IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
(HELD AT PRETORIA)

Case No: 74/CR/Jun08

In the matter between:

ASTRAL OPERATIONS LTD	First Applicant
ELITE BREEDING FARMS	Second Applicant
ROSS POULTRY BREEDERS (PTY) LTD	Third Applicant

and

THE COMPETITION COMMISSION	Respondent

In Re:

THE COMPETITION COMMISSION	Applicant
and	
ASTRAL OPERATIONS LTD	First Respondent
ELITE BREEDING FARMS	Second Respondent
ROSS POULTRY BREEDERS (PTY) LTD	Third Respondent

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member), and Andreas Wessels (Tribunal Member)
Heard on	:	04 August 2011
Reasons and order issued on	:	20 October 2011

Reasons – Application for dismissal of referral

Introduction

1] The applicants are all respondents in a prohibited practice case brought against them by the Competition Commission ('Commission').

2] In this matter the applicants seek dismissal of the complaint referral on jurisdictional grounds; specifically they allege that the claims made out in the complaint referral cannot be founded on the complaint on which it purports to be premised because the referral is not based on facts the complainants had intended to complain about.

3] We find that the application is only partially successful. We explain our reasons for coming to this finding below.

Background

4] On 20 February 2007, Country Bird (Pty) Ltd ('Country Bird') and Supreme Poultry (Pty) Ltd ('Supreme'), filed a complaint with the Commission against Astral Operations Limited ('Astral') and Elite Breeding Farms ('Elite').

5] The Commission referred the complaint against Astral and Elite on 30 June 2008. On 28 January 2010 the Commission brought an application to amend its referral so as to join Ross Poultry Breeders (Pty) Ltd ('RPB') as a third respondent. This application was not opposed. On 10 March 2010 the Tribunal granted an order joining RPB as a respondent.

6] On 10 June 2011 the three applicants brought this application to set aside the referrals.

7] Astral the first applicant in this matter is the first respondent in the referral case.

8] Elite, the second applicant is the second respondent in the complaint referral case. Elite is a joint venture between Astral and the complainant, Country Bird. RPB the third applicant is the third respondent in the referral case. RPB

is a subsidiary of Astral.

9] For convenience we will refer to the respective applicants by their names, when we deal with them individually and as the 'applicants', when we deal with them collectively. The same approach is taken with the complainants, who are Country Bird and Supreme. When we refer to firms controlled by Astral, which includes firms who are not parties to the complaint referral, we will refer to them simply as the 'Astral firms'.

10] The applicants have already filed their answers in the complaint referral matter. They did not raise the present objections then. It appears that the recent Competition Appeal Court ('CAC') decision in *Yara* may have been the catalyst for this application being brought now.[1] We discuss this case more fully below.

11] The applicants initially sought dismissal of all the claims made out in the referral. However they have since conceded that one of the abuse of dominance claims, made out in respect of Astral was properly referred by the Commission. This is a claim that Astral had required its customer MPC Chickens (Pty) Ltd ('MPC') not to sell its day old chicks to Supreme. The Commission alleges that this conduct contravenes sections 8(c) and 8(d)(i) of the Competition Act, Act 89 of 1998, ('the Act'). For this reason we need not discuss this aspect further and we are satisfied that the concession is properly made.[2]

Legal Approach

12] The legal regime for the initiation of a complaint is set out in section 49B of the Act. In brief, this section permits complaints to be initiated in two ways, either by the Commissioner or by a third party. Once initiated through either method, the Commissioner must direct an inspector to investigate the complaint and then it may be referred by the Commission to the Tribunal. The Act provides for various permutations to follow a Commission decision to refer

1 *Yara South Africa (Pty) Ltd and Omnia Fertilizer Ltd vs Competition Commission and Others, Case No: 93/CAC/Mar10*.

2 See the applicants' heads of argument paragraph 48 for the concession. The claim in respect of MPC is made in paragraph 51 of the complaint referral and is set out in paragraphs 20 to 24 and then repeated in paragraphs 47- 53, of the complaint.

or not refer a complaint. The one of relevance to this decision is what follows when the Commission refers a third party's complaint to the Tribunal.

