorities, which serve a public not private interest, must be empowered to act to achieve the purposes of the Act which include *inter alia* to *"... provide consumers with competitive prices and product choices".*[20]

[50] There is no suggestion by any of the pure *peregrini* that any other country in which they are situated is asserting jurisdiction over this conduct. There is thus no problem of comity at issue in this case. This raises the question of whether in the face of an enforcement gap, a public body such as the Commission, acting in the interests of safeguarding South African consumers, can ask for jurisdiction to be exercised over conduct based only on proof of effect in the absence of personal jurisdiction.

[51] Although the Commission did not argue this point, some writers in the international law literature have recognized what is termed a principle of subsidiarity. That is when a state with a more tenuous nexus, the so-called bystander state, could still assert jurisdiction where the State with better contacts fails to do so. According to Ryngaert:

> *"In economic law, especially antitrust law, the jurisdictional subsidiarity principle appears to have taken the form of an economic principle that allows for the exercise of extraterritorial jurisdiction when such would increase global welfare, in the face of inaction of States with stronger links, e.g. States condoning or even encouraging export cartels or corrupt practices."*[21]

[52] While we have a lot of sympathy with this argument, it is difficult to read an implied repeal of a common law requirement for personal jurisdiction into the text of the Act. Moreover, we were not given any authority where this approach has been adopted in the interpretation of any other statute.

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[20] Section 2(b) of the Act.
[21] See Ryngaert (note 12 above) p70-71.

[53] Section 3(1), as the respondents in our view correctly contended, deals not with personal jurisdiction, but subject matter jurisdiction. It sets the test for what kind of economic activity would give rise to subject matter jurisdiction. It does not follow that as a result of doing so the legislature has dispensed with the requirement of personal jurisdiction. To do so would require one to read all *"economic activity within or having an effect within"* as a connecting factor. Since its ordinary language is more suggestive of it being a subject factor, this means if one is to follow the Commission's approach, it has to be given a dual meaning i.e. implying the legal basis for both personal and subject jurisdiction. But to do so would require an expansive interpretation. The Tribunal should be cautious in coming to such a conclusion to overturn a long settled common law requirement.

[54] We find that there is no basis to rely on section 3(1) to dispense with the common law requirement to establish personal jurisdiction over a *peregrinus*.

[55] Finally, in reply, the Commission argued that the Tribunal could still grant a declaratory order against the pure *peregrini*. This suggestion had followed questions the panel had asked of the respondents during their argument about whether the Tribunal could exercise jurisdiction over a foreign cartel for the purpose of a declaratory order.

[56] The Commission argued that the Tribunal could give such an order. As we understood its position in final argument, it had conceded the practical difficulty of imposing a penalty remedy on the pure *peregrini*. This seems to have been informed by the problem of establishing whether these firms had any turnover in the Republic on which a penalty could be levied. Section 59, which deals with administrative penalties, states that a penalty must be based on the firm's turnover in, the Republic or its exports from the Republic. It is not clear if the pure *peregrini* would qualify for having either, otherwise no doubt the Commission would have had something to attach.

[57] The respondents argued that the principle of effectiveness applied equally to a declaratory order and hence this did not aid the Commission in avoiding the requirement to establish personal jurisdiction.

[58] The respondents point out that a declaratory order has subsequent consequences that impact on the requirement of whether an effective order can be given. For instance, civil liability may follow by virtue of section 65 of the Act. Secondly, a declaratory order has consequences for penalising future conduct in the event of recidivism. For instance, section 59 makes a repeat offence, a factor to be taken into account, implying the possibility of greater liability for the subsequent contravention.

[59] We agree with the respondents that a traditional declaratory order – one that has civil and penalty consequences is not an order we can competently give without personal jurisdiction over a *peregrinus* respondent.

[60] However, that does not mean we are barred from issuing any other form of declaratory order.

[61] If the Commission is able to establish its section 4(1)(b) case against all or some of the respondents, a typical declaratory order would state which firms would have been found to have participated in that conduct. There seems to be no bar to such an order being made against any pure *peregrinus* firm in this case, provided the declaratory order is limited in effect. This is what we have done in paragraph 3.3.1 of our order, where we exclude the application of any such order from the provisions in the Act, relating to civil (section 65) and further penalty liability (section 59).

[62] Is there any point in such a declarator if it has no effect? We consider that there is. Such a declaratory order is important to make in cartel enforcement because whilst the Tribunal may lack enforcement jurisdiction it is still a matter of public interest in fighting the scourge of cartels, to pronounce upon the conduct of foreign firms whose conduct has harmed South African consumers. It would be

wholly artificial to limit a declaratory order to include only the names of firms over whom the Tribunal has jurisdiction, when in fact the cartel also comprised firms over whom it does not have jurisdiction. The principle of effectiveness is not compromised by such an approach because the declarator does not require any subsequent enforcement action to be taken against the pure *peregrini.*

[63] Such a declaration may also prevent problems for a civil claimant claiming damages from members of a cartel over whom there is jurisdiction. Because of the bifurcated nature of claims for damages under the Act, where the Tribunal determines liability, while a civil court determines damages with neither having overlapping jurisdiction, the framing of the declaratory order by the Tribunal is decisive for the ambit of the subsequent damages case. In terms of section 65(6)(b) of the Act, the plaintiff in the civil matter is required to file with the Registrar of the civil court a certificate from the Chairperson of the Tribunal certifying that the conduct constituting the basis for the action has been found to be a prohibited practice under the Act. The Act further provides in section 65(7) that the certificate is *"...conclusive proof of its contents, and is binding on a civil court"*.

[64] This means if a certificate mentioned only those firms over whom the Tribunal had jurisdiction, the certificate could prove under inclusive in a later civil trial, if the plaintiff sought to rely on evidence of agreements or communications with the pure *peregrini* cartel members. Note this is something different to holding those pure *perigrini* liable. Rather, it is evidence to assist the plaintiff to claim against those respondents over whom there was jurisdiction, by allowing the conduct to be fully certified, which means naming all those found to have participated. That this is not too fanciful a concern, is illustrated by *City of Cape Town v WBHO,*[22] a recent civil case where the issue of whether a certificate was under inclusive in the description of who participated in the cartel, was an issue. The plaintiff had attempted to amend its particulars of claim, to include the names

[22] *City of Cape Town v WBHO Construction (Pty) Ltd and Others* (86873/2014) [2017] ZAGPPHC 271 (31 March 2017) (*City of Cape Town*).

of firms which it alleges were part of the cartel, but whose names did not appear in the certificate. The respondent had resisted an amendment to this effect even though it had been named and no relief was being sought against the other alleged cartelists. While the High Court allowed the amendment and did not take an overly technical approach to the problem, later courts may see the matter differently.[23]

[65] Including the names of firms who participated in a cartel, despite the Tribunal not having jurisdiction over them, by making a declaratory order of the limited scope contemplated above, strikes a balance between considerations of effective jurisdiction, the public interest in fighting cartels, and the rights of private plaintiffs not to have their claims against firms over whom we have jurisdiction compromised on technical grounds.

[66] In making this order we recognise that all the pure *peregrini* respondents would retain the rights of any other respondent over whom we have jurisdiction to defend themselves against such an order, which would, if given, have reputational consequences for them. Whether they wish to participate on this basis is obviously their choice.

**Personal jurisdiction – local *peregrini***

[67] We now consider whether we have jurisdiction over the so called local *peregrini*.

[68] Seven of the respondents are alleged to be local *peregrini* because they have some form of presence in South Africa.

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[23] See *City of Cape Town* (note 22 above). In that case the problem arose because the case was based on a consent agreement which was under inclusive of its description of the cartel participants. It appears the amendment was required so the plaintiff could more fully narrate its claim. Against the objection of the defendant (who had been cited in the declaratory order) the court allowed the amendment.

[69] Out of these firms, four have a local branch in South Africa and are registered as authorised dealers in terms of the Banks Act. They are:

69.1 BNB Paribas (2);

69.2 JP Morgan Chase Bank (4);

69.3 SCB (10); and

69.4 HBEU (14).[24]

[70] The remaining three the Commission alleges have what is termed a representative office in South Africa. They are:

70.1 Credit Suisse Group (11);

70.2 Commerzbank (12); and

70.3 BANA (21).[25]

[71] Under the common law a court has jurisdiction over a *peregrinus* that conducts business in South Africa in respect of any cause of action which arose out of its activities here.

[72] The four respondents which are registered as authorized dealers do not place in dispute that by virtue of this they carry on business in South Africa.

[73] The argument became more complicated in respect of the other three. At least one of them argued that mere existence of a local office was insufficient to meet the requirement that the firm carried on business in South Africa.

[74] This argument hinged on the provisions of the Banks Act.[26] That Act states that a foreign bank may not establish a *"...representative office in the Republic without having previously obtained the consent of the Registrar"*[27]

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[24] See March affidavit para 13, Record p59.
[25] December affidavit para 36, Record p78.
[26] Act 94 of 1990.
[27] See section 34(1) which states: *An institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of*

[75] But in terms of section 34(4) of the Banks Act a representative office may not conduct the business of a bank in South Africa.

[76] It follows, so it was argued, for these local *peregrini* that if they were banks which could not conduct the business of a bank in South Africa, they were not for jurisdiction purposes, conducting a business in South Africa.

[77] However, there is nothing in the Banks Act which precludes a representative office from carrying on business in South Africa as long as it is not the business of a bank. If it were otherwise there would be no point in requiring foreign banks to register their representative office.

[78] The term representative office is defined in the Banks Act in relation to a foreign institution as "*...premises situated within the Republic from which the business referred to in section 34(1) and conducted by such foreign institution in the other country is promoted or assisted in any way*".

[79] Case law suggests that the jurisdictional requirement of carrying on business is satisfied if the foreign corporation is permitted to do business in the local forum.

[80] In an American case that has been cited with approval in South African case law ever since, the following was stated very succinctly:

> "*Where a corporation created in one jurisdiction is permitted to do business in another, it is deemed to be resident and subject to the jurisdiction of the courts of the latter, in all matters founded upon contracts made or causes of action arising there.*"[28]

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*a bank (hereinafter in this section referred to as a foreign institution), may not establish a representative office in the Republic without having previously obtained the written consent of the Registrar.*

[28] *Aldrick v Anchor Coal Co.* 41 Am. State Rep. 831 as cited in *Appleby (Pty) v Dundas Ltd* 1948(2) SA 905 (E) and again with approval in *Bisonboard Ltd v K Braun Woodworking Machinery* (Pty) Ltd 1991 (1) SA 482, and *L and Another v Minister of Home Affairs and Others 2015* (4) SA 197 (GJ) at para 91.

[81] The Banks Act makes it clear that a representative office, is an office where the business of the foreign institution is promoted or assisted. This, put in different words, is carrying on business.

[82] There is no common law authority that we were referred to which has held that the requirement of carrying on business means business of the same nature as that that gave rise to the cause of action. The fact that these respondents do not conduct currency exchange transactions or may not accept deposits as a typical bank would in South Africa is not a prerequisite for purposes of jurisdiction. All that is required of a respondent is that it carries on a business in South Africa.

[83] We therefore find that the Commission has alleged sufficient facts to establish the Tribunal's personal jurisdiction over the seven local *peregrini*.

