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IN THIS ISSUE:

WAITING WITH BATED BREATH: A DETAILED ANALYSIS OF THE YARA AND LOUNGEFOAM MATTERS[1]

Introduction

The South African Competition Act 89 of 1998 (the "Act") has been in force for over a decade. Since its inception, the Competition Commission (the "Commission") and companies accused of contravening the Act have sought to battle out their differences before the Competition Tribunal (the "Tribunal"), the Competition Appeal Court (the "CAC") and, sometimes, even the Supreme Court of Appeal (the "SCA"). In the past year, however, there has been an unprecedented turn to the Constitutional Court (the "CC"), on issues ancillary to allegations of anti-competitive behaviour. In particular, three competition law matters have been argued before the CC (*Competition Commission v Senwes Limited* (CCT 61/11) [2012] ZACC 6 (12 April 2012) ("*Senwes*"); *Competition Commission v Yara South Africa (Pty) Ltd and Others* (CCT 81/11)

[1] A special word of thanks to Ann Boniwell and Craig Robinson for their valuable contribution to this commentary.

[2012] ZACC 14 (26 June 2012) ("*Yara*"); and *Competition Commission v Loungefoam (Pty) Ltd and Others* (CCT 90/11) [2012] ZACC 15 (26 June 2012) ("*Loungefoam*")), relating primarily to issues of jurisdiction and the scope of the Commission's powers to investigate and refer complaints of anti-competitive behaviour under the Act. It is these decisions which inform the content of this commentary.

The cases under discussion

This article will focus on the decisions in *Competition Commission v Yara South Africa (Pty) Ltd and Others* and *Competition Commission v Loungefoam (Pty) Ltd and Others* which deal with substantially similar issues, although the matter of *Competition Commission v Senwes Limited* is referred to briefly in the later part of this commentary.

Before embarking upon a more detailed analysis of the two cases, it bears mention that the legal proceedings in *Yara* date back to 2002, and in *Loungefoam* to 2007, with alleged unlawful conduct taking place in the preceding years. In the wake of a spate of procedural challenges, each seeking to preclude the jurisdiction of the competition authorities from deciding the merits of the case, the Commission has defended the exercise of its authority before a plethora of fora, unfortunately with inconsistent results. It is surprising that some ten years after the complaint in *Yara* was lodged, the fundamental question of jurisdiction has still not yet been finalised. Indeed, a general sense of disappointment has lingered in the air since June 2012 when the CC dismissed the Commission's applications for leave to appeal in *Yara* and *Loungefoam* on purely technical grounds. This leaves open the fundamental issue of jurisdiction, save for *obiter* remarks made by the CC with which the legal fraternity has been left to grapple.

Background

In order to canvass adequately the issues, which continue to vex the competition authorities and practitioners alike, it is necessary to set out each of the decisions of *Yara* and *Loungefoam* in particular detail.

The Yara matter[2]

Facts

In November 2002, Nutri-Flo CC and Nutri-Fertilizer CC ("Nutri-Flo") lodged a complaint with the Commission against Sasol Chemical Industries (Pty) Ltd ("Sasol"), a manufacturer and supplier of nitrogen-based fertiliser. This complaint was not referred to the Tribunal because of a lack of sufficient evidence.

On 3 November 2003, Nutri-Flo lodged a second complaint, comprising a Form CC1 (the prescribed form on which complaints are submitted to the Commission) and a supporting affidavit deposed to by Mr Lyle. This affidavit was prepared by Nutri-Flo in support of an application for an urgent interim interdict to prevent Sasol from increasing the price of certain products that it supplied to Nutri-Flo, which application was subsequently withdrawn. Within Form CC1, which requires a complainant to identify the firms to which its complaint relates and to insert a description of the conduct complained of, Nutri-Flo stated:

> "The respondents (Sasol) have imposed price increases in respect of raw materials it supplies to the complainants, to such an extent as to render its continued operation unviable and to constitute various prohibited practices as amplified in the affidavit attached hereto."

Notably, no firms apart from Sasol were identified on Form CC1. However, in the attached affidavit, the following statements were made in respect of the relationship between Sasol, Yara South Africa (Pty) Ltd (previously Kynoch Fertilizer (Pty) Ltd) ("Yara") and Omnia Fertilizer Limited ("Omnia"), the latter two companies also being producers, importers, distributors and suppliers of fertiliser products:

[2] The background set out in these paragraphs has been taken from the Tribunal's reasons and order in *Competition Commission v Yara South Africa (Pty) Ltd and Another, In re Competition Commission v Sasol Chemical Industries and Others* (31/CR/May05) [2010] ZACT 15 (24 February 2010), *Yara South Africa (Pty) Ltd v Competition Commission and Others, Competition Commission v Sasol Chemical Industries Ltd and Others, Omnia Fertilizers v Competition Commission* (93/CAC/Mar10, 94/CAC/Mar10) [2011] ZACAC 2 (14 March 2011).

> "47. KCL and Urea are imported by a cartel ('the cartel'), of which SASOL is a member and which cartel collusively controls the price at which these products are sold in the local market. The other members of the cartel are the Third Respondent [Yara] and the Fourth Respondent [Omnia].[3]
>
> 53. Although Urea and KCL are not produced locally, the importation of these products by the cartel, which exclusively controls the prices, collusively, of these products in South Africa, gives SASOL considerable market power in relation to these products.
>
> 54. The collusive dealings between members of the cartel to fix the price of Urea and KCL is evidenced from what is stated herein."

In May 2005, the Commission referred the complaint to the Tribunal, alleging that the complaint by Nutri-Flo was against Sasol, Omnia and Yara collectively. The complaint referred to the Tribunal included abuse of dominance complaints against Sasol and, as against all three respondents, allegations of cartel conduct in contravention of section 4(1)*(b)* of the Act.

In June 2005, Sasol and Omnia launched an application to the CAC to review and set aside the referral. Omnia contended in both its replying affidavit and heads of argument that Nutri-Flo had not submitted a complaint against it and, consequently, the allegations of collusive conduct could not have been validly investigated and referred. Although it did not pursue this line of argument at the hearing, the application was nevertheless dismissed by the CAC.[4]

Sasol and Omnia subsequently filed exceptions to the Commission's referral in July 2006 on the basis that, among other things, the referral lacked particularity. In November 2006 and March 2008, the Commission made application and was subsequently granted leave to amend its referral papers. The wording of the referral relating to a contravention of section 4(1)*(b)* subsequent to the 2008 amendment was as follows:

[3] The allegations were in fact made against Nitrochem, a wholly owned subsidiary of Omnia at the time, which is now a dormant entity with its operations run by Omnia.