13] It is common cause in this case that:

- the Commission did not initiate its own complaint nor did the complainant amend or file another complaint; and
- the complaint contained in the record of this application constitutes the sole initiating document in this matter.[3] (As we did in *SAB*, we will refer to the complaint as the 'initiating document' and the complaint referral as the 'referral' to avoid confusing the terms because of the similarity in name.)

14] Section 49B which as we noted is the section that regulates the complaint initiation regime, also provides for another possibility apart from initiation – it permits third parties to be informants as opposed to complainants. We set out the relevant sub-section below:

(2) Any person may –

a) *submit <u>information</u> concerning an alleged prohibited practice to the Competition Commission, in any manner or form; or*

b) *submit a <u>complaint</u> against an alleged prohibited practice to the Competition Commission in the prescribed form.* (Our emphasis)

15] This case turns on this distinction. Did the information provided by the complainants to the Commission in the initiating document and which the Commission has referred, constitute the submission of information or the submission of a complaint? Before we consider this, lets us briefly summarise the case law on the relationship between the initiating document and the complaint referral.

16] The case law requires that the referral be based on the initiation document.[4]

3 See record pages 19-38. *South African Breweries Ltd and appointed distributors v Competition Commission, Case No: 134/CR/Dec07.*

4 See *Glaxo Welcome and 7 Others v National Association of Pharmaceutical Wholesalers*

The initiation document creates the jurisdictional fact on which the referral must be premised to be valid; if it does not the complaint referral will be dismissed. The courts have approached this relationship very strictly and laid down criteria that must be met for a referral to be validly based on the initiation document.[5]

17] Firstly the conduct set out in the referral must be substantially the same as that set out in the initiating document. In this regard the courts have required that they are based on the same *facta probanda.* Secondly, even if the *facta probanda* on which the referral is based are set out in the initiating document, they must have been facts about which the complainant intended to complain. This relates to the distinction between the two types of submission provided for in section 49B(2).[6] What distinguishes the complainant from the informant is that the former intends to complain.

18] Most recently the CAC held in *Yara* that even though a complainant may have intended to complain in respect of some information submitted to the Commission, it may at the same time, and in the same document, have submitted information in respect of which it intended to be a mere informant.

19] This is the distinction that the applicants rely on in this case. It is not so much that the information cannot be found in the initiating document. As expressed in their heads of argument:

> *"Other information was provided by the complainants to the Commission under the heading "Summary of Complaints." Clearly that information was not intended to constitute distinct complaints in the sense of being separate causes of action, but was provided as further information concerning the three specific complaints."*[7]

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and others 15/CAC/Feb02 - paragraph 33 where the court held: "*The proper approach is to determine first what conduct is alleged in the complaint and what prohibited practices such conduct may be said to invoke or be rationally connected to. Then consideration is given to the referral to see whether the conduct alleged is substantially the same."*

5 See our decision in *SAB,* supra, for a detailed discussion of these cases.

6 For the *facta probanda* approach see *Glaxo,* supra, and for the 'intention' approach see *Yara*.

7 Applicants heads of argument, paragraph 34.

20] Thus the applicants are arguing that one can draw inferences about intention from the way the initiating document has been structured. Although the information that has been referred can be found in the initiating document, the manner in which the complaint has been drafted, suggests it is located in a section intended to serve as the provision of information, as distinct from other sections which evidence what the complainants intended to complain about.

21] In *Yara* the Commission had referred a complaint based on an initiating document from a private complainant. The case, as originally referred, alleged an abuse of dominance by Sasol. The Commission later sought to amend its referral to make a case alleging cartel behaviour by Sasol and two other firms, Omnia and Yara. The court held that such an amendment was not competent. Although the existence of the cartel had been mentioned by the complainant in its initiating document, the court held that the complainant had not intended to refer the cartel case but only an abuse of dominance case. As the court put it:

> *"But I do not agree that these allegations were intended to constitute a distinct complaint in the sense of a separate cause of action within the complaint; as opposed to further information concerning the initial complaint."* [8]

22] Later in the decision the court states:

> *"The allegations of cartel activity are bald and not supported by any detail. I can only conclude therefore that the allegations fall under information submitted under section 49(B)(2)(a) of the Act."* [9]

23] Because the *Yara* case suggests that the Commission can only refer that part of an initiating document that a complainant intends to have complained about, as opposed to inform about, the argument in this case is that the Commission did not have the necessary jurisdictional facts to refer the complaint that it did. Expressed differently, the applicants are arguing that the Commission, with one exception, did not refer the matter it did have jurisdiction to refer and referred that which it did not have jurisdiction to refer.