**Subject matter jurisdiction**

[84] Recall that to establish jurisdiction over a *peregrinus* the requirements of both personal jurisdiction and subject matter jurisdiction must be met.

[85] All the *peregrini* respondents argue that the Tribunal does not have subject matter jurisdiction over them. Since we have found that the we do not have personal jurisdiction over the pure *peregrini* this topic remains relevant only for the seven local *peregrini*.

[86] The essence of the argument is that the Commission has not pleaded the necessary facts to establish subject matter jurisdiction over the firms.

[87] To reduce the argument to its simplest form: If two foreign based traders are involved in a cartel, the Tribunal will only have subject matter jurisdiction if the cartel has, in the language of section 3(1), an economic effect in South Africa.

[88] Effects based jurisdiction is not a new problem for courts grappling with jurisdiction in competition law cases to decide.

[89] The dilemma is best summed up in a quote from American academic Professor Eleanor Fox who stated: *"Competition law is national, markets are global, there is the rub."*[29]

[90] Put differently what is being said is that cartel effects may spill over borders, but competition enforcement is limited by borders.

[91] Nevertheless, courts in competition cases have applied the effects doctrine to address these problems.

[92] Perhaps most influential as a doctrine has been the United States' test for effects.

[93] Under the US Foreign Trade Antitrust Improvement Act of 1982 (FTAIA), the Sherman Act does not apply to conduct involving trade or commerce with foreign nations unless it meets the effects exception test. As the US DOJ and FTC guidelines explain:

> *"What is commonly referred to as the FTAIA's 'effects exception' brings such conduct back within the reach of the Acts if the conduct has direct, substantial and reasonably foreseeable effect on commerce within the United States, US import commerce or the export commerce within the United States, US import commerce, or the export commerce of a US exporter, and that effect gives rise to a claim."*[30] [Our emphasis]

[94] Similar language has been used by courts in Europe. Thus, in *Intel,*[31] the General Court explained that in European case law, two approaches had been followed to establish jurisdiction, consistent with the rules of public international law; the principle of territoriality and the qualified effects test. Under the territorial principle

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[29] E.M. Fox *National law, global markets, and Hartford: Eyes wide shut* Antitrust Law Journal Vol. 68, No. 1 (2000), pp. 73-86 at page 73.
[30] US Department of Justice and Federal Trade Commission *Antitrust Guidelines for International Enforcement and Cooperation* Issued 13 January 2017 p21.
[31] *Intel Corporation v Commission* Case T-286/09 ECLI:EU:T:2014:547 *(Intel)*.

courts held that conduct had two elements – the formation of an agreement and its implementation. Even if only the implementation took place within the territory of the forum the courts would still find they had jurisdiction over the conduct, otherwise as the court explained *"... the result would obviously be to give undertakings an easy means of evading those prohibitions."*[32]

[95] The General Court then went on to discuss the second approach, the effects test as qualified in the case law. This history, the court explained, can be traced back to a case in which the issue was whether EU merger regulation applied to a concentration (merger). In *Gencor*, decided in 1999, the court explained the test was whether it was foreseeable the proposed concentration would have an immediate and substantial effect in the European Union.[33] This was the test then adopted by the General Court in *Intel,* even though this was an abuse of dominance case.

[96] The case went on appeal to the European Court of Justice, but on this point that court affirmed the correctness of this approach holding:

> *" ..as the General Court held ...the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union."*[34] [Our emphasis]

[97] The European test and the US test, on the face of it, are similar, but there are subtle differences. First, under the US test, 'direct, substantial and reasonably foreseeable' are each self-standing criterion. Under the EU test, the criterion of foreseeability is given its content by the two other criteria – an effect that immediate and substantial. Second, the EU has preferred the term 'immediate' to the term 'direct' that the US statute uses. But in most cases these distinctions may be insignificant.

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[32] *ibid* paras 231-232.
[33] *Gencor v Commission* Case T-102/96 [1999] ECR II-753 para 90.
[34] *Intel Corporation v European Commission* Case C-413/14 P ECLI:EU:C:2017:632 para 49.

[98] Our courts in South Africa have nevertheless in a case decided on exception, had cause to consider the content of the effects test. In *Ansac*[35] the Competition Appeal Court had been referred not to the text of the FAIA Act but to the US *Restatement (Third) of the Foreign Relations Law of the United States*. The court went on to state:

> *"The question is not whether the consequences of the conduct is criminal or, for that matter, anticompetitive, but whether the conduct complained of has 'direct and foreseeable' substantial consequences within the regulating country."*[36] [Our emphasis]

[99] Although *Ansac* went on appeal to the SCA, the SCA did not pronounce further on this point, but it did seem to approve of the CACs' reasoning on a related point that the section 3(1) enquiry did not involve a question of whether the effects were positive or negative. Nevertheless, it quoted with approval the following from the CAC decision that the issue was: *"... merely whether there are sufficient jurisdictional links between the conduct and the consequences."*[37]

[100] We can therefore assume that our law follows the same approach as does US law and European law to subject matter jurisdiction for competition law cases. More specifically that through the lens of section 3(1) we adopt an effects-based test that is qualified. Perhaps the clearest formulation to adopt is that of the EU in *Intel* viz. that it is *foreseeable that the conduct will have a direct or immediate, and substantial effect in the Republic.* (Note we have used both the words 'direct' as does the CAC in *Ansac* and 'immediate' as is used in the EU. While there is some overlap in the language, there are some cases in which the facts fit the one concept better than the other. We explain this more fully below when we

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[35] *American Natural Soda Ash Corporation and Another v Competition Commission* 2003 (5) SA 663 (CAC).
[36] *ibid* para 18.
[37] See *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* [2005] 3 All SA 1 (SCA) (13 May 2005) para 29 quoting para 18 of the CAC decision with approval.

consider the pleadings in this case). We will refer to this formulation from now on as the 'qualified effects' test.

**Does the referral make the necessary allegation to meet the qualified effects test?**

[101] The complaint referral makes general allegations that the conduct complained of has an anticompetitive effect. However, the complaint does not distinguish between the effects created by the three *incola* or local respondents and the *peregrini*.

[102] Whilst the issue of the broad characaterisation of the Commission's allegations as either (i) individual instances of collusion or (ii) a single overarching conspiracy will be dealt with in greater detail below, we pause to mention here that it would be immeasurably difficult for the Commission to plead, to a sufficient standard of particularity to meet the heightened scrutiny of qualified effects test, that individual instances of collusion (as opposed to a single overarching conspiracy) sufficed .

[103] We address the remainder of the Commission's allegations with regard to jurisdiction below.

[104] At paragraph 42 of the December affidavit, the Commission alleges that:

> *"the respondents' traders' participation (both active and passive) in the on-going unlawful arrangement and/ or concerted practice effected, or could reasonably be expected to affect the value of the South African rand generally and vis a vis the US Dollar."*

[105] The Commission does not however allege, to a sufficient degree of particularity what the effect on the rand was, and whether the alleged conduct of the local *peregrini* was sufficiently linked to this effect.

[106] In its earlier February referral, the Commission, in describing the conduct, repeatedly indicated that the behaviour of the traders was not conducted in 'the normal course of trading'.[38] Whilst these facts may establish a violation of trading norms or regulations, they do not establish any form of effect nor linkage between the conduct of the traders and the effect in South Africa.

[107] In the March affidavit, the Commission seems to take the most direct approach of establishing jurisdiction. It lays out four grounds of jurisdiction generally. The first and second of which addresses personal jurisdiction and will not be dealt with here.

[108] The third, dealing with subject matter jurisdiction broadly alleged that the conduct in the complaint referral affected customers who used the ZAR. This broad allegation still does not establish what the alleged affect was nor how the conduct of the traders was linked to the effect on the customers.

[109] The fourth ground was as unhelpful. The Commission alleged that the conduct involved *'the use of the means of or instrumentalities of interstate commerce or of the facilities of the Republic of South African national securities exchange in connection with the alleged transactions, acts, practices and courses of business alleged in the complaint referral."*[39] This too is unrevealing as to how the conduct of the traders was in any way linked to an effect within the Republic.

[110] It is thus necessary for the Commission to make additional averments to sustain its case against the *peregrini*. (Here we mean the local *peregrini* but should we be wrong on the case being dismissed against the pure *peregrini* the same point would apply to them as well).

[111] Let us explain why. Assume that two of the local *peregrini* through an offshore office had traders who, in furtherance of an agreement to fix the rand-dollar bid,

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[38] Paragraphs 45.5.5; 45.4.4; 45.2.4; and 45.1.4, Record p28-35.
[39] March Affidavit para 17, Record p60.

offer spread at a moment in time, thus making the exchange more disadvantageous for some customers; i.e. in normal competition parlance making the consumer pay a higher price as a result of the collusive agreement. If the effect was only on an offshore customer or set of customers, that agreement would not meet the qualified effects test under the Act. But if as a result of the same agreement between these two firms, the bid-offer spread was, at that moment in time, also able to effect the bid-offer spread for South African consumers, then the qualified effects test would be met. The effect of course could also be indirect on the price (in the language of section 4(1)(b)(i) both direct and indirect price fixing is proscribed).[40] For instance, even if the bid-offer spread thereafter to the South African consumer was not identical, but had nevertheless moved upwards, pursuant to the offshore agreement, this would constitute an immediate effect, on the EU formulation of the test, albeit that the price movement might be regarded as indirect. Whether it was substantial would be a matter left to the trial to determine.

**Conclusion on jurisdiction**

[112] In conclusion on the jurisdiction issue we find that we have no personal jurisdiction over the so-called pure *peregrini*, being the following respondents: BAMLI (1); JP Morgan Chase (3); ANZ (5); SNYS (6); Nomura (9); Macquarie (13); HBUS (19); MLPFS (20); Credit Suisse Securities (23). The case against these respondents is dismissed with the exception of the declaratory order contemplated in paragraph 3.3.1. Second, in respect of the remaining local *peregrini*, additional allegations need to be made for the referral to meet the qualified effects test. These allegations are dealt with in paragraph 3.4.1 of our order. Finally, in respect of the local *peregrini* we have required the Commission to confine the administrative penalty sought to the limit imposed in terms of the Act viz. turnover within the Republic and exports from the Republic. (See paragraph 3.3.2 of the order).

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[40] The Commission does allege both direct and indirect price fixing. See February affidavit para 40, Record p25.

## Part 3

### Further Particulars

[113] In this section we consider the exceptions which complain of the deficiency of the Commission's complaint referral as supplemented. Some respondents have classified this as a failure to make out a cause of action; others that the pleading is vague and embarrassing. For our purposes classifying the objections in this way is not necessary. Rather the issues are; (i) is there a deficiency in pleading; and (ii) if there is, might it be rectified by further pleading; and (iiii) even if it might, should the Commission be given this opportunity, or (iv) should the case be dismissed.

[114] The debate about the adequacy of the pleadings largely took place at a high level of generality. As many as there were cases the respondents relied on emphasizing the necessity for greater granularity in pleading, these were countered by the Commission citing authority that pleadings are not required to equate to evidence. Neither approach was particularly helpful in navigating the debate. Some respondents suggested what particularity would be required and this approach has been more helpful.[41]

[115] The central problem with the referral affidavits is not so much their lack of detail, (although in some places it is) but their lack of focus and consistency as we go on to discuss. The second problem is the Commission's reluctance to commit itself, unequivocally, to a particular formulation of its case. In choosing to keep all its options open to avoid risk, the Commission's case has suffered a lack of focus. We go on to discuss these problems below and how we have resolved them. We have done so under several headings in which we state what the issues are, analyse them, and then come to a conclusion.

