competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: **CR152Dec14/JOI029May16**
CR152Dec14/JOI047Jun16

In re: The applications for joinder between:

THE COMPETITION COMMISSION	Applicant
And	
HENDRIK WILHELM CARL PISTORIUS N.O.	First Respondent
LEO CONSTANTIN PISTORIUS N.O.	Second Respondent
HERMINE PISTORIUS N.O.	Third Respondent
ARNOLDUS KURT PISTORIUS	Fourth Respondent
IAN MCINTYRE N.O	(Tenth Respondent)
DANIEL HENDRIK DU PLESSIS	(Eleventh Respondent)

Case No.: **CR152Dec14/AME032May16**

And in re: The application for leave to amend between

THE COMPETITION COMMISSION	Applicant
And	
HENDRIK WILHELM CARL PISTORIUS N.O.	First Respondent
LEO CONSTANTIN PISTORIUS N.O.	Second Respondent
HERMINE PISTORIUS N.O.	Third Respondent
ARNOLDUS KURT PISTORIUS	Fourth Respondent
KALKOR (PTY) LTD	Fifth Respondent

In the complaint between:

THE COMPETITION COMMISSION	Applicant

And

HENDRIK WILHELM CARL PISTORIUS N.O.	First Respondent
LEO CONSTANTIN PISTORIUS N.O.	Second Respondent
HERMINE PISTORIUS N.O.	Third Respondent
ARNOLDUS KURT PISTORIUS	Fourth Respondent
KALKOR (PTY) LTD	Fifth Respondent
CML TALJAARD & SON (PTY) LTD	Sixth Respondent
PBD BOEREDIENSTE (PTY) LTD	Seventh Respondent
GRASLAND ONDERNEMINGS (PTY) LTD	Eighth Respondent
FERTILIZER SOCIETY OF SOUTH AFRICA	Ninth Respondent

Panel	: N. Manoim (Presiding Member) : M. Mokuena (Tribunal Member) : A. Wessels (Tribunal Member)
Heard on	: 25 August 2016
Order Issued on	: 24 October 2016
Reasons Issued on	: 24 October 2016

Introduction

1. In these reasons we are required to decide three interlocutory applications arising out of a complaint that has been referred by the Competition Commission ('the Commission') in which it alleges that certain of the above named respondents engaged in restrictive horizontal conduct by fixing agent commissions.

2. The Commission is the applicant in all three applications; two are for joinder and the third, is for an amendment to the complaint referral.

3. In the joinder applications, the Commission seeks to join Ian McIntyre ('McIntyre') and Daniel Hendrik Du Plessis ('Du Plessis'), in their capacities as trustees of the Hendrik Pistorius Trust ('Pistorius Trust'), to the complaint referral. This complaint had been referred to the Tribunal on 4 December 2014.

4. The Commission additionally seeks to amend the complaint referral to clarify that the anti-competitive conduct forming the basis of the complaint continued up until at least April 2009.

Joinder

5. The Commission referred a complaint against several firms involved in the wholesale of agricultural lime ('aglime') to the Competition Tribunal ('Tribunal') on 4 December 2014. The complaint was that the firms met annually to fix the commissions of agents charged with the sale of aglime. The Commission alleges that the firms, by so doing, have contravened section 4(1)(b)(i) of the Competition Act 89 of 1998 ('the Act').

6. That section states:

> *"An agreement between, or concerted practice by, firms, or decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price of any other trading condition"*

7. One of the firms implicated was Hendrik Pistorius & Co. At the relevant time, the business of Hendrik Pistorius & Co was conducted through the Pistorius Trust. As noted, the Commission alleges that this conduct contravened section 4(1)(b)(i) of the Act; one of the constituent elements of that section is that it must be committed by a *'firm'*. In terms of the Act a *'firm'* is defined as including "... *a person, partnership or a trust."*[1]

8. A '*respondent*' is defined in the Act as a "... *firm against whom a complaint of a prohibited practice has been initiated in terms of this Act."*[2]

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[1] Section 1(1)(xi).
[2] Section 1(1)(xxix).

9. It is thus trite that the fact that a firm takes the form of a trust does not preclude it from being a respondent in terms of the Act.

10. The next issue is how a trust, if it is a respondent, should be cited for the purpose of a complaint referral.

11. To bring the Pistorius Trust before the Tribunal the Commission cited four of the trustees by name in their official capacities, as the first to fourth respondents ('the Pistorius respondents'). For reasons we go on to explain, the Commission was not aware at that time that the trust had any other trustees.