8 See *Yara* paragraph 30.

9 Ibid, Yara paragraph 33.

Analysis

24] The question we have to resolve in this case narrows down to whether the facts supplied in the initiating document, which are relied upon by the Commission in the referral, can be regarded as facts that the complainant intended to complain about. To perform this analysis we need to examine the claims made out in the referral and then identify the manner in which they have been alleged in the initiating document to see what inferences can reasonably drawn regarding the claimants' intention; were they provided with the intention to complain or were they the mere submission of information.

25] In brief the Commission's case as made out in the referral is as follows:

26] The poultry industry comprises several levels; great grandparent stock used to breed grandparent stock, grandparent stock used to breed parent stock, parent stock used to breed broilers, broilers sold for slaughter, and finally, the sale of chicken portions to the retail market.

27] Great grandparent stock is sourced from international firms who own rights to certain breeds. These firms or their licencees compete with one another. In South Africa, Astral has the rights to variants of the Ross bird, whilst Supreme has rights to the Arbor Acres bird.

28] Typically firms who compete in these markets are vertically integrated although not necessarily at all levels. This has implications for the present case as the complainants compete with, but are also customers of the respective Astral firms.

29] The Astral firms and the complainants are both involved in breeding, the production of broilers and the processing and supply of poultry products.[10]

30] In 1992, Country Bird together with three other firms formed a joint venture known as Elite. Since that time the agreement has undergone changes both

10 Complaint Referral paragraph 37.

in its terms and its constituent parties. Astral has since acquired control over the other joint venture partners apart from Country Bird.[11] At present Astral has 82% of the joint venture and Country Bird has 18%.[12] In January 2007, Country Bird transferred all its assets to Supreme. Supreme is integrated at all levels in the poultry market and is involved in the breeding of grandparent and parent stock, the broiler market and it processes fresh and frozen poultry products. [13]

31] Two clauses of the joint venture agreement are central to the Commission's case. The first is that no resolution of the joint venture is valid unless holders of not less than 80% vote in favour of it. However, Astral is able to exercise sole control over the joint venture by virtue of its 82% voting share. The second is that Country Bird is obliged to obtain 90% of its parent stock from the joint venture.[14]

32] This, the Commission alleges, prevents Country Bird from entering the breeding market to supply grandparent stock which competes with that of Astral. Supreme, as we noted, supplies the Arbor Acres breed in South Africa.

33] The Commission takes these facts and frames two complaints from them. The first claim is that the arrangements contravene section 4(1)(b)(i) and (ii) of the Act because they fix trading conditions and allocate customers and suppliers. The Commission alleges that these arrangements have an anticompetitive effect at two levels of the supply chain – the breeder level and the broiler level because they are made between two competitors.

34] The central factual contention relied upon other than the fact that the firms are competitors is set out in paragraph 41 of the referral which states:

> *"The joint venture agreement requires Country Bird to procure 90% of its parent stock requirement from Elite. It also requires Elite to purchase all its feed requirements from Meadow, which is also*

11 One of the original parties David Bone has since retired and his interest was taken over by the other members at the relevant time. (Complaint paragraph 28.1).

12The legal nature of the joint venture is a matter of dispute between the parties – Astral contends it is a *universitas*, the complainant contend it is a partnership. This is not an issue relevant for our purposes. See record page 22.

13 Complaint Referral paragraph14.

14 Clause 14.1.2

controlled by Astral. Furthermore, Elite purchased all its grandparent stock from RBP".