[4] This factual background is referred to in paragraph 13 of the Commission's submissions to the CC.

> "8. In its complaint Nutri-Flo alleged that the respondents have divided the market for LAN that it identifies, and that they have colluded to keep the price at artificially high levels. In addition, Nutri-Flo alleged that the respondents have in similar manner colluded over the prices of certain fertilizers, namely Urea, Potassium Chloride (known as Potash, but also known as KCL and MOP), Di-Ammonium Phosphate (known as DAP) and Mono-Ammonium Phosphate (known as MAP).
>
> 9. Moreover, in its complaint, Nutri-Flo contended that Sasol, while dominant in the market for the supply of LAN and ANS, has committed an abuse of its dominant position by charging excessive prices for LAN and ANS."

In May 2009, the Commission and Sasol concluded a consent and settlement agreement in terms of which Sasol admitted the contravention of section 4(1)*(b)* of the Act and agreed to pay an administrative penalty in the amount of R250 680 000. More particularly, Sasol admitted that:

- a meeting was held between employees of Sasol, Omnia and Yara in 2001 at which pricing formulae from which base prices would be derived for fertiliser products sold by the parties were agreed to, as well as the range of discounts they would offer off the base prices;
- further meetings were held between 2001 and 2005 to address instances of deviations by any parties to the agreement; and
- committees such as the Import Planning Committee ("IPC") and Nitrogen Balance Committee ("NBC") facilitated the continued application of the pricing agreement.

The trial proceedings involving Omnia and Yara were set down for hearing in December 2009. In its response to the respondents' requests for trial particulars, the Commission included details of the meetings between the parties, as admitted by Sasol. The respondents did not object to the Commission's response. Allegations concerning the meetings were also included in the Commission's witness statements filed in October 2009. However, this time Yara raised concerns about the content of the witness statements, insofar as they related to issues that were considered

to travel beyond the scope of the amended referral, while Omnia reserved its right to challenge the admissibility of the information.

At the same time, the Commission filed a notice of intention to amend its referral, in terms of which it sought to introduce allegations of meetings held between 2001 and 2006 facilitated by the IPC and NBC, as well as allegations of specific instances of collusive conduct by the respondents.[5] These allegations were supported by further particulars and additional witness statements.

In response, Omnia and Yara filed notices objecting to the Commission's amendment on the basis that, *inter alia*, the proposed amendments would extend the referral well beyond the scope of the second Nutri-Flo complaint. In addition, Omnia simultaneously launched a counter-application in terms of which it contended that the Commission's referral was not permissible in law. Both applications were heard on 2 December 2009 and the trial was postponed *sine die*.

The thrust of Omnia's counter-application was that Nutri-Flo's complaint was limited to allegations of an abuse of dominance by Sasol, and did not extend to the content of the section 4 complaints, which the Commission had purported to refer to the Tribunal. In addition, even if the complaint did fall within the ambit of section 4,[6] Nutri-Flo had expressly stated that it intended to be a complainant only in respect of the three alleged abuses of dominance by Sasol, namely, exclusionary pricing, excessive pricing, and price discrimination in contravention of sections 8 and 9 of the Act. Omnia emphasised that Nutri-Flo's intention ought to have circumscribed the Commission's referral.[7]

[5] These were concerned with information exchanges, the construction of the market and, ultimately, compliance with pricing policies that were adopted collusively; and conduct connected to tenders for the supply of material in relation to exports.

[6] Omnia conceded that reference was made by Nutri-Flo (in Mr Lyle's affidavit) to a cartel consisting of Sasol, Omnia and Yara in respect of imports of potash and urea, which controlled or fixed prices, as part of the background to its abuse of dominance complaints against Sasol.

[7] Tribunal's reasons and order dated 24 February 2012 at para 26.

Decision of the Tribunal

The Tribunal found that the Nutri-Flo complaint in Form CC1 *did* contain allegations of section 4 contraventions and that the Commission was both empowered and enjoined to investigate and refer these, irrespective of Nutri-Flo's intention, without initiating a fresh complaint. Relying on the CAC judgment in the *Glaxo Wellcome* case,[8] the Tribunal found that all the Commission had to demonstrate was that "*the complaint must be cognizably linked to particular prohibited conduct or practices and that there must be a rational or recognizable link between the conduct referred to in a complaint and the relevant prohibition in the Act*". Accordingly, the Tribunal dismissed the counter-application on the basis that the link between the section 4 referral and the conduct described in Nutri-Flo's Form CC1 was abundantly clear.[9]

The Tribunal went even further to say that, even if it were the case that the Commission's referral did not contain allegations of section 4 contraventions at the time it was made to the Tribunal, this would not preclude the Commission from seeking an amendment at a later stage of the proceedings in order that the complaint be fully ventilated.[10] The Tribunal also granted the Commission leave to amend its referral affidavit by the insertion of additional paragraphs which included allegations of specific instances of collusive conduct by the respondents. Omnia and Yara appealed this decision to the CAC.

Decision of the CAC

Having heard the arguments raised by either side, the CAC crystallised the question to be determined by it as follows:

> "The enquiry . . . entails an examination of what it is that constitutes the Nutri-Flo complaint, or, . . .what the ambit of the complaint was. The result of such an enquiry should . . . also answer to

[8] *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002) at para 16.

[9] Tribunal's reasons and order dated 24 February 2012 at paras 43 and 44.

[10] Tribunal's reasons and order dated 24 February 2012 at para 18.

> whether the particulars contained in the proposed amendment are particulars of the Nutri-Flo complaint and what causes of action could the Commission properly refer to the Tribunal as constituting the Nutri-Flo complaint."[11]

In addressing this question, the CAC drew a distinction between a situation where a member of the public intends to submit a complaint, the details of which must be set out in the prescribed Form CC1, and where a person merely intends to submit information concerning prohibited conduct without the intention of submitting a complaint, which may be done in any manner or form.

The CAC found that the Nutri-Flo complaint contained no mention of Yara and Omnia; nor was there any statement of conduct by Yara or Omnia in Form CC1 that could be linked to a section 4(1)*(b)*(i) prohibited practice. The CAC thus held that it could find no complaint on Form CC1 relating to collusion by Sasol, Omnia and Yara over the prices of fertiliser. These facts led the CAC to conclude that it was not Nutri-Flo's intention to submit a complaint against Omnia and Yara,[12] but that its complaint related to Sasol alone.