12. The Commission accepts however that as a matter of law the following proposition as stated in the leading text book on trusts, *Honoré: The South African Law of Trusts* is correct:

> *"Unless one or more of the trustees are authorized by the others, all the trustees must be joined in suing and all must be joined when action is instituted against a trust."*[3]

13. That is the reason why the Commission is bringing the joinder applications. The question that arises in the present case is whether, as the Pistorius respondents contend, the application against them is defective *ab initio* and incapable of rectification by subsequent joinder because all the trustees were not initially cited.

14. The Commission concedes that it must join all the trustees who are in office from time to time and since it has elected to cite them *nomine officio*, it must cite the remaining trustees made known to them. But it contends there is no bar to it doing so post-referral.

15. Before we consider the law further on this we need to set out further facts regarding the appointments of Du Plessis and McIntyre.

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[3] *See* Cameron, De Waal, Kahn, Solomon and Wunsh, '*Honoré: The South African Law of Trusts*', 5th ed (2002) ('Honoré'), page 419.

16. As noted, when the Commission filed the referral it only cited four of the trustees, but not Du Plessis and McIntyre.

17. On 9 February 2015 the Pistorius respondents brought an application for the dismissal of the referral. Among the points they raised was that the referral had not been filed on all the trustees.[4] The affidavit made no further mention of who the remaining trustees were; although it might have been helpful for the Pistorius respondents to have done so. Nevertheless a resolution of the trustees dated the same date was attached. The resolution was signed by the Pistorius respondents, which, of course, came as no surprise. What was surprising to the Commission was that it was also signed by McIntyre.

18. According to the Commission, this was the first time it became aware of the fact that it had not cited all the trustees. Conceding that it needed to join all the trustees, it then brought the McIntyre joinder application on 12 May 2016.

19. In the McIntyre joinder application the Commission explained that when it brought the referral it had relied on a deed for the Trust which it had acquired in another matter it was investigating against the Trust.[5] Assuming that this document correctly reflected the names of all the trustees in the Pistorius Trust then in office, the Commission had relied on it for the original citation in the referral.[6]

20. This explains the omission of McIntyre. We now come to the explanation for the omission of Du Plessis. The Commission explains that whilst preparing the McIntyre joinder application it attempted to ascertain whether there were any other trustees of the Pistorius Trust by obtaining the most recent letters of authority from the office of the Master of the High Court, but the Master's office had lost the Pistorius Trust's file and could not provide the Commission with any further

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[4] Supporting Affidavit of Leo Constantin Pretorius to the Trust's Exception Application, ('Pistorius Exception Application') Hearing Bundle page 209, paragraph 17.

[5] The Commission describes this document as an amended deed of trust.

[6] Applicant's Founding Affidavit to the Application for Joinder of the 10th Respondent ('McIntyre Joinder Application') Hearing Bundle page 14, paragraph 30.

information.[7] The Commission is not alone in experiencing such a problem. Recently, in a case brought to our attention by the Commission, the High Court in the *Pro-Khaya case* mentions the following:

> *"In Pro-Khaya's replying affidavit Friedman stated that prior to the issue of summons in the High Court action the only information Pro-Khaya had relating to the identity of the trustees of the Trust was the reference in the pre-tender information to "The Independent Development Trust." Friedman attempted to discover the identity of the trustees at the office of the Master of the High Court, without success."*[8]

21. The matter was then set down for the purpose of hearing the dismissal application as well as exceptions raised by other respondents and the McIntyre joinder. On the day of the hearing, 2 June 2016, the matter was postponed after the Commission indicated that it would be amending the referral in response to the objections that had been received. The matter was set down for a later date at which both the amendment application and the joinder (then only relating to McIntrye) would be heard. It appears in response to a request from the Tribunal during this hearing that the Pistorius respondents then sent the present letters of authority to the Commission on 7 June 2016. This document, which is dated 12 March 2015, revealed the existence of yet another trustee, the sixth, namely, Du Plessis.

22. In the light of this new information the Commission then brought an application to join Du Plessis on 13 June 2016.

23. The Pistorius respondents, belatedly, filed papers to oppose both the joinders. Curiously, although the legal representatives claim to be acting on behalf of all the trustees, neither McIntyre nor Du Plessis filed affidavits to oppose the joinders.