35] The central legal conclusion that the Commission makes in respect of the horizontal restrictive practice claim is made in paragraph 43 of the referral which states:

> *"The anticompetitive effects of the arrangements around the joint venture agreement are such that they constitute restrictive horizontal practices. They fix trading conditions and allocate customers and suppliers in contravention of section 4(1)(b)(i) and (ii). This has the effect of preventing Country Bird from being an effective competitor at the breeder level against Astral and Elite. They also prevent Country Bird from being an effective competitor at the broiler level due to the restrictions as to the sourcing of parent stock from Elite."*

36] The Commission then goes on to observe that the supply restriction has; (i) prevented Country Bird from obtaining the supply of grandparent breed which competes with the Ross breed and (ii) stifled entry into the breeding and broiler markets; the Commission gives as an example the attempts of Supreme to gain entry into the market for its Arbor Acres Bird which competes with Astral's Ross Bird.

37] The second claim concerns an abuse of dominance.

38] The dominance claim partly overlaps the horizontal claim, but also raises other claims. The overlap concerns reliance on the compulsory purchase requirement.

39] It is alleged that Astral is a dominant firm in the breeding market and has used the 90% purchase requirement to restrict competition in two respects. Firstly, firms which compete with Elite are denied the opportunity to compete for 90% of Country Bird's custom. Secondly, the same obligation means Country Bird faces higher input costs – since fewer firms compete to supply most of its requirements - making it less competitive in the market at broiler level.

40] The remaining abuse of dominance claims are:

- Astral required its customer MPC not to deal with the complainant. This claim the applicants concede is founded on the complaint and hence we do not need to consider it further;[15]

- A requirement that tied Elite to procuring its feed requirements from Meadow Feeds, an Astral subsidiary, which it is alleged, forecloses other feed suppliers from competing to supply Elite.[16]

41] The applicants argue that these claims cannot be founded in the initiating document.

42] Reliance for this argument depends, as we shall see, on the architecture of the initiating document. The complainants have divided the document into various sections each of which has a heading.

43] It starts with a description of the parties, allegations of jurisdiction, then a summary of complaints, itself subdivided further into sections, on restrictive vertical practices, horizontal practices and an abuse of a dominant position. Following these sections is a section headed "*Background to the complaints*" which itself is followed by three further sections headed *"First complainant's first complaint against first respondent: restrictive vertical practice"* and then; "*First complainant's second complaint against First and second respondents: Restrictive horizontal practice"* and finally "*Second complainant's complaint against second respondent : abuse of a dominant position."* (We will refer to these three sections in the initiating document from now on as the 'complaint sections.') At the end of the document comes a section headed "*Conclusion*".

44] The arrangement of sections is admittedly eclectic and the content sometimes repetitive.[17] This has afforded the applicants the opportunity to read it disjunctively. They argue that those portions whose headings suggest they

15 Paragraph 51.

16 Paragraph 53.

17 For instance the facts concerning MPC are contained in both the body of the complaint under the heading Abuse of dominant position (paragraphs 20-24) and is repeated under the heading Second complainants Complaint against second respondent : abuse of a dominant position (paragraphs 47-53).

are the intended complaint (i.e. the 'complaint sections') can be separated from those whose headings do not suggest the same intention. Only the former constitute the complaint, the latter are mere information.

45] Applying this methodology the applicants argue that the complaint in respect of vertical restrictive practices is the one found under the heading "*First complainant's first complaint against first respondent: restrictive vertical practice.* An examination of what is alleged here they argue, reveals a concern that Astral manipulates the prices and quality of the stock that Country Bird sources from Elite. These complaints they argue do not form part of the referral.

46] The argument is similar in respect of the horizontal complaint. This complaint they argue is the one headed "*First complainant's second complaint against First and second respondents: Restrictive horizontal practice."* Here they argue the allegation is that the joint venture is used to fix prices for the sale of progeny produced by the parties to the joint venture viz. Country Bird and Astral who are alleged to be competitors. This is also not a complaint that has been referred.

47] Finally, the applicants argue that the abuse complaint is limited to the paragraphs under the heading "*Second complainant's complaint against second respondent: abuse of a dominant position".* The only allegation made out here is that Astral induced MPC not to supply day old chicks to Country Bird.[18] As we have seen, this is the only abuse case made out by the Commission conceded by the applicants.