In reaching its decision, the CAC recognised that Form CC1 is not the only document that may contain details of a complaint, as the form provides for the attachment of various documents. With reference to Mr Lyle's affidavit, the CAC stated that it served to amplify the complaint set out in Form CC1, and pointed out that Mr Lyle had specifically stated that no relief was sought against Omnia and Yara. In addition, it was noted that Omnia and Yara were referred to in only three paragraphs of Mr Lyle's affidavit. The CAC accordingly found that Nutri-Flo intended to submit information to the Commission relating to cartel activity and collusion by Sasol, Omnia and Yara (in order to demonstrate Sasol's dominance and the limitations on Nutri-Flo in relation to price increases by Sasol), but did not intend this information "*to constitute a distinct complaint in the sense of a separate cause of action within the complaint; as opposed to further information*

[11] CAC judgment at para 16.

[12] *Supra*, 25.

concerning the initial complaint".[13]

At paragraph 37 of its judgment, the CAC referred to the SCA judgment in *Woodlands*, where it held:

> "The problem is that there were no facts that could have given rise to any suspicion that others were involved [in the alleged prohibited conduct]. A suspicion against some cannot be used as a springboard to investigate all and sundry. *This does not mean that the commission may not, during the course of a properly initiated investigation, obtain information about others or about other transgressions. If it does it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.*"[14] (My emphasis.)

The CAC, however, made the point that, if it appears from Form CC1 and accompanying statements that no complaint lies against a particular party, such a party may assume that it is not a true party to the proceedings, and it is therefore improper to bring such a party within the ambit of the complaint either by way of a referral or an amendment thereto.[15] A further point was made that the Act does not provide for the amendment of a complaint.

In conclusion, the CAC found that the allegations relating to cartel conduct and collusion did not form *facta probanda* relevant to the complaint, and that the Commission was not entitled to refer to the Tribunal any complaint or particulars of any complaint other than those relating to the complaint submitted and specifically contemplated by Nutri-Flo.[16] Accordingly, the appeal was upheld, the application for amendment was dismissed, and it was declared that no complaint was pending against Yara and Omnia.

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[13] *Supra*, 27–30.

[14] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA); [2010] ZASCA 104; 105/2010 (13 September 2010) at para 36.

[15] *Yara South Africa (Pty) Ltd v Competition Commission and Others, Competition Commission v Sasol Chemical Industries Ltd and Others, Omnia Fertilizers v Competition Commission* (93/CAC/Mar10, 94/CAC/Mar10) [2011] ZACAC 2 (14 March 2011) at para 38.

[16] *Supra*, 39.

Application to the CC

In response to the CAC's decision, the Commission initially filed an application to the CAC for leave to appeal to the SCA. However, prior to the application being heard, application for direct access to the CC was made by the Commission on the basis that the legality of any exercise of public power (in this case the Commission's powers of investigation and referral under the Act) was a constitutional issue. The Commission further submitted that the balancing of the respondent's right to a fair hearing and the public interest in having prohibited conduct adjudicated by the Tribunal was a further constitutional issue which conferred jurisdiction on the CC.[17] This application was dismissed by the CC and is discussed in detail below.

The Loungefoam matter[18]

This matter related to substantially the same questions of law and due process canvassed under *Yara* above. In particular, in *Loungefoam*, the Tribunal, and on appeal the CAC, was asked to consider whether the Commission could amend its referral to the Tribunal to include parties and complaints not referred to in the original complaint. As was the case in *Yara*, subsequent to the decision by the CAC, application was made by the Commission for leave to appeal directly to the CC, bypassing the SCA as the appropriate court of appeal. This application was dismissed on the same day, and on substantially the same grounds, as that in *Yara*.

Facts

On 25 May 2007, the Commission received a letter from Mr Carelse of Foaming Concepts (Pty) Ltd in which he alleged anti-competitive conduct in respect of the supply of chemicals used to produce flexible polyurethane foam (or block foam), used in the furniture and bedding industry.

[17] Commission's affidavit in support of application for leave to appeal at para 69.

[18] The background set out in these paragraphs has been taken from *Competition Commission v Loungefoam (Pty) Ltd and Others, In re: Competition Commission v Loungefoam (Pty) Ltd and Others* (103/CR/Sep08) [2010] ZACT 39 (8 June 2010) and *Competition Commission v Loungefoam (Pty) Ltd and Others* (CCT 90/11) [2012] ZACC 15 (26 June 2012).

Neither the participants to the alleged conduct nor the particular provisions of the Act were referred to in the letter.[19]

A complaint was subsequently initiated by the Commission on 3 September 2007 against Loungefoam (Pty) Ltd ("Loungefoam") and Vitafoam SA (Pty) Ltd ("Vitafoam") for engaging in prohibited restrictive horizontal practices and an abuse of dominance. More specifically, Form CC1 identified the anti-competitive conduct as involving:

> "[p]rice fixing and dividing markets by allocating customers in contravention of section 4(1)*(b)*(i) and 4(1)*(b)*(ii). Exclusionary acts, inducement, predatory pricing and buying up scarce resources in contravention of section 8*(c)*, 8*(d)*(i), 8*(d)*(iv) and 8*(d)*(v)".

Neither Form CC1 nor the initiation statement provided further information or detail on the market under investigation.

Stemming from documents obtained as part of the investigation process against Loungefoam and Vitafoam, the scope of the investigation process was widened on 27 November 2007, when the Commission initiated a separate complaint relating to the same conduct, but against additional parties, including Feltex Ltd ("Feltex").[20] The Commission's initiation statement referred to a restraint clause in the sale of business agreement between Feltex and Loungefoam and to a "Foam Forum" in which Loungefoam and Vitafoam allegedly colluded with other parties.

On 26 May 2008, the Commission initiated a further complaint to include Steinhoff International Holdings (Pty) Ltd ("Steinhoff International") and Kap International Holdings (Pty) Ltd ("Kap"), as a result of their respective shareholdings in some of the entities under investigation, which the Commission alleged appeared to have orchestrated the collusive conduct

[19] This background is included in paragraph 8 of the Commission's submissions to the CC.