24. This is a significant factual defect in the opposition to the joinders. The Pistorius respondents' main legal argument at the hearing was the fact that the referral was void because all the trustees had not been cited *ab initio*. However there is no

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[7] McIntyre Joinder Application (note 6 above) Hearing Bundle, page 14, paragraph 32.

[8] Pro-Khaya Construction CC v Trustees for the time being of the Independent Development Trust [2016] 2 All SA 909 (ECP) paragraph 23.

factual allegation made by either these two trustees or for that matter by any other, to indicate that McIntyre and Du Plessis were trustees at the date of the filing of the referral.

25. What evidence we have from the record is that McIntyre was a trustee at least on 9 February 2015, the date of the resolution. However this does not tell us if he was a trustee at the date of the filing of the referral which was 4 December 2014.

26. In respect of Du Plessis, *prima facie* it appears that he was not a trustee at the time of the referral. If he was, one would have expected his name to have been included as a signatory to the resolution dated 9 February 2015, but it is not.

27. Therefore the respondents have put up no factual averments to found their legal averments. On that basis alone the opposition to the joinders is flawed.

28. Nevertheless we will still consider the legal argument advanced on behalf of the Pistorius respondents which was that the failure to cite all the trustees at the date of referral renders the referral void *ab initio.*

29. Despite making this legal argument, no relevant authority was cited by the Pistorius respondents to support this proposition.

30. What authority we have been referred to suggests that the Commission is entitled to join trustees subsequent to the date of the referral.

31. The reason that all the trustees must be joined in legal proceedings against a trust is that a trust lacks legal personality. This has had consequences for the manner in which the courts have approached the citation of trustees in the case law.

32. First, courts accept that a trust can either be cited in its own name or as 'the Trustees for the time being of XYZ Trust'. This passage from Honoré has often been cited by the courts where the learned authors state:

> *"It is usual for the trustees to be cited as 'A, B and C in their capacity as the 'trustees of the XYZ Trust' but cases in which the trust as such is cited are not unknown and*

there should be no objection to a citation of 'the trustees for the time being of the XYZ Trust."[9]

33. This means that courts recognise other methods of proceeding against trusts other than citing all the serving trustees. If courts accept that a generic citation of the type mentioned above is adequate, then it places a different context on the technical requirements around the citation of trustees.

34. Second, the courts appreciate that from a business point of view there is very little difference between the way a company and a trust operate in practice.[10] Both are used, as in this case, as economic vehicles for engaging in commerce. As explained in the case of *Cupido v Kings Lodge Hotel:*

"There is in many respects very little practical difference between the common business enterprise or corporation and the business trust. These developments have made it difficult for a plaintiff who intended suing a defendant to always be sure whether he was a trust, corporate body or private individual."[11]

35. The court in *Cupido* cites the following passage again from Honoré:

"It is relatively difficult for those doing or contemplating business with a trust to discover the terms of the trust instrument or the names of the trustees."[12]

36. The court went on to say:

"It is misleading to trade under an assumed name and when questions of citation arise from a procedural point of view, to then spring the defence that the defendant had not been correctly cited. I believe that it would be undesirable and indeed unconscionable for a defendant to be allowed to escape liability for damages incurred by a plaintiff based on the technicality that the plaintiff should have sued the trust in the name of

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[9] *See* De Waal *et al* Honoré: The South African Law of Trusts (note 3 above), pages 419-420. Cited with approval in many instances, for instance see *Pro- Khaya* (note 8 above) at paragraphs 20-22.

[10] Cupido v Kings Lodge Hotel [1999] 3 All SA 578 (EC) ('Cupido') at pages 585-586.

[11] *Ibid* page 585.

[12] De Waal et al Honoré: The South African Law of Trusts (note 3 above), page 75 as cited in *Cupido* (note 10 above) page 585.

the trustees where the defendant had conducted a business under a particular trade name."[13]

37. For this reason the case law demonstrates that the courts have adopted a permissive approach to amendments or joinders to allow deficiencies in citation in matters against trusts to be rectified.