Analysis

48] Read as a whole all the allegations that inform the Commission's referral can be identified in the body of the complaint. Further they are mentioned in the 'complaint sections' even if their link to the conclusions made in those

18 I.e. the one headed "*Second complainant's complaint against second respondent: abuse of a dominant position".*

paragraphs is not always evident.

49] The primary fact that informs the Commission's case in the referral is that the complainants and the applicants are in a supplier and competitive relationship at various levels in the industry. As a result of the joint venture, effectively controlled by Astral, Country Bird is obliged to source 90% of its parent stock from the joint venture. The Commission identifies horizontal and abuse of dominance contraventions as a result.

50] The applicants argue that the compulsory purchase obligation is, properly read, the mere submission of information and not part of the complaint.

51] But this reading of the initiation document is implausible.

52] We can first glean the intention of the complainants in the second section of the initiating document headed '*Jurisdiction*'. Here in paragraph 6 the complainants state:

> *"In the premises, the Competition Commission has the necessary jurisdiction to receive and investigate the complaints particularised below."* (Our emphasis).

53] The sentence is unambiguous. It is stating that what is '*particularised below'* is a complaint not the mere submission of information.

54] Let us now consider the particularity that follows "*below*".

55] In paragraph 7 of the initiating document the compulsory purchase obligation gets mentioned for the first time. This comes under the heading "*Summary of complaints"* which has an additional sub heading, *"Restrictive vertical practices"* The allegation is made that in terms of clause 14.1.2 of the joint venture agreement Country Bird is obliged to purchase 90% of its parent stock requirements from Elite. This allegation is repeated several times throughout the remaining paragraphs in this section of the complaint. The complainant leaves no doubt of what it thinks are the effect of this clause as its states:

> *"The agreement embodying clause 14.1.2 read against the background of the Agreement as a whole and the implementation*

thereof by Astral and Elite constitutes a restrictive vertical practice."

56] In a further concluding paragraph the complainants state such conduct constitutes a restrictive horizontal practice which is prohibited in terms of section 4(1)(b)(i) of the Act.

57] Because a complainant is not obliged to pigeonhole its complaint under particular sections of the Act the same facts can be used by the Commission to found a section 8 claim. (Note that elsewhere in the document the factual allegation is made that Astral is a dominant firm.)[19]

58] Were there nothing further in this document the matter would be beyond doubt. What the applicants latch onto as dispositive of the complainants' intention, are the later sections in the initiating document, where complaints are particularised against the particular applicants as we noted above.

59] The applicants seek to suggest that the heart of the complaint is set out here and that it involves a complaint about manipulating the pricing of the chickens and selection of products something the Commission has not referred. Whilst it is true that the allegations of manipulation are found in this section it is not limited to these. The compulsory purchase obligation is mentioned several times in this section.[20] If the applicants own argument is to be followed it means that the compulsory purchase obligation is something the complainants intended to complain about because it is made in a 'complaint section' and not limited to the earlier sections, which on their version are the mere submission of information.

60] Moreover it is repeated several times in this section in paragraphs 38.2 and 39 and then again, unambiguously, in paragraph 41 where it is stated:

> *"In consequence of the aforegoing, the effect of the compulsory purchase provision contained in clause 14.1.2 of the Agreement read with the rest of the Agreement as whole, is to substantially lessen competition in the said market and to prejudice in consequence of*

19 See paragraph 33.

20 I.e. the section headed first complainant's first complaint against first respondent: vertical restrictive practice. Record page 33.

such effect."

61] Still in this section, the complainants go on to conclude:

> *"In the premises, a restrictive vertical practice is being conducted by Astral and Elite, the latter under the direction and control of Astral, through the employment of clause 14.1.2 of the Agreement."* (Our emphasis).

62] The applicants argue that this reference to 'aforegoing' in paragraph 41 is merely the complainants restating their complaint about manipulation of pricing and quality. However this reading is wholly artificial, neither supported by the language used nor the context of the document read as a whole. No sensible reading can be made of the complaint document without an appreciation that the compulsory purchase obligation is at the heart of their concerns.