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[41] For instance, the submission from Commerzbank regarding particulars required to determine whether or not the action was time barred in terms of section 67(1).

**Issue one- Has the Commission clearly identified which conspiracy it alleges?**

[116] In the course of this litigation the Commission's case has undergone several changes. The case was initiated on 1 April 2015. This initiation statement was then amended on 31 August 2016. The case was referred in February 2017. But since that referral the Commission has filed three supplementary affidavits, the last and most significant being what we have termed the 'December affidavit', filed in December 2017.

[117] This case involves a contravention of section 4(1)(b)(i) and 4(1)(b)(ii) of the Act in that the respondents are alleged to have entered into an agreement or concerted practice to rig the rand- dollar exchange rate and in so doing directly or indirectly to fix prices and secondly to effect a market division on a temporal basis by allocating customers.[42] Here the allegation is that by pulling trades or withholding from trading one trader left the market open for another and hence at a moment in time, agreed to allocate customers. For the time being we will refer more loosely to the term conspiracy to embrace both the concepts of agreement and concerted practice although doctrinally in terms of the case law they must be differentiated.[43] This we discuss later in the decision.

[118] Three candidate conspiracies emerge from the papers because of the manner of the pleading. It is sometimes difficult to discern whether they are posited in the alternative or exist in a complementary sense.

[119] The main conspiracy involves all the respondents in a single overarching conspiracy. We will refer to this as the single overarching conspiracy or 'SOC'. The second candidate conspiracy the Commission refers to as a multilateral collusive arrangement. What the Commission refers to here are a series of conspiracies differentiated on two bases. First, they are differentiated based on the type of mechanism agreed upon to rig the exchange rate. Each type

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[42] February affidavit para 40, Record p25.
[43] See *Netstar (Pty) Ltd and others v Competition Commission and another* [2011] 1 CPLR 45 (CAC) (Netstar).

constitutes a different multilateral conspiracy. The second distinction between this and the SOC is that the former involves only some of the respondents, not all of them. However as there are always several respondents involved, it is termed multilateral. The third candidate is a bilateral conspiracy. Like the multilateral it is confined to a specific type of agreement, but unlike it, it involves a conspiracy between only two firms hence the name bilateral. The bilateral agreements can be broken down further into two categories. They may involve repeated contacts between two firms or single instances. Here again the Commission employs distinguishing labels; the former conduct is referred to as *"cumulative"* the latter as occurring in *'isolation'*.[44]

[120] These distinctions are crucial because, as we explain later in the legal section, this determines facts such as when the conspiracy is alleged to have started, when it ended, whether a firm is liable for the actions of the other respondents, and if so, the extent.

[121] We now examine why confusion has arisen around the three types.

**How the Commission's case changed**

[122] When the case was initiated in April 2015, the Commission alleged that it had information that the respondents had entered into *"...an arrangement, agreement and or concerted practice"* to fix prices in the foreign exchange market, in relation to rand-based pairs. On an ordinary reading of the language, although the statement does not expressly use that term, this was an allegation of a single overall conspiracy i.e. an SOC. Further it was alleged to be ongoing.[45]

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[44] See December affidavit para 49.2 as an example but the pattern is repeated throughout paragraphs 49 – 144 of the affidavit, record p91-123.
[45] See paragraphs 2.1 and 2.3 read with the covering form to the initiation, Record p40-45. Note that not all the present respondents were identified in this initiation document.

[123] The April initiation statement went on to allege that the respondents' traders had made use of the Bloomberg instant messaging system or chatroom to share information used to manipulate the prices of foreign currencies.[46] It alleged that:

> *"They log into the messaging platform and communicate about how much should be charged for a particular spread of dollar/Rands."*[47]

[124] The Commission explained that the chatroom enabled traders to communicate in near real time thus enabling the frequent, short and rapid exchange of information.

[125] Here the chatroom and its utility and the fact that it involved the exchange of "*confidential or competitively sensitive information*" to effect price collusion made it the centre piece of the case.[48]

[126] When the initiation document was amended in August 2016, market division was added to the theory of harm. The Commission alleged this took the form of:

> *"... a temporal sharing of customers in that for a limited period of time the trader that is holding or pulling will have not have his offers or bids available to customers to trade with."*[49]

[127] Although this amendment made no further mention of the chatroom, it also did not state anything inconsistent with what was contained in the April statement. The two initiation statements were thus consistent in alleging an SOC, the latter merely amplifying the former.

[128] The complaint referral was filed in February 2017. In the accompanying affidavit there is now an explicit reference to what is described as the respondents

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[46] *ibid* para 5.1-5.2, Record p44.
[47] *See* paragraph 5.2 of the Initiation statement, Record p44.
[48] *ibid* para 5.4, Record p45.
[49] *See* para 4.3 of the Amended initiation statement, Record p53.

*"overarching agreement"* in one of the prefatory paragraphs.[50] In a concluding paragraph the allegation is made at its most explicit:

> *"The collusive conduct by the respondents set out above constitutes a single conspiracy by the respondents to fix prices and divide markets through bilateral and multilateral agreements using among others, chatrooms, telephone discussions and meetings."* [Our emphasis]

[129] What the Commission is alleging here is that there is an SOC. But that SOC is implemented through the mechanism of bilateral and multilateral agreements and in chat rooms. But this is not a self-evident proposition. The link needs to be alleged but it is not.

[130] Granted the February affidavit goes into some detail about the multilateral agreements. It outlines five types of multilateral agreements that are distinguished based on the type of conduct they involve. They are; agreements to fix bids and offers prices on the trading platform; coordination of trading activities around the fix; agreements to fix prices and offers quoted to customers; agreements to fix bid-offer spreads; agreements to coordinate trading.

[131] Yet from the way the affidavit is structured the multilateral agreements each appear as discrete self-standing conspiracies. This is because the Commission alleges which respondents were involved in each respectively. Whilst all respondents are involved in at least one of these five, not all are involved in each one.

[132] Yet all are implicated in the SOC. If by virtue of involvement in any of the multilateral agreements a respondent is *ipso facto* linked to the SOC this must be alleged. The Commission needs to explain how the separate parts get glued to the whole.

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[50] *See* para 45 of February referral, Record p27: *"Below we set out the bilateral and multilateral agreements through which the respondents implemented their overarching agreement to fix prices of bids, offers and bid offer spreads as well as dividing markets."*

[133] Put differently a respondent reading the February affidavit might understand the allegations against it being involved in one or more multilateral conspiracies, but not understand how this relates to being involved in either the SOC or any bilateral conspiracy. Indeed, the February affidavit says nothing about what the bilateral conspiracies are other than alleging their existence.

[134] A further confusion created in the February affidavit is the means of communication. In paragraph 41 of the February affidavit, in what is a prefatory description of the operation of the alleged cartel, the Commission states:

> *"Further, the respondents had a general understanding to divide the market by refraining from trading, taking turns in transacting on* [the] *Reuters platform …"*

[135] The Reuters platform features again in the next paragraph. *"The respondents used the Reuters trading platform … to fix prices …"*

[136] In other words, the Commission is alleging that the conspiracy is carried out by using that platform but how it is used is not explained. In paragraph 43 of the February affidavit the Commission goes on to allege that in addition to the platform described above (i.e. the Reuters platform) the respondents also carried out their collusive activities using other bilateral and multilateral interactions, including the Bloomberg chatroom.

[137] When the Commission goes on to provide further elaboration on the five types of collusive agreements it highlights their use of the Reuters platform. Granted each time it adds in, *inter alia*, their use of the Bloomberg chatroom, but it comes in as one of many mentioned extras, not as it was in the initiation statement, and as we shall see in the December affidavit, the sole instrument of communication of the conspiracy.

[138] To summarise; the February affidavit places emphasis on the manner of the conduct and why it is collusive, rather than on the means of communication, which seems incidental. Further, although alleging the existence of an SOC

comprised of multilateral and bilateral agreements, it does not link the latter two to the former, which is a necessary allegation.

[139] The December affidavit would have provided the Commission with a subsequent opportunity to resolve these issues. Instead it has led to a further mutation in the way the case has been presented.

[140] The first part of the December affidavit seems to repeat what has been alleged in the February affidavit. For instance, in paragraph 40.1, all the platforms are listed, again in a neutral fashion, suggesting no more than these were the means for traders to communicate. In addition to the three platforms mentioned, so are the more conventional forms of communication; emails; the phone and personal communication. This paragraph on its own does not suggest that there was anything collusive about the choice of means of the communications; rather it is the content of the message not the means of communicating that matters. In this sense up till this paragraph in the affidavit, both the February and December affidavits are consistent.

[141] But from paragraph 40.2 of the December affidavit, the emphasis shifts. Now it appears that the means of communication does matter. The Commission now focuses on what are described as instant messaging platforms. These platforms it explains contain a facility that allows for the creation of permanent *ad hoc* chatrooms with selected participants. One such instant messaging platform is the Bloomberg one. Recall that in the February affidavit the Bloomberg platform was one of many forms of communication mentioned – indeed it did not receive much attention; playing it seemed second fiddle to the Reuters platform.

[142] But from paragraph 40.2 onwards, the Bloomberg chatroom moves from the footlights of the February affidavit to the floodlights of the December affidavit and now appears to be the only means of communication the Commission seeks to rely on. The case now turns on the centrality of the chatroom to the conspiracy. The mere fact of it being utilized as the chosen form of communication is relied on by the Commission to infer a covert, discrete conspiracy. This notion, even if

not yet fully crystalized in the December affidavit, will become, as we go on to show, the basis of the Commission's case for an SOC.

[143] The first signs of this shift emerge in this portion of the December affidavit (paragraph 47 onwards) where the Commission lists in respect of each respondent, one or more of what it terms are "*some of the manifestations of the agreement, arrangement and concerted practice and examples of its implementation*".[51] Notably all the examples given occur in the Bloomberg chatroom. No 'manifestations' on any other platform, instant or otherwise, are alleged. This approach appears to suggest that notwithstanding the February affidavit, the instances of implementation the Commission will rely occur exclusively on the Bloomberg chat room.

[144] What the December affidavit does resolve, unlike the February affidavit, is the link between the bilateral and multilateral agreements and the SOC.

[145] In paragraph 40.2.4 it explains that through the use of instant messaging the respondents could engage in bilateral or multilateral communications. We assume that this is the sense that the terms were used earlier in February although in that affidavit it was never explained in this way.

[146] But then the crucial link between the three is made. The Commission alleges that messages on the chatroom were visible to all participants in the chatroom *"...regardless of whether a participant chose to actively engage in the communication"* or were "passive".[52] It explains that *active participants* – were those directly participating in the chats and *passive participants* were those who while not participating in the conversation, could nevertheless view the conversation. Importantly, the Commission alleges that even passive participation makes a respondent liable for the communications of the others in

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[51] December affidavit para 45, Record p90
[52] *See* December affidavit para 41.2.5, Record p83.

the chatroom. This is because passive participants had access to all the information on the chat and it is precisely because they were supine, they are alleged to permit the conduct of the active traders.[53]

[147] But even the December affidavit read as whole, whilst hinting at the centrality of the Bloomberg chatroom, does not yet commit itself to it fully. Later this only becomes apparent in oral argument.