38. As the court stated in *Du Toit v Highway Carriers:*

"...courts should lean towards allowing amendments which would correct inadvertent incorrect descriptions and should not be astute to refuse such amendments involving the description of the defendant on pure semantic and legalistic grounds which ignore the realities of the situation as perceived by the parties themselves. By so refusing an amendment at the instance of the defendant the courts lend themselves to an exercise in formalism, the object of which is to enable a defendant to escape a summons which it knows is directed to it, and often to wholly defeat a claim which has by then prescribed."[14]

39. Further the courts have recognized that permitting such amendments (or in this case a joinder) does not amount to a change of defendant. In *First National Bank v Strachan* the court stated:

"*In my view in the present case, the real defendant has in fact not changed but only its description as set out in the notice of amendment.*"[15]

40. There is no reason why the permissive approach to amendments - to correct the citation of trustees – that is followed by the courts in civil cases should not be followed in Tribunal proceedings. This approach is strengthened by the explicit recognition the Act gives to the fact that at trust can be a firm. It is unlikely that the legislature, having expressly sought to ensure that trusts were not used as vehicles to evade competition scrutiny, would have intended that the Act be interpreted in a technical or formalistic manner so that trusts should escape the

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[13] Cupido (note 10 above) page 385. Note that in the matter before us, the Trust trades under the name 'H Pistorius and Co'. *See* Complaint Referral, Hearing bundle page 149, paragraph 7.

[14] Du Toit v Highway Carriers [1999] (4) SA 564 (W) at 569J- 570D.

[15] First National Bank v Strachan Family Trust [2000] 3 All SA 379 (T) at 383-385.

Act's ambit. Nor is the point that the referral is a nullity if the error occurs at the point of filing, of any substance. It is precisely at that time when a party referring a complaint against a trust may be ignorant of the true identity of the trustees. Since the trust itself remains the "real defendant" there is no change of the respondent in substance. The objection in this case amounts to pure formalism.

41. Although the Pistorius respondents initially contended that the joinder application was not procedurally competent this point was not pursued in oral argument. As the Commission correctly argued sections 55(2) and 58(1)(c) of the Act confer a wide discretion on the Tribunal to condone any technical irregularities arising in any of its proceedings.

42. The applications for the joinder of McIntyre and Du Plessis are hereby granted. Our order appears at the end of these reasons.

Amendment application

43. In the complaint referral of 4 December 2014, the Commission alleges that the respondents met annually from January 1995 until May 2008 and agreed to fix the rates of agents' commission in contravention of section 4(1)(b)(i) of the Act.[16]

44. The Commission alleged that these agreements were struck at the annual general meetings of the ninth respondent, the Fertilizer Society of South Africa ('FSSA') and were effective for a one year period and were revisited subsequently at the next annual general meeting.

45. Thus one reading of the referral is that agreements were made at an annual general meeting with a prospective effect until at least the next annual general meeting. The last annual general meeting of the FSSA that the Commission relies

[16] Hearing Bundle page 154 paragraph 26.

on, took place in May 2008. Thus on this reading, the conduct was in effect until at least May 2009.

46. However the referral contains another paragraph which might suggest otherwise. In paragraph 26 of the referral the Commission states:

> *"This complaint referral is based on the Commission's findings in its investigation of the complaint that the respondents, being firms in a horizontal relationship, engaged in an agreement and/ or concerted practice to fix the agents' commission in contravention of section 4(1)(b)(i) of the Act. The above conduct commenced in or about January 1995 and endured until May 2008."*[17] (Our emphasis)

47. According to the respondents, a fair reading of this paragraph is that the practice had *'ceased'* (although the Commission does not use either of these terms, it says the '*conduct*'... '*endured*') in May 2008.

48. That is how all the respondents in this matter understood it and the Pistorius respondents together with Kalkor, the fifth respondent and PBD Boeredienste, the seventh respondent, represented separately, relied on this reading to bring an objection to the referral on the basis that the claim had prescribed.

49. They based this argument on the provisions of section 67 of the Act which deals with the limitations of bringing an action. In particular section 67(1) states:

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

50. In this case the date of initiation is crucial. In 2009 the Commissioner initiated a complaint against, *inter alia*, the present respondent firms. However in 2012, the Commissioner amended the initiation. The amended 2012 initiation makes specific reference to the conduct in this matter; the earlier one does not. If the practice had ceased in May 2008 and the initiation was only in 2012, then, it would *prima facie* appear, that the referral had been brought too late. If however the

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[17] Complaint Referral, Hearing Bundle page 154, paragraph 26.

practice continued at least until May 2009, then the referral would still have been brought in time.