[20] It is relevant to point out that the Feltex foam business in question was in fact operated by Feltex Holdings (Pty) Ltd and not Feltex Ltd.

complained of.[21]

In September 2008, the Commission referred a consolidated complaint against Loungefoam, Vitafoam, Feltex Holdings (Pty) Ltd ("Feltex Holdings"), Steinhoff International and Kap to the Tribunal in terms of section 51 of the Act, making allegations of conduct in breach of section 4(1)*(b)*(i) by Loungefoam and Vitafoam[22] and conduct in breach of section 4(1)*(b)*(ii) by Loungefoam and Vitafoam[23] and Loungefoam and Feltex Holdings.[24]

While admitting their participation in the conduct alleged to be in contravention of sections 4(1)*(b)*(i) and 4(1)*(b)*(ii), Loungefoam and Vitafoam contended that this conduct was lawful by virtue of section 4(5),[25] as they were constituent firms within a single economic entity, being Steinhoff International, and thus exempt from the application of section 4(1) of the Act. In addition, Loungefoam and Vitafoam denied that they had colluded with Feltex Holdings to divide the bedding and furniture and automotive markets, stating that they operated in different markets

[21] It bears mention that on 30 March 2012 the Tribunal unconditionally approved a large merger between Steinhoff International and Kap. In paragraph 33 of the Tribunal's reasons for the decision, published on 15 August 2012, it is stated that despite allegations of market allocation between the parties in the enforcement proceedings, the Commission "*submits that it is unlikely that the proposed transaction will result in coordinated effects as the merger does not facilitate collusion in any manner*". The ease with which the Tribunal was able to conclude the absence of collusion in the block foam industry is astonishing in light of the complaint proceedings discussed in the course of this paper would appear to demonstrate the incongruous approach adopted by different investigative teams within the Commission. (See Case No. 101/LM/Nov11.)

[22] Loungefoam and Vitafoam had allegedly fixed the purchase price of input chemicals in the manufacturing of foam and the selling price of foam that was produced and sold to furniture manufacturers.

[23] Loungefoam and Vitafoam had allegedly engaged in customer allocation by agreeing not to compete for certain customers through discussion of pricing and customer allocation via the "Foam Forum".

[24] Loungefoam and Feltex Holdings had allegedly engaged in market division through a reciprocal restraint of trade clause contained in the sale of business agreement concluded between them, and more particularly, not to compete in the automotive and bedding and furniture markets, respectively.

[25] Section 4(5) provides that the "p*rovisions of [section 4(1)] do not apply to an agreement between, or concerted practice engaged in by–*

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a)".

for legitimate business reasons.

In contrast, Feltex Holdings claimed that the referral against it was invalid as the complaint initiated against it in November 2007 cited Feltex and not it as a respondent. It also denied the allegations of collusion and claimed to operate predominantly in the automotive industry for business reasons.

On 16 February 2010, the Commission applied to the Tribunal to amend its referral in order to counter the contention raised by Loungefoam and Vitafoam that their conduct was excusable under section 4(5).[26] The Commission sought, *inter alia*, to include the following amendments:

- a new allegation implicating Feltex Holdings, a company falling outside the Steinhoff group, in price fixing conduct together with Loungefoam and Vitafoam (the "Feltex amendment");
- a refutation of the claim that Loungefoam and Vitafoam were part of a single economic entity (being the Steinhoff group), alternatively that, if they were, this was a result of collusion between Steinhoff International and Kap, the ultimate holding companies of Loungefoam, Vitafoam and Feltex Holdings, respectively (the "collusion amendment");
- the allegation that, if Loungefoam and Vitafoam were in fact firms within a single economic entity whose activities were directed and controlled by Steinhoff International and/or Steinhoff Africa Holdings (Pty) Ltd ("Steinhoff Africa"), but it was proved that they had nonetheless colluded with Feltex Holdings, Steinhoff International and/or Steinhoff Africa, they should similarly be held responsible for such collusion and liable for any administrative penalties imposed ("the penalty amendment"); and
- the Commission thus also sought to join Steinhoff Africa to the proceedings.

[26] The Commission applied in terms of Tribunal Rule 18(1) which provides for the person who filed a Complaint Referral to apply "*at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT1(1), CT1(2) or CT1(3), as the case may be, as filed*".

The respondents objected to the proposed amendments and joinder on the basis that they served to refer conduct that had not been foreshadowed by the complaint initiated by the Commission or submitted to it by a third party and, accordingly, could not be competently brought before the Tribunal. The Steinhoff respondents also argued that the new relief sought was not competent under the Act.[27]

Decision of the Tribunal

On 8 June 2010, the Tribunal granted all of the amendments sought by the Commission, on the following grounds:[28]

- with respect to the Feltex amendment, the Tribunal found that as "*there was no dispute between the Commission and the respondents that the chemical cartel had in fact been initiated . . . the jurisdictional ground for extending the complaint to Feltex [Holdings] [was] met*"[29] and so granted the amendment; and
- as regards the collusion amendment to extend the complaint to Steinhoff and Kap, the Tribunal pointed to section 49B(1) of the Act as not requiring anything more than to "*provide a rational link between the conduct complained of and a relevant section of the Act*". With this in mind, the Tribunal found a clear, rational link between the Commission's initiation statement of May 2008 that "*the relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of*" and section 4(1)*(b)*(i) or 4(1)*(b)*(ii),[30] concluding that "*there was no need for the Commission at that stage to identify exactly which, how many or even which subsidiaries or divisions of the respondents were*

[27] The penalty amendment was contested on the basis that the Act does not allow for a fine to be imposed on any entity other than the one found to have transgressed its provisions.

[28] *Competition Commission v Loungefoam (Pty) Ltd and Others, In re: Competition Commission v Loungefoam (Pty) Ltd and Others* (103/CR/Sep08) [2010] ZACT 39 (8 June 2010).

[29] *Supra*, 61.

[30] *Supra*, 62.

involved in collusive activities".[31]

Notably, the Tribunal provided no reasons for granting the penalty amendment.

In reaching its decision, the Tribunal placed emphasis on the fact that the Commission acts in the public interest with a view to ensuring that alleged contraventions of the Act are ventilated and determined. Accordingly, in order to promote the objects of the Act, it was stated that the Tribunal should assume a permissive approach to amendment applications. Feltex and the Steinhoff respondents appealed to the CAC against the whole judgment of the Tribunal and further applied to have the decision reviewed and set aside.

