

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 45/CR/May06

And

Case No.: 31/CR/May05

In the matter between:

The Competition Commission of South Africa	Applicant
And	
Sasol Chemical Industries (Pty) Ltd	First Respondent
Yara South Africa (Pty) Ltd	Second Respondent
Omnia Fertilizer Ltd	Third Respondent
African Explosives and Chemical Industries Ltd	Fourth Respondent

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and M Mokuena (Tribunal Member)

Heard on : 07 April 2009

Decided on : 17 April 2009

REASONS AND ORDER

[1] This matter concerns an application for consolidation of two referrals brought by the Competition Commission. In May 2005 the Commission referred a complaint to the Tribunal in which it alleged that Sasol Chemical Industries (Pty) Ltd (“Sasol”), Yara South Africa (Pty) Ltd (“Yara”) (referred to as Kynoch), Omnia Fertilizers (Pty) Ltd (“Omnia”) and African Explosives and Chemical Industries (“AECI”) had contravened section 4, section 8 and section 9 of the Competition Act No 89 of 1998 (“the Act”) (“the Nutriflo complaint”).¹ In that complaint the Commission alleged that the respondents had colluded to structure the market for the supply of a number of fertilizers and that Sasol had abused its dominance in certain of these markets. On 25 May 2006, the Commission referred another complaint to the Tribunal in which it alleged that Sasol, Kynoch and AECI had colluded in the market for a

¹ Case number 31/CR/May05

fertilizer known as LAN² and that Sasol had abused its dominance in that market (“the Profert complaint”). In addition Sasol had engaged in price discrimination in relation to the supply of LAN to Profert. In the Nutriflo complaint the Commission seeks relief against Sasol, Kynoch and Omnia but does not seek relief against AECl. In the Profert complaint the Commission seeks relief only against Sasol. Sasol, Kynoch and AECl are respondents in both complaints but Omnia is only implicated in the Nutriflo complaint.

[2] Section 55(1) of the Act confers on the Tribunal a wide discretion to manage its proceedings.³ The Tribunal rules do not expressly deal with the issue of consolidation but rule 55 permits the Tribunal to invoke the Rules of the High Court in order to deal with a matter not expressly provided for. Consolidation of actions is governed by rule 11 of the High Court rules. This is not the first time that the Commission has brought such an application regarding these two referrals. The first application was lodged on 5 October 2007 but was withdrawn by the Commission on 13 February 2008. The second application was brought on 15 October 2008 but was dismissed by the Tribunal on 05 December 2008 on the basis that it had not been properly brought.

[3] These referrals have a drawn out and chequered history.⁴ We find it unnecessary to traverse this history, save to say that at the time of this application, pleadings in the Nutriflo complaint had finally closed but none of the pre-trial preparations such as discovery and exchange of witness statements had as yet commenced. On the other hand, trial preparations in the Profert matter had by and large been completed albeit with some outstanding matters regarding discovery by Profert.⁵ The Commission has also in the course of the history of these two referrals, amended its pleadings in the Nutriflo matter and has decided not to persist with its section 4 allegation in the Profert complaint limiting this to the Nutri-flo matter. Notwithstanding these differences the two complaints nevertheless seem to have some areas of overlap. Both complaints concern the manufacture and supply of LAN and the conduct of the respondents in that market. In both cases it is alleged that

² Limestone Ammonium Nitrate

³ See also *Competition Commission v SA Airways (Pty) Ltd* [2004] 1 CPLLR 235 (CT) at 239H-240C.

⁴ The Commission has been granted two amendments in the Nutri Flo matter one dated 18 April 2007 and the other dated 09 July 2008. On 15 February 2009 we also refused an application by the Commission for an amendment of the Profert complaint referral. Again on 15 February 2009 we granted an application by Sasol to strike out certain portions of the Commission’s expert witness statement in the Profert matter. On 28 March 2008, we dismissed Sasol’s application for the dismissal of the Profert complaint referral. The Competition Appeal Court has also dismissed two separate applications for review of the Commission’s decision to refer the Nutri Flo matter to the Tribunal. See : *Omnia Fertilizer Ltd and The Competition Commission of South Africa; Sasol Chemicals Pty Ltd;Kynoch Fertilizer Ltd;Nutri-Flo CC;Nutri Fertilizer CC and in the matter between Sasol Chemicals (Pty) Ltd and The Competition Commission of South Africa; Nutri-Flo CC;Nutri Fertilizer CC; Kynoch Fertilizer Ltd and Omnia Fertilizer Ltd* [2006]1CPLR 27 (CAC).