[148] In oral argument Mr. Ngcukaitobi for the Commission, clarified that the use of a particular platform was of no significance. Rather it was what the chatroom could be used for that was. As he put in argument:

> *" ...hence our suggestion at the beginning that Bloomberg as a facility is benign, but the opening of the chatrooms with the specific aspects described in paragraph 41.2 and the invitations, even* [is an] *invitation to a conspiracy and the acceptance of that invitation, is an acceptance to join the conspiracy because it is these chatrooms that were used by the traders to facilitate, perform and undertake activities that are in violation of section 4(1)(b)."* [54]

[149] This statement is the clearest exposition of the Commission's case linking respondents to the SOC. It is not made out this clearly in either of the affidavits, even with the most sympathetic reading of paragraph 40 of the December affidavit. As Mr. Ngcukaitobi explains, the SOC comes about because respondents are invited to join the platform and accept the invitation. It is the electronic equivalent of the proverbial smoke-filled room of cartel folk lore.[55]

[150] Less clear even in oral argument was whether the chatroom existed solely to further the conspiracy. If it was, one can understand the Commission's argument. If not, why does the Commission attach so much emphasis to the offer and acceptance to be a member of the chatroom. If the chatroom existed for both

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[53] December affidavit para 41.4, Record p84.
[54] Transcript of Exception Proceedings 30 July 2018- 3 August 2018 (Transcript) p324. Note the reference to the paragraph should be paragraph 41.2 of the December affidavit.
[55] As he put it: *"The Bloomberg chatroom simply provided a forum, in other words it is the smoke filled darkroom, and when you got in you full knew what you were getting into."* Transcript p325.

benign and malign purposes why does acceptance of an offer constitute membership for the malign purpose? The respondents are entitled to know this. Furthermore, was this chatroom specific to the rand-dollar trades? Later in the December affidavit the Commission seeks to rely on the existence of another chatroom that concerned the Euro-dollar pair. Is there some relationship between the two? Did different chatrooms exist for different currencies – were the modalities the same, only the currency pairs different? Did different traders who operated in the platform in this case operate in other platforms to achieve the same ends in respect of other currency trades?

[151] It is also not clear whether the Commission is alleging the existence of an express agreement that underpins the SOC or whether it seeks to infer its existence from the surrounding facts.

[152] It seems from what Mr. Ngcukaitobi argued that this is a case of inference. For instance, in argument he asks the following rhetorical question:

> *"Reasonably speaking what did they think they were doing when they logged in? When they told others to withhold their positions? When they told them to put their fixes and bids? When they told them to put fake bids? What did they think they were doing?"*[56]

[153] The respondents are entitled to know if this is based on inference or an express agreement. If it is a case based on inference, then they are entitled to know what facts the Commission relies on to draw the inference.[57]

[154] The reason the referrals have led to confusion is the Commission's failure to distinguish between the agreement that underpins the case (the SOC) and the acts of consensus that constitute the implementation of that agreement. Because the term 'agreement' has been applied to both, in a loose fashion, this distinction

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[56] Transcript p325, line 23- p326 line 3.
[57] See our decision in *Tourvest Holdings (Pty) v The Competition Commission (and a related matter)* CT Case numbers CR209Feb17/EXC134Aug17 and CR209Feb17/EXC132Aug17 (10 January 2018) (CT).

is lost. As we explain in the section below this distinction matters for the legal consequences that flow. It is now clearer to us from the oral argument that the Commission has returned to its original case of the existence of an SOC made out in the April initiation.

[155] As we now understand the Commission case, after oral argument, there is only one agreement or arrangement or concerted practice that underpins its case – that is the SOC.

[156] The SOC is an agreement in general terms to fix the price of the rand dollar exchange rate and to divide the market on a temporal basis. Because it is too general an agreement to be practically implemented, it requires furthermore specific consensus between the participants to the overall SOC to do so. This is where the two other species of agreement fit in – the multilateral and bilateral agreements. The latter are not the agreements to conspire, but the mechanism by which to implement the conspiracy. They have done this in two ways: consensus on (i) the modes of implementation (the five kinds set out in the February referral in paragraph 45.1 to 45.5.) and (ii) the medium of communication of the implementation (use of the Bloomberg chatroom). But if that is what the Commission means it must state this clearly.[58]

[157] But there also appears to be a further distinction between the SOC and the multilateral acts of implementation. The SOC appears to be a continuous agreement. The Commission alleges that it is "ongoing." By contrast the multilateral and bilateral agreements, if they are the acts of implementation, as itemised by the 85 manifestations set out in the December affidavit, are of a temporary nature; specific to certain acts and those actors alleged to have performed them. They are thus temporary in nature.

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[58] We think this is what it means by paragraph 41.2.4 of the December affidavit which states: Through the exchange of instant messages, the participants in a chatroom would engage in bilateral or multilateral communications or conversations with one or more participants in the chatroom.

[158] But because these acts of implementation involve repeated patterns between different sub-groups of respondents, played out over time and in the same forum (the chatroom), the Commission seeks to allege that what appear to be actions temporary in nature, in regard to implementation, are also, taken cumulatively, evidence of an ongoing overarching conspiracy, the SOC.

[159] But most importantly and this, in fairness to the Commission, is made out clearly in the December affidavit, is the idea that passive participation in a chatroom is enough to make a firm liable for the acts of implementation of all the rest and thus links individual acts of participation to the overall conspiracy. The chatroom is akin to a virtual boardroom, once you have been let in, remaining silent is no excuse.

**Has the Commission made this case out in the affidavits already?**

[160] The Commission may be correct to contend that every element of this case we have described above, can be found somewhere between the covers of its various referral affidavits, if read with sufficient care. The problem is that there is much else in between the covers to create confusion for even a diligent respondent. We take as one example the case Standard Bank has to meet. We have chosen Standard Bank because the case against it is factually the simplest.

[161] Recall that it is in the December affidavit that the Commission, for the first time, lists the manifestations of conduct that each respondent respectively was involved in on the Bloomberg chatroom. In the case of Standard Bank, unlike some of the other respondents, this is limited to one alleged manifestation.

[162] The manifestation is alleged to have taken place on 1 October 2012 and involves what is described as a communication between Peter Taylor of Barclays and Bryan Brownrigg of Standard Bank, in which they are alleged to have discussed a bid-offer spread in contravention of section 4(1)(b)(i)[59] i.e. price fixing.

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[59] *See* December affidavit para 135, Record p120.

[163] The Commission goes on to state that this communication *"...was a manifestation of the broader agreement, arrangement and or collusive practice between respondents' traders ..."* Put more simply the Commission is saying 'this is one instance of you, Standard Bank, being involved in the larger SOC.' It is saying we are giving you one example of a bid-offer price fix, but you are part of the conspiracy for everything – not just for this conduct but all the rest suggested in the two affidavits. We call this the primary December allegation.

[164] But if Standard Bank just read the February affidavit in isolation, it would understand the case against it differently. The specific allegation made against it was that it was involved in agreements to fix bid-offer spreads. While this allegation is at least consistent with that made out in December in terms of the species of conduct involved, there is no suggestion of its frequency. Indeed, the impression created by the manner of pleading in the February affidavit was that this conduct was ongoing and frequent. The Commission here alleges that this conduct i.e. fixing bid-offer spreads, occurred *"... from at least 2007..."* From this expansive language Standard Bank would have reasonably understood that it was an active party during this period in respect of this conduct – not that its conduct was limited to one instance as alleged in December - confined to one communication between Taylor and Brownrigg.

[165] Furthermore, still reading the February affidavit, its conduct is described as involving only those respondents named as involved in this species of conduct. That list is more limited than all the respondents then alleged to be part of the SOC.[60] A reasonable reading of the February affidavit would be that Standard Bank is liable only for this type of conduct in a conspiracy only with those other named respondents – not all the respondents cited in the case. Granted paragraph 48 of the February affidavit seeks to pull all respondents back into the SOC, but, as explained earlier, there is nothing in the February affidavit to explain why this should be the case.

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[60] See February affidavit at para 45.4, some eleven are listed compared to the 23 listed in December.

[166] The February affidavit is thus narrower in terms of scope of conduct and co-conspirators than the primary December formulation. But to add to the confusion the December affidavit also rests the Commission's case against Standard Bank on an alternative formulation. The alternative formulation is that the conduct i.e. the Brownrigg/ Taylor communication: *"...in isolation and cumulatively constitutes a breach of 4(1)(b)(i) of the Act."*

[167] We understand this formulation to mean that even if there was only proof of one communication with one competitor, with Taylor of Barclays, Standard Bank is liable for price fixing, for this act alone. Put differently, it means that even if the main case of the SOC fails against Standard Bank it would still be liable for this single instance.

[168] The use of the term cumulatively with regard to Standard Bank, may be a drafting error. It is used repetitively in respect of all the respondents, most of whom are alleged to have been involved in more than one manifestation. This is how we understand the term cumulatively to mean as used in the alternative formulation. It is the cumulation of all the instances cited in respect of that particular respondent. Since Standard Bank faces only one manifestation there can be no cumulation of the conduct. Nor could 'cumulation' refer to of all the conduct by all respondents, since that is the subject of the SOC (paragraph 135.1) and would make the term cumulative redundant.

[169] What the exercise in analysis of the case in respect of Standard Bank shows is the dissonance between the different allegations in the February and December affidavit, the latter also in respect of its alternative formulations.

[170] We can appreciate that in cases of SOC's, the Commission, relying on a case of inference to prove the SOC, may in the alternative want to rely on a more modest theory, involving isolated acts as constituting on their own contraventions of section 4(1)(b). In this case however the theory advanced now by the Commission is so dependent on the chatroom and on the notion of active and

passive participants, that pleading in the alternative a case that a firm would be otherwise liable for individual instances of conspiracies is so at variance with its main theory of harm that it almost contradicts it. But this is not the only problem. It also places an intolerable burden on the resources of the respondents in conducting their defence.

[171] If the respondents are in for all the manifestations of the theory, be they active or passive participants, they are entitled, particularly at a stage in the proceedings when the Commission has had a chance to reformulate its case, to know which one they face. Is Standard Bank faced with the prospect of responding to 85 instances or just one? Fairness requires the Commission to stick with the theory its counsel has advanced in oral argument and to clarify that this is where its case rests.

[172] For this reason, we have taken the unusual approach to require the Commission to confine itself to the case of an SOC as described by its counsel in oral argument, and to drop the allegations of single isolated or cumulative isolated instances.

[173] This is not to hold that in general the Commission cannot make out a case in the alternative. Indeed, ordinarily we would avoid making directions that constrain the Commission's prosecutorial discretion to formulate its charges in the manner it considers best. But we also have a duty to ensure that Tribunal proceedings are fair.[61] When the formulation of a case in the alternative, makes the case confusing for respondents, as we have found it does, and when after being given an opportunity to re-formulate the case, the Commission's efforts have still not added further clarity, then fairness requires that we should intervene.

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[61] A requirement of section 33 of the Constitution of the Republic of South Africa, 1996 is that everyone has a right to just administrative action that is lawful, reasonable, and procedurally fair, while section 52(2) (a) of the Act imposes a requirement on the Tribunal to ensure that proceedings are conducted in accordance with the principles of natural justice.