63] There is no doubt that the complainants have set out the facts about the compulsory purchase obligation in the initiating document, that they intended to make this part of the complaint and not merely to furnish information, and that the Commission was entitled to refer this aspect of the claim under sections 4 and 8 of the Act, as it did.

64] To the extent that the Commission may have drawn different legal and economic conclusions from the same facts as mentioned in the initiating document, the Commission is entitled to do so. The particulars remain the same even if the conclusions drawn may differ.

65] As long as the *facta probanda* are the same as in the initiating document, the legal and economic conclusions from the behaviour may differ in the referral, without requiring a new initiation, simply to support a different legal conclusion. We do not need to decide whether the Commission has gone further on this aspect than the complainants did in the initiating document. This is because it is entitled to add particulars to a complaint. In terms of section 50(3)(a)(iii) of the Act:

> *(3) When the Competition Commission refers a complaint to the*

Competition Tribunal in terms of subsection 2(a), it –

a) may –

.....

(iii) add particulars to the complaint as submitted by the complainant...

66] It remains for us to consider whether the final aspect of the Commission's section 8 claim relating to Meadow Feeds (Pty) Ltd, forms part of the matter complained of or is mere information.[21]

67] The Meadow Feeds allegation is mentioned in detail only twice in the initiating document, both references come under the heading *'Background to the Complaints'*

68] First, the complainants outline certain changes that have taken place with respect to the joint venture agreement over time. In paragraph 28.3 the complainants mention that Astral became the controlling supplier of feed to Elite. Explicit mention is then made of, *"Meadow Feeds Mill to which reference will be made below."*

69] Mentioned '*below*' in paragraph 32 of the initiating document the complainants state:

> *"In terms of clause 13 of the Agreement, Elite is obliged to purchase all of its feed requirements from Meadow Feed Mill.."*

70] Granted this allegation is not repeated again in the initiating document in the same way as an instance of an abuse of dominance, as has the allegation concerning MPC, discussed earlier.

71] However this does not mean one can infer that the complainants did not seek to complain about Meadow Feeds. They clearly did, albeit not necessarily as an abuse of dominance.

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21 The Commission refer to this firm as Meadow Feeds Pty Ltd. See complaint referral paragraph 6.3. The complainant refers to it as Meadow Feed Mills. (See complaint paragraph 32.) Nothing seems to turn on this but it explains the inconsistent terminology in some of the quotations we cite later. We will refer to Meadow Feeds.

72] In the section headed "*First complainant's First complaint against First Respondent: restrictive vertical practice*" in the opening paragraph 38 the complainants state:

> *"By virtue of Astral's control of RPB and Meadow, its subsidiaries and operating divisions, it is able to...."* (Our emphasis).

73] Several paragraphs follow thereafter in which the complainants make allegations that Elite manipulated the prices of stock that it sold to Country Bird.

74] Part of manipulating prices would have been the cost of inputs as suggested by the complainants in the earlier paragraph 32 under the background section we quoted above. Why else is Meadow Feeds expressly mentioned here? Clearly the complainants, having first identified the nature of the practice in paragraph 32,under the rubric '*Background*', intended, by further mentioning Meadow Feeds in paragraph 38,under the rubric "*First Complaint....*" to complain about it. There is no other reason for Meadow Feeds to have been subsequently mentioned.

75] Since the complainant is not required to pigeonhole its complaint to a section of the Act, the fact that it chose to make allegations that this conduct constituted a section 5 or vertical restrictive practice, whilst the Commission referred the conduct under section 8 as an abuse of dominance is of no moment.[22] There is a great degree of convergence between the two concepts on the present set of facts. The additional fact that needs to be alleged to make out a case under section 8 is the fact that the respondent firm is dominant in some market relevant to the abuse. The complainants have alleged that Astral is a dominant firm in the breeding market. The Commission makes the same allegation in the referral. [23]

76] Thus all the *facta probanda* to found the Commission's dominance claim can be located in the complaint, albeit that they are organised in different parts of the complaint. That the Commission has widened the dominance claims to