⁵ See transcript page 15 and 43 where the Commission and Omnia are of the view that there were a number of discovery issues outstanding between Sasol and Profert.

the supply of LAN constitutes a separate market from the supply of urea, and that Sasol enjoys market power in the market for nitrogenous fertilizers and it has abused it. In the Nutriflo complaint the abuse is alleged to have taken the form of excessive pricing, in the Profert complaint of price discrimination. Apart from Omnia who was only implicated in the Nutriflo matter and notwithstanding the fact that the Commission has decided not to seek relief against some of them, Sasol Kynoch and AECI are respondents in both complaints.

[4] Sasol and Omnia both opposed the application for consolidation. While there was consensus on some overlap between the two referrals,⁶ the extent of such overlap and the evidence relevant to it still remained a matter of contention. In the course of the various interlocutory applications attendant upon the Profert matter this Tribunal, in order to avoid delaying the hearing of that matter at that time, had ruled that the evidence of the Export Club, Import Planning Committee and Nitrogen Balance Committee could not be led by the Commission's expert in that hearing.⁷ Sasol and Omnia were concerned that a consolidation of the matters would result in the evidence of the committees led in the Nutriflo matter being introduced in the Profert matter by some "backwash" effect.

Nature of application

[5] In the hearing, a fair amount of debate ensued in relation to the nature of the application. Sasol argued that it was unclear whether the Commission intended to consolidate the two referrals into one and thereby file new pleadings and new witness statements or whether it merely sought to have both matters heard together. Omnia argued that the Commission was not legally entitled to consolidate the two referrals into one but could only seek to consolidate the hearing of the two referrals. The Commission in turn argued that the nature of the application was patently clear from its Notice of Motion and paragraph 15 of its heads of argument.

[6] In paragraph 1 of its Notice of Motion the Commission seeks and order in the following terms –

“Consolidating the referrals made by the applicant under CT case no 31/CR./May05 ...and CT case no 45/CR/May06and directing that the two cases henceforth be dealt with and disposed of as one referral;”

⁶ See page 19 transcript.

⁷ See our decision in the Commission's application to amend the Profert complaint referral so as to include reference to the impugned committees and Sasol's strike out application of certain portions of the Commission's expert witness statement in Case No: 45/CR/May06, reasons issued on 1 April 2008.

[7] In paragraph 15 of its heads of argument, it is stated as follows:

“In the present case, we stress, consolidation entails no more than this: that the evidence led in the consolidated proceedings is, to the extent it is relevant, applicable to both sets of claim. Consolidation does no more than (sic) eliminate the need to lead and examine the same evidence twice over.” (our emphasis)

[8] This suggests to us that the Commission sought to consolidate the two proceedings and to minimise the duplication of evidence, save costs and avoid inconvenience to witnesses, parties and the Tribunal. Counsel for both Sasol and Omnia, while persisting with their arguments that consolidation of the type asked for by the Commission was not competent or practical, were not opposed to some kind of practical arrangement in hearing both matters together in order to avoid the duplication and inconvenience discussed above.⁸

[9] Mr Unterhalter nevertheless persisted with opposing the consolidation or any practical arrangement on the basis that the Profert complaint was ripe for hearing, that the Nutriflo complaint was a long way away from being ready for trial and further delays would result in prejudice to one or more respondents. The view that Profert was ripe for hearing was not necessarily shared by the Commission and Omnia, both of whom were under the impression that there were outstanding discovery issues between Profert and Sasol and that in fact there was a dispute about it on the papers.⁹