[174] We have not done so arbitrarily. We have also not chosen for the Commission. The order in question does no more than to confine the Commission to the very case its counsel in final argument advanced.

[175] Some counsel had argued that we should call time out on the Commission's opportunities to reformulate its case. We think that goes too far and given that the Commission acts not in its own right but as the guardian of the public interest, the balance between the interests of the remaining respondents and the public interest is better served by requiring the Commission to prune its case, rather than dispose of it.

[176] We turn now to why it matters legally whether the Commission relies on an SOC or a lesser form of agreement.

**Legal consequences of the type of agreement pleaded**

[177] The distinction between an SOC and a single or cumulative set of agreements has important implications for the case the respondents are required to meet.

[178] First, in a single overall agreement each respondent is responsible for the actions of the others. It follows from this that each respondent needs to know not only the case against it for its actions but that against all the others as well. When did it start, when did it end, if it indeed has ended, and, while not every detail, some indication of its scope?

[179] Secondly the respondents in this type of case need this information not only for understanding the case they have to plead to on the merits, but also the issue of remedies. For instance if administrative penalties are to be imposed – the relief the Commission seeks against all the respondents - amongst the factors the Act obliges the Tribunal to take into account in respect of a prohibited practice are

its *duration, gravity and extent.*[62] It may also in respect of duration be relevant for possible follow on civil liability.[63] Thirdly, it is relevant to the issue of prescription or limitation of action as we discuss below. A case based on single instance of conspiracy may not have been brought in time because an individual respondent's actions may have ended three years prior to the initiation of the complaint. However, if the case is based on an overall conspiracy, where, as in this case, passivity and not just activity leads to liability, the later actions of other respondents may mean that the prohibited practice still subsisted at the date of initiation and accordingly the case against that respondent has not prescribed.[64]

[180] Here case law emanating from the European Courts is of great assistance because courts there have had to grapple with what distinguishes an overall conspiracy from isolated acts of conspiracy. In *Team Relocations*, the General Court held that three conditions must be met to establish participation in what it termed a single and continuous infringement or what we in these reasons have called an SOC. These, the court held are:

> *"... the existence of an overall plan pursuing a common objective, the intentional contribution of the undertaking* [firm] *to that plan, and its awareness (proved or presumed) of the offending conduct of the other participants."*[65]

[181] In other decisions these criteria have received further elucidation. For instance, the European Court of Justice has held that the fact that a cartel existed over distinct products and geographic markets, did not preclude the existence of a single infringement. Nor does the second criteria of an intentional contribution, require that the firm had participated from the start of the conspiracy or pursued

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[62] See sections 59(3)(a) of the Act which sets out the factors to be considered in the imposition of a penalty which includes inter alia, *"...duration, gravity and extent"*.
[63] See section 65 of the Act for civil actions which are dependent on a prior finding of liability by the Tribunal.
[64] See the CAC's Judgement in *The Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 167/CAC/Jul18 (3 April 2019) ('Pickfords'), and *Pickfords Removals SA (Pty) Ltd v Competition Commission* [2018] 1 CPLR 390 (CT) (Pickfords CT) for analysis on when a concerted practice ends.
[65] *Team Relocations v Commission* Case T-204/08 EU:T:2011:286 para 37 quoted with approval by the Court of Justice in the appeal against the General Court judgement: C-444/11 P EU:C:2013:464.

the plan in the same way as other members. Nor does the fact that some members may have had reservations or indeed cheated make a difference.[66] As far as the third criteria awareness of the conduct of the others is concerned, here the courts have been stricter. The General Court has held that the firm must be aware of the general scope and the essential characteristics of the cartel as a whole.[67]

[182] Less clear in European law is whether a regulator in prosecuting a cartel must allege that an SOC exists as an objective fact or whether in the face of murky evidence where the distinction is not clear cut this is a choice of prosecutorial discretion. For instance in a thoughtful passage on the subject by former EC Advocate General Wahl, he stated:

> *"In the case law of the court, the concept of single and continuous infringement has been employed, in particular, in the context of art.101 TFEU to capture several elements of anti-competitive conduct under the umbrella of one single and continuous infringement for the purposes of enforcement. In that regard, the underlying rationale is to ensure effective enforcement in cases where infringements are composed of a complex of anti-competitive practices that can take different forms and even evolve over time.*
>
> *In other words, the aim is to avoid the unfortunate enforcement outcome where various agreements and concerted practices under art.101 TFEU, which in reality form part of an overall plan to restrict competition, are treated separately. For that reason, recourse to the concept of single and continuous infringement tempers the burden of proof generally weighing on enforcement authorities regarding the need to prove the continuous nature of the anti-competitive practices scrutinised. More particularly, where a complex of agreements and practices have been implemented over a long period of time, it is not unusual that changes in the scope, form and participants to those agreements and/or practices have taken place during the relevant time period. Without the assistance of the concept of single and continuous*

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[66] C204/00 *P etc Aalborg Portland A/S v Commission* EU:C:2004:6 para 85; C444/11 P *Team Relocations v Commission* EU:C:2013:464 para 56.

[67] These summaries of the decisions appear in a useful discussion in Whish and Bailey, *Competition Law* 9th Edition, pages 107-8.

*infringement, the Commission would have to meet a higher evidentiary threshold. It would need to identify and prove the existence of several distinct anti-competitive agreements and/or concerted practices as well as identify the parties involved in each of them separately. Treating the impugned practices separately could also in some cases result in a time-bar of older agreements and/or concerted practices. That would make enforcement less efficient.*
*The concept of single and continuous infringement thus constitutes a procedural rule."*[68]

[183] In the present case we do not have to decide this point. We understand the Commission to be alleging the SOC through the centrality of the chatroom as an objective fact. It just has to be bold enough not to hedge its bets.

**Conclusion**

[184] We return to the question of whether the Commission's case has changed. Undoubtedly, as we have shown above, it has. No reader of the February referral would have understood the case in the way it has been presented now. But it is no answer for the Commission to contend that the December affidavit has supplemented the February affidavit.

[185] The Commission has not replaced the February affidavit with the December one. This means one is required to read both together. This might be acceptable if the later affidavit provided more meat to the bones of the first. But the December affidavit is not drafted in this manner. Aside from omitting the citations of the respondents already joined and the background to the industry which are only set out in the February affidavit, the December affidavit is drafted as if it were a replacement of the February affidavit, as it sets out the entire case *de novo*. The two formulations are so dissonant that the criticism that the case becomes impossible to comprehend if one has to plead to both is well made. For this

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[68] Opinion of Advocate General Wahl *Intel Corporation Inc v European Commission* (20 October 2016) ECLI:EU:C:2016:788 para 180-182 as cited in *Balmoral Tanks Limited v The Competition and Markets Authority* [2019] EWCA Civ 162.

reason when the Commission furnishes the particularity required we have directed it to file a completely new affidavit, that substitutes and replaces the two others, so that the respondents are faced with only one pleading to answer.

[186] Furthermore, if the Commission clarifies its referral in the manner suggested in its oral argument, with the addition of the particulars we require in these reasons, this will resolve most of the exceptions that relate both to no cause of action or vague and embarrassing. There will now be a coherent case of what the conspiracy was, how it was entered into, and how it ended; it if it indeed has. It will also explain why the relationship between the firms is one of competitors as distinct from one between buyer and seller. In the order we have indicated the minimum features that this supplementary affidavit needs to have.

**Limitation on bringing action**

[187] Several respondents have raised the possibility that the case against them may no longer be actionable against them, because of the provisions of section 67(1) of the Act which states as follows:

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

[188] Note that section 67(1) sets up a measuring tape that goes backward in time. One first determines the date the complaint was initiated on and then measures back in time. If the conduct in question has ceased more than three years prior to the date of initiation, then the complaint may not be initiated.

[189] For convenience we refer to this provision as the *prescription* provision.[69]

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[69] We note the cautionary language in the recent CAC case of *Pickfords* that it would not be correct to think of the section 67(1) as a prescription period but rather as a limitation or expiry period. Nevertheless, like us, the court found it useful to use the word prescription as a shorthand for repeating the whole provision. See *Pickfords* (note 64 above).

[190] We are not able to decide the prescription arguments now. This is because two issues relevant for the application of section 67(1) are presently unclear. They are the date of the initiation and the date when the conduct ceased. The date of initiation is unclear because it raises both factual and legal issues that need to be determined. We explain these issues in greater detail later in the section on joinder in a postscript.[70]

[191] Depending what date is selected for the date of initiation this may have different implications for different respondents. If the date of the first complaint initiation (i.e. April 2015) is held to be the date of initiation for all the respondents regardless whether they have been named, because this is an SOC, then this might not matter. But if the date of initiation is the date when the respondent is named and indeed named correctly, then some respondents are named only in the August 2016 amended initiation and some, those five sought to be joined, only in the December 2017 affidavit. A gap of more than two and half years separates the naming of the early initiates from the last sought to be joined. It is conceivable that for some prescription may have run its course during this interregnum, depending on the answer to the crucial dates.

[192] The date the conduct ended is unclear as well.[71] As this is the most important fact of all, depending on when it is, it may render all the uncertainty around the date of the initiation moot.

[193] Of course, if as the Commission alleges in the December affidavit, all respondents were part of the SOC and that the conduct persists, then the complaint would still have been timeously initiated against all, even those deemed to have only had the complaint initiated against them by virtue of tacit initiation in the December affidavit.

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[70] See paragraphs [239] to [247] below.
[71] In *Power Construction v Competition Commission* 145/CAC/Sep16 (2 May 2017) para 45, the CAC had to determine when the practice had ceased in relation to a bid rigging conspiracy in the construction industry. The Court held that the practice ceased when the last payment was made to the winning bidder.

[194] This raises the second question in the prescription debate. Whether it is sufficient for the Commission to allege, as it has done, that the conduct still persists.[72] This is what the Commission argues; once it has alleged the conduct is ongoing the onus shifts to the respondents to plead the date when it ended if they seek to refute this. This, for the Commission, is an issue then of fact for the trial to resolve and should not be determined by way of exception.

[195] The Commission relies for this on our decision in *Pioneer* where we held that:

> *"Section 67(1) is silent on the issue of onus. However the position in South African law is abundantly clear. A court shall not of its own motion take notice of prescription. In other words if a party wishes to rely on prescription then it is required to raise it as a special plea. Moreover it is for a party invoking prescription to allege and prove the date of inception of the period of prescription. Hence, Pioneer, if it wishes to rely on the provisions of section 67(1) is required to allege and prove, on a balance of probabilities that the conduct complained of by the Commission in its complaint referral of 2007 ceased three years before this date. Such an approach to section 67(1) is entirely appropriate in the context of the secretive nature of cartel activity, where respondents engage in meetings held behind closed doors, at restaurants, pubs and hotels, keeping virtually no paper trail and where proof of these arrangements lie squarely and solely within the knowledge of co-conspirators."*[73]

[196] In *Pickfords* we took the position further when we held that at the end of the day the question of where the onus lay was one of fairness.