Decision of the CAC

On 6 May 2011, the CAC upheld the appeal on the grounds listed below:[32]

- As regards the Feltex amendment, the submission or initiation of a complaint is a jurisdictional prerequisite for a prohibited practice to be referred to the Tribunal. This is so because section 49B(3) of the Act[33] allows the firm under investigation to engage with the Commission and to demonstrate its innocence before the matter proceeds to the referral stage, thus avoiding potential reputational damage caused by a public charge of anti-competitive conduct.
- In addition, section 67(1) of the Act, in line with the period for statutory prescription, bars the initiation of a complaint made more than three years after the practice has ceased. This makes the date of initiation of a complaint crucial. The CAC relied on *Woodlands* in holding that the Commission's investigative powers arose from the initiation of a complaint which must, in turn, be founded on information upon which a reasonable suspicion can be based. It

[31] *Supra*, 65.

[32] *Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others, Feltex Holdings (Pty) Ltd v Competition Commission South Africa and Others* (102/CAC/Jun10) [2011] ZACAC 4 (6 May 2011).

[33] Section 49B(3): "*Upon initiating or receiving a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable*."

must also identify each respondent allegedly engaged in the unlawful conduct.

- Given that no complaint was initiated against Feltex Holdings, Kap, Steinhoff International or Steinhoff Africa in respect of the conduct identified in the amendments, the amendments would serve to introduce a new cause of action and accordingly could not be permitted.
- Regarding the collusion amendment, the claim that certain companies constituted a single economic entity constituted a defence, and could not, therefore, be used by the Commission to pursue relief against other companies within the group.[34]

Application to the CC

On this basis, the appeal lodged by the respondents was upheld and the amendments, which related to collusion and an administrative penalty, were set aside. In response, the Commission applied to the CAC for leave to appeal the decision to the SCA. Without withdrawing its application for leave to appeal to the SCA, the Commission simultaneously applied to appeal against the whole of the CAC judgment directly to the CC, that is, without first seeking leave from the CAC. This application for direct access was dismissed by the CC in a judgment handed down on 26 June 2012 per Maya AJ. The reasoning provided by the CC is discussed under below.

The decisions of the CC

The basis of the applications

In its founding papers, the Commission in both *Yara* and *Loungefoam* made reference to the fact that the CAC had relied extensively on the decision of the SCA in *Woodlands*, but that the principles extrapolated by the court in these cases had been inconsistently applied, thereby creating an altogether inconsistent investigative regime.[35] In particular, the Commission made

[34] The CAC also found that the penalty amendment (and joinder) should have been refused.

[35] See para 14 of the Commission's affidavit in support of its application for leave to appeal in *Yara* and paras 54 and 55 of the Commission's affidavit in support of its application for leave to appeal in *Loungefoam*.

reference to that portion of the *Woodlands* judgement which appeared to recognise that the Commission may amend or expand the parameters of a complaint where new prohibited practices and/or role players are uncovered. This was contrary to the decisions of the CAC in these matters.

The Commission further alleged that the apparently contradictory decisions rendered it virtually impossible for it to discharge its duties under the Act properly, given that it was unable to determine either the standard it is required to apply in formulating complaint initiations, or its power to amend a referral.[36] In this regard, in *Loungefoam*, the Commission stated that, since delivery of the CAC's judgment in *Yara*, it had been inundated with objections to matters it had already referred to the Tribunal which, based on the reasoning of the CAC, it was unable to investigate and prosecute. In particular, and by way of example, the Commission referred to the Tribunal's decision in *South African Breweries Limited and Others v Competition Commission* (the "*SAB* matter"),[37] where, although the Tribunal dismissed the referral against SAB on materially the same reasoning as the CAC in *Yara*, it described in some depth the manner in which the current jurisprudence "*threaten[s] to undermine the rights of the complainants and the public*", and proposed an alternative approach to considering complaints and referrals.[38]

The Commission also suggested that the Act authorises an inquisitorial process and should not be governed by the same rules and standards as a criminal trial. For this reason, it was alleged that it was inappropriate for the Tribunal and/or the CAC to adopt an unreasonably formalistic interpretation of section 50(3) of the Act, where such an interpretation would undermine the Commission's ability to discharge its investigative duties (for example, by finding that there must be symmetry between the initiating document and the referral). More specifically, the

[36] Commission's affidavit in *Yara* at paras 15 and 40. The Commission also noted (see footnote 4 of its affidavit) that in *Loungefoam*, the CAC interpreted *Woodlands* as allowing the amendment of a referral in these circumstances only where the Commission had itself initiated a complaint (or amended an existing complaint) and submitted that such an interpretation was unduly limited. See also the Commission's affidavit in *Loungefoam* at para 56.

[37] *South African Breweries and Others v Competition Commission* (134/CR/DEC07) [2011] ZACT 73 (16 September 2011).

[38] *Supra*, 97–158.

Commission contended that section 50(3) of the Act expressly authorises the Commission to refer some or all of the particulars of a complaint submitted to it, and to add particulars to the complaint where appropriate.[39]

It was further submitted by the Commission that to require symmetry between the initiating complaint, on the one hand, and the Commission's referral, on the other, is entirely inconsistent with the scheme and purpose of the complaint procedure, which triggers an investigation by the Commission and, in the case of a private individual, serves to define the ambit of its "ownership" of the complaint. It does not have the further function of circumscribing and limiting the Commission's referral to the Tribunal.[40]

In finding that the Commission was not entitled to add facts to the complaint or to re-formulate it for purposes of the referral, it was argued that the CAC had rendered the Commission's powers of investigation meaningless.[41] Having recognised that its investigators are granted broad powers of investigation under the Act, the Commission submitted that such powers must be deployed in accordance with the safeguards imposed by the Act, the common law and the Constitution.[42] In depriving the Commission of its authority to supplement or amend a referral, the CAC undermined the public's right to have anti-competitive conduct properly determined.[43] This was particularly true where, in the absence of an amendment to the referral, a respondent would arbitrarily escape prosecution in terms of section 67(1) of the Act, which precludes the initiation of a complaint in respect of conduct which has ceased more than three years before.[44]

The Commission submitted that, whether the original complaint is submitted by the

[39] Commission's affidavit in *Yara* at paras 54 and 55.

[40] Commission's submissions in *Yara* at paras 81.1, 81.2, 82 and 82.3.

[41] Commission's affidavit in *Yara* at para 15.