[10] Mr Farlam, appearing on behalf of Omnia was most constructive in his approach to the matter. In his view the only area of overlap between the complaints involved the question of market definition and the question whether LAN and urea are substitutable and the geographic boundaries of the relevant markets. On this basis he argued it seemed logical to proceed with the Nutri-flo complaint first because it covered a wider range of issues such as relevant market, market power and abuse of dominance and to thereafter deal with the few remaining issues germane to the Profert complaint. He dismissed the notion that it would take years for the Nutriflo matter to be ripe for hearing and submitted that all the practicalities argued for would be taken care of by such an arrangement. Moreover any prejudice that may be caused to Omnia by either a consolidation or further delays as a result of the Profert matter proceeding first would be mitigated by such an arrangement.

⁸ See transcript pp 39-41 where Mr Unterhalter concedes that his client would not in principle be opposed to such a consolidation.

⁹ Mr Unterhalter submitted that these matters were largely resolved. However this does not appear from the papers. See transcript pages page 15 and page 43.

[11] As mentioned above it was conceded by both Sasol and Omnia that the complaints did indeed have overlapping areas. At the very least it was conceded that the evidence that the Tribunal would need to consider in defining the relevant market would involve the same facts and the evaluation of similar economic evidence.¹⁰ The Commission itself indicated that it anticipated that the same witnesses will be led in relation to the expert evidence.¹¹

[12] Given the extent of the overlap, another more significant outcome that the Tribunal would wish to avoid would be one where different panels arrived at different conclusions on the definition of the relevant market on substantially the same evidence. Moreover if the Profert complaint were to proceed first and was decided against Sasol, it was highly likely that such a decision would be taken on appeal or review to a higher court thus resulting in further delays in the adjudication of the Nutriflo matter.¹²

[13] It appears to us that if this Tribunal is to avoid the outcomes and the scenario's discussed above, and is to expedite both matters as it is enjoined to do by the provisions of the Act, some kind of joint or consolidated hearing of the two complaint referrals is required, along the lines suggested by Mr Farlam. However, we are of the view, notwithstanding the degree of overlap in the allegations made in the two referrals, that it may be inappropriate to grant such an order before the issues in both matters have been fully delineated. As is usual in litigation of this nature issues tend to crystallise nearer the time of the hearing and after discovery and witness statements have been filed. At this stage of the proceedings both referrals have had relatively significant changes made to them – the pleadings in Nutriflo have been amended and the Commission has desisted from its section 4 allegations in the Profert matter. Witness statements in the Nutriflo matter have not yet been filed and discovery is yet to proceed. The outstanding discovery issue in the Profert matter once resolved may require amended witness statements to be filed. The Commission itself may wish to file amended witness statements in the Profert matter in light of its decision not to pursue a section 4 contravention in that case. We are therefore unable, at this stage to craft an order which in our view will promote an efficient management of the evidence and the issues to be decided in such consolidated hearing without having a full conspectus of the evidence before us. In the circumstance we are disinclined to grant an order to consolidate the two referrals pending the filing of witness statements in the Nutriflo matter.

[14] Furthermore the Commission and the respondents are urged to expedite their pre-trial preparations in the Nutriflo matter and to resolve the outstanding disputes in the Profert

¹⁰ See transcript page 33

¹¹ Transcript page 64.

¹² Mr Unterhalter, quite unpersuasively dismissed the likelihood of such a scenario.

matter. To this extent the Commission and the respondents in the Nutriflo matter are required to agree on a timetable for pre-trial preparations within ten days of date hereof and submit same with the Tribunal, failing which the Tribunal will issue directions in that regard. As far as the outstanding issues in the Profert matter are concerned Sasol is urged to resolve this expeditiously and to approach this Tribunal for any assistance it may require in this matter.

17 April 2009

Y Carrim

Date

Concurring: D Lewis and M Mokuena

Tribunal Researcher: J Ngobeni

For the Commission : Adv MSM Brassey SC with Adv O Mooki instructed by
Cheadle Thompson & Haysom Inc

For the First Respondent : Adv DN Unterhalter SC with Adv A Cockrell instructed by
Webber Wentzel

For the Third Respondent : Adv P Farlam instructed by Deneys Reitz Inc