> *"The Constitutional Court has made it clear that in civil matters there is '.. nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established golden thread like the presumption of innocence that runs through criminal trials. As Davis AJA, quoting Wigmore,*

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[72] *see* February affidavit paragraph 6.3:
*"the conduct may be ongoing"* and December affidavit paragraph 40 " *the terms of the ongoing arrangement, agreement and concerted practice were…"*
[73] *The Competition Commission v Pioneer Foods (Pty) Ltd* [2009] 2 CPLR 323 (CT) para 73-74.

*put it: … all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness.' The approach to who bears an evidential onus in the Tribunal case should follow this approach. We should avoid rigidity in determining who bears an onus and rely on experience and fairness."*[74] [Footnotes omitted]

[197] Thus in the present case on a fairness standard is it sufficient for the Commission to allege that the conduct is ongoing? We would suggest not for two reasons.

[198] First, since this case concerns an SOC which has, at its heart, interactions on the Bloomberg chatroom. The Commission alleges that even passive members of the chatroom are liable for the actions of those who are active. This means a member of the chatroom who has been passive may well not know when the last interaction on the chatroom took place or even if it took place. Nor indeed might a respondent which may have remained a member but did not log in. It would be unfair for the burden to shift to those firms which might have knowledge of their own conduct but cannot be assumed to have knowledge of conduct of other firms whose manifestations might pull them into the SOC on a later date than they could reasonably be aware of.

[199] Secondly, there is reason to be sceptical about the Commission's ongoing conduct claim. Although the December affidavit was filed in 2017, and sets out 85 manifestations, the last relied on occurs in November 2013. One might reasonably expect if the conduct had continued beyond that date, the Commission would have listed at least some manifestations to demonstrate this, knowing that prescription had already been raised by some of the respondents in response to the February affidavit.

[200] Moreover, from the referral it appears that time between the "manifestation" and the payment may be brief. In the February affidavit the Commission suggests

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[74] *Pickfords CT* (note 64 above) para 93.

that the gap between conducting a transaction and settlement is no more than two days, unless it is a forward transaction. But even a forward transaction is it appears settled *"...at least after two days"*.[75] If each collusive transaction is concluded by the act of payment, then the conduct in this case may have ceased within a few days after the date of the last manifestation. This suggests that unless the Commission has more information available to it the conduct may have ceased by late November or December 2013.

[201] In these circumstances we consider that fairness dictates that the Commission should either plead the last date of the manifestation it relies on or otherwise set out what facts it relies on for the allegation that the conduct still is ongoing.

**Wrong trader or no longer trader**

[202] Certain of the respondents were represented by traders who were employed by them (such as Investec), whilst others had a looser form of association with them. We know from the referral that certain traders allegedly represented more than one bank whilst others represented several at different times.

[203] Several of the respondents make the point that the trader who is alleged to have acted on their behalf no longer acted for them at the time of the alleged attributed instances or acted for them at a time when the particular instance alleged must have predated the referral.

[204] Thus one Jason Katz appears to have acted for a number of different respondents at different times.[76] Another trader, Christopher Hatton, is alleged in one paragraph of the February affidavit to have represented HBEU (14), but in the same paragraph he is also said to have represented Credit Suisse (11).[77]

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[75] See para 31 of the February affidavit, Record p21.
[76] See the February affidavit where it is alleged that Katz acted for BNP Paribus (para 45.2.5) then it is alleged that at some point during the period 2007 to 2013 he represented Standard New York and Barclays (Para 45.2.6 and 45.3.4), Record p30.
[77] See para 45.5.3 of the February affidavit, also para 45.3.3, Record p35.

In its exception HBEU (14) alleges that these allegations are contradictory as Hatton could not have acted for both at the same time.[78] This of course is a question of fact. It is not self-evident that he could not have acted for both and so this is a matter best decided at trial. Nor is it possible to determine, as HBUS (19) requires us to find in the case of Hatton, that the conduct was time barred because Hatton's actions were last alleged to have taken place more than three years prior to the earliest possible date of initiation.[79] This as we explained earlier in relation to prescription is not an issue we can decide now.

[205] This does not mean that the respondents are not entitled to some more particulars on the relationship that existed between the banks and their traders. The chatroom has now become the centerpiece of the conspiracy through the communications of traders. As we understand the Commission's case, it is the activities of the trader that link the bank that employed or retained them to the conspiracy. The Commission also alleges that even passive membership of the chatroom at the relevant time constitutes participation in the conspiracy. Thus, it is reasonable, if the Commission alleges that the same trader at the same time acted for more than one respondent, to either clarify this issue or correct it. What links the trades of a trader, who at the same time is acting for more than one principal, to the trades of a particular bank? Second, where a trader ceased to be retained or employed by a bank during the conspiracy, the Commission should indicate on what basis the bank remains liable beyond that date.

[206] Beyond requiring this clarity, it is premature to determine whether allegations made out concerning specific traders are contradictory or inconsistent.

**Exceptions dismissed**

[207] We can at this stage dismiss certain of the exceptions raised.

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[78] para 31, Record p804.
[79] See HBUS affidavit in answer to the application for joinder, para 37, Record p828. HBUS also alleges that Hatton ceased employment with it in October 2010 which would suggest on its version Hatton could not have been engaged in activity on its behalf on any of the dates suggested by the Commission as all those dates are after the date of his termination. Para 35.2, Record p828.

[208] Some respondents alleged that they could not be competitors because they were not authorized to trade in rands in terms of the Exchange Control legislation ('Excon'). They are correct that the referral is silent on this issue. However, this was not a necessary allegation for the Commission to have to make. If the particular respondents were trading rands in the chatroom, with some or more of the other respondents, then the fact that they may not have been authorized to trade in terms of Excon, is not a defence to collusion in competition law.

[209] If, however, this defence is raised because it makes trading impossible for the bank or less likely, then this can be raised as a defence on the facts. The failure of the Commission to deal with this in the referral does not make the referral excipiable as a matter of law.

[210] Next, several respondents argue that the Commission has failed to set out the respective facts on which it alleges that the conduct also constituted a concerted practice. The respondents who argued this point relied on dictum in the *Netstar* case where the Competition Appeal Court held as follows:

> *"No doubt in many cases the same evidence may be relied upon as pointing towards either an agreement or a concerted practice. However, sight should not be lost of the fact that they are different. The definition of an agreement extends the concept beyond a contractual arrangement. However, what it requires is still a form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement. Absent such an arrangement there is no agreement even in the more extended sense embodied in the definition. By contrast a concerted practice examines the conduct of the parties to determine whether it is co-ordinated conduct or they are acting in concert."*[80]

[80] Netstar (note 42 above) para 25.

[211] In a subsequent case, *Omnico*,[81] decided after *Netstar*, a similar point was argued at exception stage. We held there that there would be sufficient compliance with the *Netstar* ruling:

> *The Commission appears to rely on both. Case law suggests that if a concerted practice is relied on it needs to be specifically pleaded. For instance, parties may commence with an agreement but later follow on conduct may constitute a concerted practice. Sometimes the difference may be theoretical and the distinction elides. Nevertheless, due to the case law this difficulty must at least be grappled with by the pleader when seeking to allege both as the Commission has in the present referral. It is unclear if the conduct that is relied on for the concerted practice is the same as that for the agreement or something different or additional thereto. This requires further particularity and we address this in paragraph 2.5 of our order. If the allegation of a concerted practice relies on facts that differ from those relied on for the agreement these should be set out.*[82]

[212] We will follow the same approach in this matter and accordingly have directed the Commission to indicate whether it relies on the same facts to make this conclusion as it does for the agreement, and if not, and it relies on other facts, to set these out.

[213] It is worth noting that in in European law not much is made of the distinction between an agreement and a concerted practice. For instance, the then Advocate General Reischl stated in an opinion: *"there is little point in defining the exact point at which an agreement ends and concerted practice begins."*[83] Whish says legally nothing turns on the distinction between the two; the important distinction is between collusive and non-collusive behavior. He points out that the European Commission has alleged in cases that even if the contacts between competitors do not amount to an agreement they can still be

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[81] *Omnico (Proprietary) Limited and others v Competition Commission; In re: Competition Commission v Pienaar and others* [2013] 1 CPLR 342 (CT).
[82] *ibid* para 29.
[83] *See* cases 209/78 *etc Van Landewyck v Commission* EU:C1980:248, p3310. Quoted in Whish (note 67 above) p104.

characterised as a concerted practice.[84] This is the approach the South African Commission has adopted in this case.

[214] It is certainly legitimate for the Commission to allege that the same facts might give rise to either conclusion of law. Certainly, there is not a great deal of daylight between the expansive conception of an agreement as defined in the Act, which ranges in the continuum of consensus, from a contract to an *"...understanding"* and the definition of a *concerted practice* which is defined as:

> *"co-operative or coordinated conduct between firms, achieved through direct or indirect contact., that replaces their independent action, but which does not amount to an agreement."*[85]

[215] However, if the Commission is not relying on the same facts for both, the respondents are entitled to be alerted to this.

**Strike out**

[216] The Commission has attached three plea agreements, concluded in a District Court in the United States, as annexures to the December affidavit. In the plea agreements the three banks (JP Morgan Chase & Co, Barclays Plc, and Citicorp) pleaded guilty to contravening section 1 of the Sherman Act (the United States equivalent of our section 4(1)(b)). In the agreements the banks plead guilty to fixing the Euro-dollar exchange rate, using inter alia, the mechanism of a chatroom.

[217] Much of the affidavit on this aspect contains selected quotations from the plea agreements. The Commission alleges that the *"... collusive practices* [ in this case] *were not limited to trades in the USD/ ZAR pairing.*[86] It goes on to allege that *" in recent years, wide-spread collusive practices by traders on the FX Spot market have come to light."*

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[84] *See* Whish (note 67 above) p104.
[85] S1 of the Act.
[86] December affidavit para 145, Record p123.

[218] What the Commission is implying is that if this practice was happening with the USD and Euro pair, through the medium of chatrooms, and the banks have admitted to this in the United States, is it not likely that this has happened here?

[219] This is what is known as similar fact evidence. This type of evidence can be highly prejudicial simply because what appear to be similar facts are not.

[220] The third and fourth respondents (collectively the JP Morgan respondents) argue precisely this point.

[221] They say that neither the currency pair nor the individuals concerned in the US case, are the same as in the present case. Accordingly, they argue, there is no basis to introduce this as similar fact evidence. Instead it is vexatious, irrelevant and prejudicial. They seek an order to have all these paragraphs in the December referral struck out. [87]

[222] The Commission did not do much to counter this in their heads of argument. However, in oral argument Mr. Ngcukaitobi turned the tables on the JP Morgan respondents, accusing them of bringing a vexatious striking out application.

[223] He argued that there were several reasons why the conduct was the same. The usage of the instant messaging platforms, the same trading strategies. But he argued that the inclusion of these paragraphs in the referral went beyond a reliance on similar fact evidence. He argued that the plea agreements were not limited to the euro/dollar currency pair. The settlement agreement contains the following admission:

> *"In addition to its participation in the conspiracy to fix, ... the EUR/USD currency pair exchanged in the FX Spot Market, the defendant through its currency traders and sales staff, also engaged in other currency trading and*

[87] *See* Third and Fourth Respondent's Notice of Objection, Record p483.

*sales practices in conducting FX Spot Market transactions with customers via telephone email, and/ or electronic chat …"* [Our emphasis]

[224] Mr. Ngcukaitobi said the Commission wanted to be able to cross examine the JP Morgan witnesses on what the other currencies were that it had admitted to in the US plea agreement.