[42] Commission's affidavit in *Yara* at para 52.4.

[43] Commission's affidavit in *Loungefoam* at para 57.

[44] Commission's affidavit in *Yara* at para 57.

Commission or by a third party, the proper approach is to accept that it "*can be expanded or amended at any time to include additional respondents and additional details of prohibited practices, provided that the addition or amendment is rationally or recognizably linked to the conduct originally complained of*" (emphasis added). The material date for the purposes of section 67(1) would then be the date of the initial complaint initiation.[45]

Finally, the Commission sought to address the CC briefly in relation to its application for condonation of the late filing of its applications for leave to appeal.

Counter-arguments

Opposition by Yara

The Commission's application to the CC was opposed by Yara on, *inter alia*, the grounds that:

- the application was excessively late and condonation should not be granted;
- the Commission is a creature of statute and may exercise only such powers afforded it in terms of the Act; and
- it was not in the "interests of justice" that leave be granted.

Yara emphasised that the Commission wanted the CC to lay down a binding precedent regarding the ambit of its powers, and qualify or overrule the case law of the CAC and the SCA, without first thoroughly canvassing these issues in these courts.[46] The Commission was thus, in *Yara's* view, seeking to side-line the CAC and leapfrog the SCA by applying for direct access to the CC.[47]

[45] Commission's affidavit in *Yara* at para 58. The Commission contends, at para 59, that this approach accords with that of the Tribunal and CAC prior to the *Woodlands* decision (and refers to *Sappi Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another* [2003] 2 CPLR 272 (CAC) at para 38 and *Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others* (15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002) at para 16.33.

[46] Yara's written argument at paras 13.1, 13.2, 13.3, 14.2 and 26.

[47] Yara's written argument at para 27.

Yara also argued that, based on a proper interpretation of the Act, as opposed to any "technical" or "broader" interpretation, a complaint triggers an investigation by the Commission and, should other prohibited practices and/or parties be discovered, the Commission needs to initiate a further complaint.[48] It further submitted that it is apparent that, unlike a referral, there is no provision in the Act or Rules for the amendment of a complaint.[49]

Finally, a critical issue raised by Omnia in its argument was whether a person may apply to the CC for leave to appeal directly to it on a constitutional matter without first seeking leave to appeal from the CAC, as envisaged by section 63(2) of the Act.[50] Omnia took the view that it may not. It further submitted that the interests of justice in this case did not require a by-passing of this section by the CC in circumstances where the Commission's arguments had not been considered by the CAC and the SCA.[51]

Opposition by Loungefoam

The respondents in *Loungefoam* opposed the application for direct access to the CC on the same procedural grounds, namely that the Commission's explanation for the delay in bringing the application was unsatisfactory and that the Commission was obliged first to seek the CAC's leave to appeal in terms of section 63(2) of the Act. In relation to the merits, the respondents contended, *inter alia,* that:[52]

- anti-competitive conduct cannot exist "in the air", and a complaint can be properly initiated in respect of a prohibited practice only if the party to the alleged conduct is identified. This

[48] Yara's written argument at paras 14.9 and 14.11.

[49] Yara's written argument at para 80.

[50] Section 63(2) provides that: "*[a]n appeal in terms of section 62(4) may be brought to the Supreme Court of Appeal, or, if it concerns a Constitutional matter, to the Constitutional Court, only – (a) with the leave of the Competition Appeal Court; or (b) if the Competition Appeal Court refuses leave, with the leave of the Supreme Court of Appeal or the Constitutional Court, as the case may be*".

[51] Omnia's heads of argument at paras 28 and 29.

[52] First, Second, Fourth and Fifth Respondents' answering affidavit in the application for leave to appeal dated 7 October 2011 at parass 48 to 52.

conclusion has nothing to do with the application of inappropriate standards by the CAC, but rather involves the proper interpretation of the jurisdictional requirements of the Act;

- the provision which entitles a respondent to raise a plea of prescription will not be capable of enforcement if a complaint may be initiated without identifying either the respondent or the conduct that is the subject of the complaint; and
- the SCA in *Woodlands* and the CAC in *Loungefoam* have made it clear that the Commission may extend or amend a complaint initiation during the course of an investigation should new facts come to light, and this is hardly an onerous requirement.

Feltex also raised the argument that, in its application for leave to appeal to the SCA, the Commission had omitted the aspect of the appeal relating to Feltex and elected to abide that aspect of the CAC's decision and thus could not rely on it in its application to the CC.[53]

Feltex further raised the distinction between a complaint initiated by the Commission (as in this matter) and a complaint initiated by a third party (as in *Yara*), and thus argued that the Commission's reliance on *Yara* was misplaced. According to Feltex, a third party-initiated complaint is governed by the provisions of section 50(3)*(a)*(iii) of the Act, in terms of which the Commission is entitled to "*add particulars to the complaint as submitted by the complainant*". There is no equivalent provision for complaints self-initiated by the Commission.[54]

In re Yara

In keeping with the decision reached by the CC in *Senwes* on 12 April 2012, the majority judgment of Zondo AJ held that a dispute as to whether the Tribunal went beyond its powers in considering elements of a referral not included in the original complaint raises a constitutional

[53] Sixth respondent's answering affidavit at para 11.

[54] Sixth respondent's answering affidavit at paras 43 and 44.

issue and it thus has jurisdiction to hear the matter. Notwithstanding this conclusion, the Commission's appeal was dismissed.[55]

Much emphasis was placed on the fact that the Commission had failed, in accordance with section 63(2) of the Act, to apply to the CAC for leave to appeal to the CC. The CC discussed two possible interpretations of section 63(2): firstly, that non-compliance constitutes a bar and, until complied with, the CC cannot entertain an application for leave to appeal against a CAC decision; and secondly, that access to the CC is regulated by section 167(6) of the Constitution and the Rules of the CC, in terms of which non-compliance with section 63(2) is not a bar, but rather one of the factors to be taken into account when considering if it is in the interests of justice to grant the Commission leave to appeal.[56] The CC concluded that on either interpretation the Commission had failed to meet the appropriate test, and for this reason found it unnecessary to decide which interpretation is correct.[57]

It is noteworthy that, in its judgment, the majority made the following statement:

> "If this Court does not entertain the Commission's appeal at this stage, all it will mean is that this is not the right time for it. Not only are there prospects that the constitutional issue may, in due course, reach the attention of the Supreme Court of Appeal, if leave to appeal is granted, but also that the constitutional issue may receive the attention of this Court in due course."[58]

The majority further observed that the preferable approach appears to be for the SCA first to be afforded an opportunity to hear and pronounce on the merits of the Commission's complaints with regard to *Woodlands*, as a problem appears to have arisen in relation to its interpretation.[59]

The Commission's application for leave to appeal was accordingly dismissed with costs.[60]

[55] Judgment at para 13.