22 On not being required to pigeonhole see the CAC decision *in Glaxo,* supra, at paragraph 15.

23 See paragraph 47.

include a complaint that the complainant had characterised as a vertical restrictive practice is something perfectly permissible under the existing case law. Recall that the purpose of the *Glaxo* decision was to prevent complainants from withholding information from the Commission which it was not given the opportunity as prosecutor of first instance to investigate and refer. The same consideration does not apply here. There is nothing to prevent the Commission from alleging that the same practice which a complainant relies on for an upstream anticompetitive effect, also has a downstream negative effect and vice versa, without requiring a fresh initiation to establish the jurisdiction for it to do so.

77] It is not necessary for us to decide whether the Commission has drawn different legal and economic conclusions about the conduct from those made out in the initiating document. Even assuming it has, it is entitled to do so. As we explained earlier in terms of section 50(3)(a)(iii) the Commission may add particulars to the complaint as submitted by the complainant.[24]

Application of the Yara principles to the facts of this case

78] Should the application of the approach in *Yara* lead us to a different conclusion? In order to derive the complainant's intention, the court in *Yara* examined the manner in which the complaint had been drafted and the structure of the complaint. It is this methodology that the applicants as we have seen have attempted to rely on in approaching this case. However, even if the *Yara* approach is followed, there are important differences between the complaint in that matter and the present one.

79] The court in *Yara* had regard to several facts:

- That the complainant had explicitly disavowed relief against the alleged co-cartelists in its supporting affidavit;
- That allegations concerning the cartel were not given significant mention in the affidavit;

24 The Commission is alleging that Astral's abuse occurs in selling an input from its subsidiary to the joint venture to the exclusion of competitors of that input supplier and then requiring the party to the joint venture to procure the final product at the allegedly higher price. Paragraphs 53 and 54 of the complaint referral.

- The cartel allegations were bald and unsubstantiated; and
- That under a heading in the affidavit "Prohibited practices" there was no mention of the cartel allegations. [25]

80] As we have seen it is this last factor - the absence of the relevant allegation under the relevant heading - that the applicants particularly rely on in this case. But to rely solely on this, is not a proper reading of the *Yara* decision. As we see from the factors set out above this was not the only factor the court had regard to. In other words, the mere failure to mention the cartel under the heading prohibited practice was not conclusive evidence of the lack of intention on behalf of the complainant; it was its presence as a fact along with several others which gave rise to the inference being drawn.[26]

81] It is clear that the court in its exercise of divining the complainant's intention took a holistic approach of which this absence of allegation under a so- called relevant heading, was only one contributing fact leading to its conclusion of an absence of intent. Headings cannot be read in isolation. Context is everything. In *Yara* the court found that the allegation of a cartel was followed by a disavowal of relief in respect of it. In this case the complainants have not disavowed any aspect on which the Commission seeks relief.

82] The real precedent to draw from *Yara* in examining intention is to look at the initiating document holistically and not in discrete segments. This is the approach we have taken in this matter.[27]

Conclusion

83] Accordingly we find that the referral is sufficiently based on the complaint to give the Commission jurisdiction to found the referral in respect of Astral and Elite, the first and second respondents. The only exception, which is conceded by the Commission, is that no case is made out to support a referral against RPB, the third respondent, which was joined as a result of the

25 Ibid Yara paragraph 33.

26 Ibid Yara paragraph 29.

27 See supra fn8, *Yara* decision, paragraph 30.

amendment. [28]

84] We make the following order:

1. The application for the dismissal of the referral in respect of the third respondent RPB, is upheld.

2. The application for dismissal of the referral against the first and second respondents is not successful and is dismissed.

3. There is no order as to costs.

Norman Manoim **20 October 2011**

Date

Yasmin Carrim and Andreas Wessels concurring.

Tribunal Researcher : Ipeleng Selaledi

For the Applicants : A. Subel SC and A. Berkowitz instructed by Edward Nathan Sonnenbergs

For the Commission : N.H Maenetje instructed by the State Attorney

28 See transcript of hearing page 113.