[225] There is no provision in the Tribunal rules for striking out applications. Nevertheless, in terms of Rule 55 regard may be had to the High Court rules. Striking out applications have been granted in the past by the Tribunal but are upheld infrequently as these applications are more often tactical and are inimical to the less formal and more expeditious culture of the Tribunal's approach to pleadings. Nevertheless, there are cases where allegations are highly prejudicial to respondents who should still be entitled to the use of this procedure.

[226] In the present case reliance on a settlement agreement with one of the respondents in another jurisdiction is, at this stage of the proceedings, prejudicial to the third and fourth respondents and indeed to other respondents in this case given that they are alleged to be part of the same conspiracy.[88]

[227] While the fact of the plea agreement is not confined to the euro/dollar pair and refers to "other currencies" is correct, these other currencies are not named. Until further evidence is introduced in this case, the connection between the settlement agreement and the present pleadings remains tenuous.

[228] We accordingly strike out paragraphs 145 to 152 of the December affidavit.

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[88] Note that JP Morgan Chase (3) is one of the class of pure *peregrini* so the prejudice here would be limited to the reputational harm of a potential declaratory order if the Commission establishes the contravention.

**Joinder**

[229] The Commission seeks an order joining the 19th to 23rd respondents. It is common cause that none of these respondents were respondents in the original February referral. The Commission accepts that to join these respondents in the current matter it must apply to join them in terms of Rule 45 of the Tribunal rules.

[230] Each of the firms the Commission seeks to join, belongs to the same corporate family and has a similar name to an existing respondent already cited in the February referral. From when the first exceptions were brought to the February affidavit, it became apparent that certain respondents would be taking the point that the Commission had *"got the wrong guy."* Since in the market place some of these firms are simply referred to by a common brand name, it may well be correct that there is confusion as to which entity in a corporate group was the one the particular trader represented in the chatroom. The Commission for this reason seeks to ensure that at least the "right guy" is joined as a respondent. Nevertheless, it has not elected to drop the case against the others in the group.

[231] Four out of the five respondents the Commission seeks to join, have opposed the joinder. One, Investec Bank Limited (22), does not oppose the joinder. We have therefore made an order to join them. (See paragraph 4.1 of the order).

[232] Mr. Cockrell, who argued the joinder issue on behalf of the other four respondents, said in order for the Tribunal to order joinder we have to be satisfied on four issues: (i) whether we have jurisdiction over the respondent; (ii) whether the complaint has been properly initiated against the respondent; (iii) that the complaint has not prescribed; and (iv) whether prima facie a cause of action has been made out.

[233] Of these four, one BANA (21), is a local *peregrinus*, as it has a representative office in South Africa. (BANA (21) is the parent corporation of BAMLI (1)).

[234] The remaining three HBUS (19), MLPFS (20) and Credit Suisse Securities (23) are pure *peregrini*.

[235] Of Mr. Cockrell's four issues, items (ii), (iii) and (iv) cannot be determined now until we have received the Commission's response by way of the further particulars ordered. For this reason, we have taken the decision to defer the question of joinder pending the submission of the further particulars we have ordered. (See paragraph 4.2 of the order).

[236] We can however rule on the issue of jurisdiction, since this is a matter we have already decided in relation to the other respondents already joined. Insofar as the four respondents may otherwise be competently joined (i.e. in relation to items (ii),(iii)and (iv)) then the relief granted has to be consistent with the treatment of the other *peregrini* respondents.

[237] The nature of the relief granted in respect of BANA (21), is not subject to any limitation save for the extent of any administrative penalty as it is a local *peregrinus*. (See paragraph 3.3.2 of our order). The relief granted in respect of the other three viz. HBUS (19), MLPFS (20) and Credit Suisse Securities (23) is limited to only the relief provided for in paragraph 3.3.1 of our order.

[238] We leave open, as this issue has not been argued, whether the 3.3.1 relief may still be granted against these three respondents if they cannot otherwise be competently joined in respect of (ii) and (iii).[89]

**Postscript on the initiation problem**

[239] Although we have deferred deciding this point now, because until particulars are furnished we don't know if we need to decide it, what this case does raise is the

[89] Of course, if item (iv) the cause of action is not made out then this has implications for the entire case against all the respondents not just those sought to be joined.

complications that arise if the initiation statement is not used as the starting time in respect of all respondents allegedly party to the practice.[90] If the initiating statement is the date of initiation for all the respondents; named and yet to be named, this difficulty is avoided. We believe this is one reason why the language of section 67(1) is worded as it is. It states that *"A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. "*

[240] Notably the provision refers to initiation in respect of a 'practice' not a 'firm'. This is to be contrasted with choice of language in the other limitation of action provision, section 67(2). Here there is a reference to a *firm.* It states: *"A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section relating substantially to the same conduct."*

[241] The choice of the legislature to confine section 67(1) to a practice without reference to a firm as it does in section 67(2) is significant.

[242] Nor is the reason for this differential treatment simply because one occurs at initiation stage and the other at referral. Rather, it reflects a distinct policy choice for the differential language and that we suggest is informed by the temporal logic of the system and its informational asymmetries.

[243] We explain it in this way.

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[90] At present the law is unclear on three issues.
Is it sufficient for the Commission to allege in the initiation as it did in April 2015 that there was a single overall conspiracy and mention the respondents then known to it but not all of them? The *Loungefoam* case [*Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others and two related review applications [2011] 1 CPLR 19 (CAC)*] suggests it is not but the Commission disputes this interpretation of the decision.
Further, *Loungefoam* may need to be reconsidered in the light of the SCA's later *Omnia* decision [*Competition Commission v Yara (SA)(Pty) Ltd (784/12) [2013] ZASCA 107 (13 September 2013)*] where the distinction between the consequences of an initiation and a referral is given a much clearer explanation.
Third, in *Loungefoam* the linguistic distinction between two limitation on action provisions in section 67 is not discussed and may well not have been brought to the court's attention.

[244] When the Commission initiates it goes without saying it has commenced rather than concluded its investigation. Granted it must have some appreciation that a prohibited practice has occurred, but this does not mean that it knows with precision the identity of all the participants. This is particularly the case in cartels whose frequently subterranean character means that some participants may be known, but others not.

[245] For instance, it may be that at the initiation stage the Commission has evidence of communications between some but not all of the participants in what may be a cartel. This may be the case if communications are, as alleged in this case, sometimes bilateral or sometimes multilateral. If the Commission has in its possession at initiation stage only some emails or documents from some participants, it may have a reasonable belief from that series of communications that a prohibited practice may have taken place and hence an initiation is warranted. But due to the fact that it does not at that stage know the identity of all the other participants it might assume that those initially named constitute the full universe of the cartel. But later during the investigation it might discover that the cartel had more members than initially there appeared to be.

[246] This is not the only problem. Even if, at the moment of initiation, the identities of all the allegedly colluding parties are known to the Commission generally, they may not be known specifically; i.e. they may not be known with the precision required for a citation in a referral. For instance, different firms in the same group may generally be known by the same brand name, but despite this be incorporated differently. For instance, the 3rd and 4th respondents both have the name, JP Morgan Chase. Only the anodyne appendage to the brand name ('& CO' as opposed to 'Bank N.A.') would alert an investigator early enough to the distinction. Moreover, since these appendages are not the names commercial players use in ordinary parlance when communicating amongst themselves, the distinction may not manifest itself until a much later stage of the investigation. Thus, the Commission at initiation stage may well not yet know that it is dealing

with an entity that it part of a similarly named corporate family, and if so, which of the entities are implicated.

[247] If the initiation against a firm only occurs when it is later named, or correctly named in an initiation; or deemed to be named (the latter in the case of a tacit initiation) this may have the anomalous result that some firms in the cartel assume liability (including civil) because they had the misfortune to be named first, whilst others, fortuitously only identified later, escape the three year time limit. We find no policy reason to interpret the Act to allow such a result, especially when as we have shown the language of the section does not suggest it either.

**Part 4**

**Declaratory Order**

[248] The final application we must consider is Investec's application for a declaratory order to censure the Commission for the manner in which it has prosecuted this matter.

[249] As background before we consider the terms of the order sought it is important to set out the legal position in relation to costs in the Tribunal. In the leading case on the point, *Pioneer*,[91] a merger case, the Constitutional Court held that insofar as costs before the Tribunal were concerned each party was responsible for its own costs:

> *"The purpose of the Act is well served in this reasoning. Considering that the protection of public-interest concerns will seldom be advanced by an opposing party at the Tribunal stage in the majority of cases, a thorough defence of the public interest and the protection of the Commission's decision-making independence necessitates the preservation of the "own costs" rule at the Tribunal stage. The correct interpretation is therefore that the Tribunal has no powers to award costs against the Commission under the Act."*[92]

[250] Investec accepts that this is the legal position but argued that this does not preclude the Tribunal from giving a declaratory order of censure and that there is case law that suggests that in other instances such an order is competent and has been given if it is "fundamentally ancillary to proceedings" before the Tribunal."[93]

[251] In its Notice of Motion Investec framed the order in this way:

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[91] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others 2014* (2) SA 480 (CC) (18 December 2013).
[92] *ibid* para 40.
[93] Investec relied upon the dicta in *Simon NO v Air Operations of Europe* 1999(1) SA 217 (SCA) at 231B-C.

*"Declaring that the Commission's Conduct in prosecuting this referral is vexatious and unreasonable"*

[252] In its replying affidavit, Investec submitted that the declarator *"is intended to mark the conduct of the Commission up until this point in the referral and to censure it"*

[253] In Investec's heads of argument it summarizes its position in the following terms:

*"All that the Tribunal is being asked to determine is whether the Commission's conduct since February 2017 in prosecuting this referral has been vexatious or unreasonable".*

[254] In support of its application, Investec reprised the history of the Commission's prosecution in detail. Since this history has been set out in our chronology section it is not necessary to repeat it here. Investec relies on this history to come to the following conclusions about the Commission's conduct: [94]

254.1 The Commission had not approached the referral responsibly;

254.2 It had adopted positions on various issues, only to back track on them later;

254.3 It had caused the respondents significant prejudice because of its erratic behaviour;

254.4 The respondents have had to incur substantial unnecessary costs in preparing for hearings that cannot proceed because of the Commission's inexplicable actions;

[255] In the light of this conduct Investec submitted the Commission had been unreasonable and vexatious in the manner it was prosecuting the referral. It argued that the Tribunal should grant the declaratory order because (i) it would have a disciplining effect on the Commission; and (ii) it was important to mark the inappropriateness of the Commission's conduct because if the conduct

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[94] Investec Declarator Application, p13-18, para 50-78. See also Investec HOA para 66-90 p273-281.

persisted and the matter was appealed, Investec may seek a cost order against the Commission before the CAC. If the Commission had been censured for its conduct during the Tribunal proceedings this would be a relevant consideration for the appeal court to have regard to in considering costs.[95]

[256] The Commission argued that: (i) the Commission's conduct did not meet the test for vexatious conduct established by the ordinary legal meaning of the phrase owing to an absence of mala fides; (ii) the declaratory order would undermine the own costs rule before the Tribunal; and (iii) it would be premature to decide the declarator prior to a determination of the merits of the case.[96]

[257] Investec's response to this argument was that conventional cost awards are frequently awarded along the path of litigation as various interlocutory and other proceedings are dealt with. It submitted that when costs are granted in such matters, the cost order does not purport to address the merits of the main matter but is particular to the application in which they are awarded. Investec submitted that its declarator asks no more than such conventional cost awards.