[56] Judgment at para 20.

[57] Judgment at para 21.

[58] Judgment at para 36.

[59] Judgment at para 39.

Of particular interest to the outcome of the proceedings before the CC in *Yara* are the two dissenting judgments. The first, by Cameron and Yacoob JJ, agreed that the CC had jurisdiction to entertain the appeal[61] and considered there to be no absolute statutory bar to the Commission appealing directly to the CC.[6263] Cameron and Yacoob JJ also stated:

> "In matters involving the constitutionality of the Commission's interpretation and exercise of its statutory powers, this Court is necessarily the final Court. The questions at issue here are so important that it is nearly inevitable that, whoever succeeds in the Supreme Court of Appeal, this Court will be asked to have the last word. The issues do not involve matters of common law, on which this Court particularly values the views and experience of the Supreme Court of Appeal . . . Nevertheless, the largely statutory and constitutional nature of the questions at issue counts against requiring an appeal to the Supreme Court of Appeal first."[64]

In their view, leave to appeal should accordingly have been granted.

The second dissenting judgment, by Froneman J, agreed that leave to appeal should not be granted, but for a different reason from that of the majority. In essence, the learned judge found that the constitutional issue relating to the public power of the Commission is inextricably bound to, and perhaps even finally determined by, a court's view on the extent to which there should be a deference to the determination of economic issues by the Tribunal.[65] He thus stated that:

> "For my part, I would value as much articulation and debate of these often unarticulated premises by all concerned, before making a final determination on the issue . . . "[66]

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[60] The Commission also failed in its application for condonation as the CC considered its delay excessive and its explanation unsatisfactory.

[61] Dissenting judgment of Cameron and Yacoob at para 47.

[62] Dissenting judgment of Cameron and Yacoob at para 59.

[63] Dissenting judgment of Cameron and Yacoob at para 49.

[64] Dissenting judgment of Cameron and Yacoob at para 62.

[65] Dissenting judgment of Froneman at para 80.

[66] Dissenting judgment of Froneman at paras 80 and 81.

Notwithstanding this point, Froneman J concluded that he would not grant leave to appeal at this stage of the process.

In re Loungefoam

As in *Yara*, the majority of the CC represented by Maya AJ found, in line with the CC's decision in *Senwes*,[67] that issues concerning the exercise of the statutory powers and functions vested in an organ of state, such as the Commission, are indisputably constitutional matters.[68] The CC also found it unnecessary to resolve the conflicting constructions of section 63(2) on the basis that the facts on record did not show compliance with either interpretation.[69] The CC found that the application for direct access was not in the interests of justice on the basis that the Commission, in appealing directly to the CC, had leapfrogged the SCA.

Maya AJ found that, in the absence of a declaration of invalidity, section 63(2) remains valid law and is important, as it serves to ensure that the decision-making of the SCA and the CC is informed by the expert views of the specialist CAC. Furthermore, the SCA, which the Commission chose to pass over, "*serves as a further filter in the appellate hierarchy*" even in "*matters that do not explicitly involve the development of the common law*". The CC further noted that the Commission had not shown that the SCA would not deal with the matter expeditiously or give finality to some or all of the issues.[70]

Notwithstanding the Commission's arguments that the matter was urgent, raised issues of public importance, and would ultimately end up in the CC, the CC dismissed the application.

As regards the procedural shortcomings of the Commission's application, the minority judgment, per Yacoob ADJC and Cameron J, concluded that these were outweighed by:

[67] *Supra*.

[68] *Supra*, 16.

[69] These are discussed more fully above.

[70] *Supra*, 6.

- the importance of the Commission's public role;
- the significance of the issues on which it sought determination;
- the existence of prospects of success; and by the fact that
- the matter was not at the "*complex intersection of law and economics*",[71] and is therefore in the interests of justice.[72]

These findings are similar to those reached in the minority judgement in *Yara*,[73] where Yacoob ADJC and Cameron J also set out why an appellant is not barred from appealing to the CC without first approaching the CAC.

Discussion

The analysis of *Yara* and *Loungefoam* set out above evidences the extent to which the Commission and the respondents have adopted polarised interpretations of the Act – the Commission's stance being that a permissive, more flexible approach ought to be adopted; and the respondents, conversely, advocating a purposive approach and "proper" interpretation of the Act.

The obvious criticism which can be levelled against respondents, particularly those with deep pockets, is that they have become obsessed with due process and taking technical points, so as to avoid the consequences of an adverse decision. By doing so, respondents undermine the public's right to have anti-competitive conduct uncovered, adjudicated and penalised as quickly as possible. The flip side to this criticism is that a flexible approach risks undermining the rule of law, a respondent's right to a fair trial, and just administrative action. Furthermore, the protection afforded to accused parties, as enshrined in our Constitution, may be compromised. The latter

[71] *Supra*, 36.

[72] Feltex Holdings was excepted from their conclusion as they considered the Commission's appeal in respect of Feltex Holdings to have become perempted.

[73] See *Yara* at para 49. See also *Yara* at para 62 justifying why the SCA may be skipped.

considerations will become even more pertinent when the Competition Amendment Act 1 of 2009, which criminalises hard-core cartel conduct, comes into effect.[74]

One may wonder whether this jurisdictional debate has developed into the proverbial "storm in a teacup". An obvious question that comes to mind is surely that the Commission could simply initiate a fresh complaint as and when additional infringements of the Act or additional transgressors are uncovered? Is this not merely a matter of completing the prescribed Form CC1 together with a reasonably clear initiation statement? The detailed debate between the Commission and the respondents before the various fora set out above shows that this is not such a simple matter after all.

What is clear is that a number of important questions relating to procedural matters when litigating under the Act remain unanswered. The critical questions which require determination are:

- whether symmetry between a complaint and referral is required and, if so, to what extent;
- whether the Commission may amend a complaint and/or referral; and the related question
- what is meant by the addition of particulars to a complaint for the purposes of a referral?