[258] But the Commission argued that the relief sought in the notice of motion is framed in the broadest possible terms, seeking to censure the Commission in respect of all past conduct in relation to the referral and is not limited to the specific interlocutory applications.

[259] We agree with the Commission on this point.

[260] Investec, in all manifestations of its declarator, asks for a declaration that the Commission's conduct 'in' prosecuting the referral is vexatious and unreasonable. The repeated use of the word 'in' as opposed to 'whilst' suggests that the correct interpretation of the relief sought would be one that requires us

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[95] Investec June HOA para 94.2, Record p282

[96] We condoned the late filing of the Commission's answering affidavit as such was done in accordance with a timetable established as an exercise of the Tribunal's broad powers in terms of Rule 55 which was fair and ensured no prejudice accrued to Investec.

to censure not only the Commission's actions as they relate to the process of prosecuting its referral, but also its initial decision to prosecute. But the facts show that Investec does not complain of all the conduct of the Commission only certain of it. The relief sought and the mischief complained of are not consonant.

[261] But the breadth of the relief is not the only problem with it. The timing of the application is a problem as well. The premature declaration of vexatious and unreasonable prosecution has far reaching consequences in the context of a case that is still ongoing. Such relief should only be considered at the end of the case and after the merits have been decided, lest it chill the Commission's conduct in its further prosecution of the matter which would be against the public interest. Nor is it correct to argue that an order of this nature is akin to a cost order. Its rarity suggests it is a far graver expression of censure than a costs order. Unlike an interlocutory costs order which can be focused on the conduct at issue, the declaratory order is by its very nature sweeping, because it has to conclude that conduct was vexatious, making the analogy inappropriate.

[262] In the circumstances Investec's application is dismissed.

[263] Our decision to dismiss the application at this stage does not preclude Investec from bringing such an application at the conclusion of these proceedings when it would be more appropriate to decide it with the benefit of the full conspectus of the case before us. A ruling at this stage would be premature.

[264] Our finding on the issue means that we do not need to decide whether a declarator is consonant with the 'own costs' ruling of the Constitutional Court in *Pioneer* and what the correct test is when defining vexatious conduct, and so we do not address these issues further.

**Conclusion**

[265] In light of the above we make the order that follows.

## ORDER

**Definitions**

For the purpose of this Order the following terms have been defined:

*Complaint referral* means the application by the Competition Commission dated 15 February 2017 and as subsequently supplemented by the affidavits dated on 31 March 2017, 07 April 2017, and 20 December 2017.

*December affidavit* means the supplementary affidavit to the complaint referral filed on 20 December 2017.

*Excepting respondents* means Bank of America Merrill Lynch International Limited (1); BNP Paribas (2); JP Morgan Chase & Co (3); JP Morgan Chase Bank N.A (4); Australia and New Zealand Bank Limited (5); Standard New York Securities Inc (6); Investec Limited (7); Standard Bank of South Africa Limited (8); Nomura International PLC (9); Standard Chartered Bank (10); Credit Suisse Group (11); Commerzebank AG (12); Macquarie Bank Limited (13); HSBC Bank PLC (14); and HBUS (19); MLPFS (20); Bank of America National Association (N.A) (21); Investec Bank Limited (22); and Credit Suisse USA (23).

*Pure peregrini* means Bank of America Merrill Lynch International Limited (1); JP Morgan Chase & Co (3); Australia and New Zealand Bank Limited (5); Standard New York Securities Inc (6); Nomura International PLC (9); Macquarie Bank Limited (13); HBC Bank USA, National Association (N.A) (19); Merrill Lynch Pierce Fenner and Smith (20) and Credit Suisse Securities (USA) LLC (23);

*Local Peregrini* means BNP Paribas (2); JP Morgan Chase Bank N.A (4); Standard Chartered Bank (10); Credit Suisse Group (11); Commerzebank AG (12); HSBC Bank PLC (14); and Bank of America National Association (N.A) (21).

*Remaining excepting respondents* means all the excepting respondents other than the pure *peregrini*

Having heard the parties the Tribunal orders that:

**Part A (Exceptions)**

In respect of the exception applications brought by the excepting respondents in respect of the complaint referral:

[1] The applications for dismissal of the complaint referral, brought by the pure *peregrini*: Bank of America Merrill Lynch International Limited (1); JP Morgan Chase & Co (3); Australia and New Zealand Bank Limited (5); Standard New York Securities Inc (6); Nomura International PLC (9); Macquarie Bank Limited (13); HBC Bank USA, National Association (N.A) (19); Merrill Lynch Pierce Fenner and Smith (20) and Credit Suisse Securities (USA) LLC (23) are upheld, but subject to paragraph 3.3.1 below;

[2] Insofar as any of the remaining excepting respondents sought the dismissal of the complaint referral, such relief is dismissed, but subject to the alternative relief granted in paragraph 3 below;

[3] The applications for alternative relief and/or further particulars of the remaining excepting respondents are upheld in part, as follows;

3.1 The Commission must file a new referral affidavit to substitute for and replace all the complaint referral affidavits. This affidavit must be filed within 40 business days of this order;

3.2 The respondents will only be required to file their answers to the new referral affidavit; Answers must be filed within 20 days of service of the new referral affidavit;

3.3 The new referral affidavit must contain an amended notice of motion which provides as follows:

3.3.1 Any order for declaratory relief against the pure *peregrini* must include the proviso that such relief excludes the operation of sections 59 and 65 of the Act;

3.3.2 Any order for the imposition of an administrative penalty should be limited, in the case of local *peregrini*, to the respective firm's turnover in the Republic and exports from the Republic.

3.3.3 In the event that the Commission cannot allege the particulars set out in para 3.4.1 then any order against the local *peregrini* will be limited in the same way as it is to the pure *peregrini* in terms of paragraph 3.3.1.

3.4 The new referral affidavit must:

3.4.1 In the case of the local *peregrini* respondents set out the facts the Commission relies to allege that it was *foreseeable* that the impugned conduct would *have a direct or immediate, and substantial effect in the Republic*;

3.4.2 Confine the case to a single overall conspiracy (SOC), provided, subject to 3.4.3 below, that the Commission is not restricted from alleging that this may be founded on an agreement, arrangement or concerted practice;

3.4.3 Indicate whether the same facts are relied on for proof of the concerted practice or allege any different facts if they are not;

3.4.4 Allege whether its case for an SOC relies on proof of an express agreement or arrangement or whether this is an

inference based on facts; if the latter, allege in general terms what those facts are;

3.4.5 Provide each respondent with a date, or period. in which they are alleged to have joined the SOC or deemed to have joined the SOC;

3.4.6 Provide the facts that are relied on to prove that the particular respondent joined or had joined the SOC;

3.4.7 If the SOC has ceased;

3.4.7.1. provide what dates the SOC is alleged to have ceased;

3.4.7.2. what facts are relied on for establishing that the conduct had then ceased; and

3.4.7.3. whether all the respondents remained participants in the SOC on that date; and, if not, when the respective respondent/s exited.

3.4.8 If the SOC is still alleged to be ongoing;

3.4.8.1. what facts this is based on; and

3.4.8.2. Whether all the respondents are still part of it; if not, when the respective respondent/s exited;

3.4.8.3. In relation to the relationship between the respondent banks and their respective traders:

3.4.8.3.1. Is it alleged that some traders acted for more than one respondent at the same time? If so, details should be provided;

3.4.8.3.2. If a trader ceased to act for a respondent bank, did this end the respondents'

participation in the SOC or if not, on what basis is it alleged that the respondent's participation continued?

3.4.8.3.3. Is it alleged that all the traders named as participants in paragraph 40 the December affidavit were so-called active participants or were some so called passive participants;

**Part B (Joinder applications)**

[4] In respect of the application for joinder brought by the Competition Commission dated 12 January 2018, read with the December supplementary affidavit:

4.1 Leave to join the twenty second respondent (Investec Bank Limited) is granted;

4.2 Leave to join HBUS (19), MLPFS (20), BANA (21) and Credit Suisse Securities (23) is deferred for consideration pending the Commission's compliance with the requirements of paragraph 3, other than 3.3; and then only, in the event of such compliance, the relief sought in the Notice of Motion is to be limited as follows:

4.2.1 In the case of BANA to comply with 3.3.2; and

4.2.2 In the case of HBUS (19), MLPFS (20), and Credit Suisse Securities (23) as limited by the operation of paragraph 1 to only the relief provided for in paragraph 3.31.

**Part C (Strike Out)**

[5] In respect of the application for strike out brought by the third and fourth respondents:

5.1 Paragraphs 145 to 152 and corresponding annexures of the December supplementary are struck out and should not be included in the amended referral submitted in terms of 3.1 of this order.

**Part D (Declaratory order)**

[6] In respect of the application for a declaratory order brought by the seventh respondent (Investec Limited):

6.1 The application is dismissed.

**Part E (General)**

In respect of all the applications brought above:

[7] There is no order as to costs; and

[8] Condonation is granted in respect of any late filing.

**Mr Norman Manoim**

**Ms Yasmin Carrim**

**Ms Mondo Mazwai**

**12 June 2019**

**Date**

| | | |
|---|---|---|
| Tribunal case managers | : | Aneesa Ravat, Karissa Moothoo-Padayachie, Alistair Dey- van Heerden, Ndumiso Ndlovu, Andiswa Nyathi. |
| For the Commission | : | D Mpofu S.C, T Ngcukaitobi, A Hassim, F Hobden, H Drake, L Zikalala and I Kentridge *instructed by* Ndzabandzaba Attorneys. |
| For the first, twentieth, and twenty-first respondents | : | P Farlam S.C., P Ngcongo *and* M Mbikwa *instructed by* Webber Wentzel Attorneys. |
| For the second respondent | : | J Campbell S.C. *instructed by* Bowmans. |
| For the third and fourth respondent | : | M van der Nest S.C *and* D Turner *instructed by* Webber Wentzel. |
| For the fifth respondent | : | C Loxton S.C., R Pearse, *and* P Pillay, *instructed by* Cliffe Dekker Hofmeyr. |
| For the sixth and eighth respondents | : | A Subel S.C. *and* G Engelbrecht *instructed by* Herbert Smith Freehills. |
| For the seventh respondent | : | W Trengove S.C. *and* K Hofmeyr *instructed by* Edward Nathan Sonnenbergs. |
| For the ninth respondent | : | J Butler S.C. *instructed by* Faskens Attorneys. |
| For the tenth respondent | : | F Snyckers S.C. *and* A Msimang *instructed by* Webber Wentzel. |
| For the eleventh and twenty-third respondents | : | W Luderitz S.C. *and* G Marriot *instructed by* Werksmans Attorneys. |

| | | |
|---|---|---|
| For the twelfth respondent | : | R Bhana S.C. *and* L Sisilana *instructed by* Webber Wentzel. |
| For the thirteenth respondent | : | J Wilson S.C. *and* P Bosman *instructed by* Falcon & Hume. |
| For the fourteenth and nineteenth respondents | : | A Cockrell S.C. *and* C Avidon *instructed by* Baker McKenzie. |