The judgments of the CC in *Yara* and *Loungefoam* are disheartening to say the least, in that the clarity sought by the parties regarding the ambit of the Commission's powers was not obtained. The judgments do, however, contain overt references to the potentially strong merits of the Commission's case, but these remain to be tested by the SCA and, potentially again, by the CC.

[74] This Act was signed by the President of South Africa at the end of August 2009.

The implications of the Senwes decision

In contrast to the matters of *Yara* and *Loungefoam* discussed above, the Commission achieved an early victory in the CC in *Senwes*.[75] In this matter, the Commission alleged that by charging farmers less than traders for storing their grain, Senwes Ltd ("Senwes") had engaged in an "exclusionary practice" in terms of section 8*(c)* of the Act, since traders could not afford to compete with Senwes. This contravention was considered by the Tribunal to be a "margin squeeze" in contravention of section 8*(c)*. Subsequent to the finding, Senwes objected that the complaint of "margin squeeze" was not part of the original referral and accordingly that this conduct had not been competently referred by the Commission to the Tribunal. Consequently, the issue that arose was whether the Tribunal was entitled to look beyond the limits of the referral document (as distinct from the jurisdictional issues which require determination in *Yara* and *Loungefoam*).

The CC held that section 52(1)[76] of the Act authorises the Tribunal to adopt an inquisitorial adjudicative approach and that confining a hearing to only those matters that were raised in the original referral would undermine such an enquiry. The CC concluded that, based on the evidence, Senwes had contravened section 8*(c)* of the Act, regardless of the label attached to the contravention.

While *Senwes* will no doubt be subject to interpretation and may be distinguished from the factual matrices in other matters, it would be foolish to think that the SCA, despite its stance in *Woodlands*, will not have due regard to *Senwes* when making any further determinations on the ambit of the Commission's powers.

That said, the CC's decision in *Senwes* does not address in any detail the significant amount

[75] This matter involved a complaint of anti-competitive conduct in practices relating to grain storage tariffs lodged by the Commission against grain storage giant Senwes, and resulted in a long and arduous process through the Tribunal, the CAC, the SCA and eventually the CC.

[76] In terms of section 52(1), the Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of the Act.

of jurisprudence which states that the Tribunal's jurisdiction to hear a matter is triggered only by the ambit of the complaint as initiated, as well as the precept of a fair trial: that an accused is entitled to know what case it is required to meet and rebut so as not to be prejudiced.

In addition, the judgment of the CC in *Senwes* opens the door for parties to argue that almost every competition law issue (which involves the exercise of statutory powers by the Commission or Tribunal under the Act and, consequently, the exercise of "public" powers) is open to be litigated up the towering hierarchy to the CC. Although the *Senwes* decision resulted in a victory for the Commission, it may nevertheless prove to be problematic, as justice may be delayed while opponents manoeuvre through the different fora. The benefits of ultimately reaching the CC may thus constitute a trade off against the efficiencies of having specialised fora within the system, in the form of the Tribunal and CAC. A possible mechanism to counter the potential abuse of this situation would be for the CAC to be more circumspect in granting leave to appeal to the SCA and CC (if such application is indeed necessary), by carefully assessing the prospects of success of a party's application and whether exceptional circumstances exist for the next step up the adjudicative ladder.

The SAB decision

These issues were again ventilated before the CAC in the *SAB* matter referred to above.

A decision of the CAC was handed down on 14 November 2012, in a judgment by Judge Davis, President of the CAC.[77]

The Commission had sought to include a direct appeal to the CC against the decision of the Tribunal in this case, but the direct access application had been dismissed by the CC at an early stage through a direction of the Chief Justice. Directions of the CC on some of these issues are swift and opaque, as no reasons are given. However, presumably the CC is wary of accepting direct access applications from the decisions of administrative tribunals such as the Tribunal.

[77] *The Competition Commission v South African Breweries Limited & 13 Others* 114/CAC/Nov11, handed down on 14 November 2012.

In the *SAB* matter, Judge Davis re-affirmed the jurisprudence developed in the *Yara* and *Loungefoam* cases. Applying the jurisprudence to the facts of the *SAB* case, he found that there was a cognisable link between the original complaint and the various legs of the complaint referral. The decision of the Tribunal was set aside and the Commission's appeal was upheld.

A careful reading of the CAC judgment does make one wonder what the *Yara* and *Loungefoam* jurisprudence really means. The judge essentially held that as long as a complainant has some general grumble about price, this is sufficient to take one to all areas of the Act, including, strangely, a sufficient basis to found a complaint of market division under section 4(1)*(b)*(ii) of the Act. Taking that to its logical conclusion seems, in our view, to place the knot in the jurisdiction case under some pressure to unravel.

In the *SAB* matter, counsel for the Commission argued strenuously that certain dicta of Jafta J in the *Senwes* case were dispositive of the jurisdictional arguments when Jafta said:

> "The fact that section 52(1) expressly states that the Tribunal must conduct a hearing into every matter referred to it does not necessarily mean that the Tribunal has no power to entertain a matter not included in the referral . . . In essence, section 52(1) obliges the Tribunal to conduct a hearing whenever a complaint is referred to it. It is clear from a reading of the section as a whole that the Tribunal cannot initiate a hearing. But this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral."[78]

Judge Davis studiously avoided dealing with this argument in his judgment. The inference, however, is that he did not accept the expansive argument made by the Commission: to have done so would have fundamentally undermined the *Yara / Loungefoam* jurisprudence developed by the CAC.

[78] See para 48 of the *Senwes* decision in the CC; also referred to in some detail in *Competition Law Sibergramme* 5 of 2012

Conclusion

What is apparent from the above discourse is that decision-making in competition law matters has become increasingly compromised. This statement is made without attributing blame to either the Commission or the respondents. Both sets of parties are entitled to seek clarity regarding their procedural rights and to safeguard their own interests, and they have all been subject to protracted and costly litigation.

We wait with bated breath as to the eventual outcome of this debate and hope that a fair balance will be struck between the rights of the Commission, and of the public whom it represents, as well as the rights of parties accused of contraventions of the Act.[79]

Cases

Any questions or comment on the content of this *Sibergramme* may be directed to Robert Legh at rlegh@bowman.co.za.

[79] On 13 September 2012, the CAC granted the Commission leave to appeal to the SCA in *Yara.* A date has not yet been set for the hearing of the Commission's application in *Loungefoam.*