51. At the hearing on 2 June 2016 – the one referred to earlier in connection with the joinder applications – the Commission advised the Tribunal that it intended to bring an amendment to the referral to deal with these objections. The Tribunal, against the objections of the Pistorius respondents and the fifth respondent, granted the postponement to allow the Commission to bring the amendment.[18]

52. On 25 May 2016 the Commission brought an application to amend its complaint referral by adding what it termed '*Supplemented or clarified facts*' to its referral.[19] These read as follows:

"*Supplemented or Clarified facts*

11. The Commission's case in the complaint referral against all the respondents is that during the period of January 1995 until May 2008, the respondents met annually and agreed to fix the rates of agents' commissions in contravention of s4(1)(b) of the Competition Act. This is made clear in paragraphs 24, 26, 28 and 32 of the referral affidavit

12. Paragraph 32 of the referral affidavit clearly states that the agreements reached by the respondents in respect of the agents' commissions were effective for a one year period and were revised on an annual basis at the time of the ninth respondents annual general meeting

13. For the sake of clarity I state the following

13.1. The agents' commissions that were agreed to by the respondents in May 2008 were implemented for a period of a year thereafter.

13.2. This means that the duration of the contravention lasted until a year after May 2008 and, at the very least until April 2009."

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[18] Tribunal Transcript 2 June 2016, page 46.

[19] The Commission brought the application in terms of Rule 181(1) of the Rules for the Conduct of Proceedings in the Competition Tribunal ('Tribunal Rules').

53. The seventh respondent noted the amendment application and chose not to oppose it. The Pistorius respondents and Kalkor elected to oppose the amendment, filing answering affidavits to this effect on 21 and 25 June 2016 respectively.

54. The Commission submits that it makes the application to amend in order to provide a clarification of facts already before the Tribunal. It submits that the application's purpose is to ensure the proper ventilation and delineation of the dispute in the case.

55. In terms of rule 18(1) of the Rules for the Conduct of Proceedings in the Competition Tribunal ('Tribunal rules'), the Tribunal has a discretion to permit the amendment of a complaint referral at any time prior to the hearing of that complaint, upon application of the party which referred such a referral.[20] This discretion is broad enough to permit the widening of the scope of a referral[21] and is exercised with a permissive approach in applications for amendments that seek to fully ventilate a complaint so that it may be prosecuted in the public interest.[22] This discretion is to be exercised having regard to the context of a particular application and the possible prejudice caused to the parties to the proceedings and the interests of justice.[23] The Supreme Court of Appeal found that the amendment of a complaint referral should be allowed in instances where the amendment constitutes further particulars to complaints already covered by the referral.[24]

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[20] "CTR *18. Amending documents*
(1) The person who filed a Complaint Referral may apply to the Tribunal by Notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorising them to amend their Form CT 1(1), CT 1(2) or CT 1(3), as the case may be, as filed"

[21] Competition Commission v Yara (South Africa) 9Pty) Ltd 2013 (6) SA 404 (SCA) ('Yara SCA'); Loungefoam (Pty) Ltd v Competition Commission 102/CAC/Jun10 ('Loungefoam') para 16.

[22] The Competition Tribunal v Yara South Africa (Pty) Ltd and another; In re The Competition Commission v Sasol Chemical Industries and Others 31/CR/May05 [24 February 2010] para 48.

[23] Competition Commission of South Africa v Sasol Chemical industries (Pty) Ltd, Kynoch Fertilizer (Pty) Ltd Africa explosives and Chemical industries Ltd 45/CR/May06 [1 April 2008] para 8.

[24] Yara SCA (note 21 above) para 31.

56. As noted earlier paragraph 28 of the original complaint referral states that "*During the period between January 1995 until May 2008, the respondents met annually and agreed to fix the rates of the agents' commissions.*" This phrase suggests that the last agreement to fix the agents' commissions was made in May of 2008. The proposed amendment thus does not amend or alter the case as previously pleaded.

57. For instance, in paragraph 32 of the complaint the Commission stipulates that the agreements reached at the annual AGM's were effective for a one year period. The supplemented and clarified facts do not therefore introduce any new facts into the matter, but rather draws on two, previously unconnected, facts to arrive at the conclusion that the practice in question lasted until, at least, April 2009.

58. Thus what the amendment seeks to secure is that any ambiguity created by the use of the word *endured* in paragraph 26 of the referral quoted earlier, is resolved, by distinguishing between the date that the agreement was reached (May 2008) and the date on which the effects of the conduct pursuant to that agreement were still being experienced (April 2009). Note that the test in section 67(1) for measuring the endpoint of the prescription period, is not the date of the conclusion of the agreement, but the date on which the *practice* has ceased. The two are distinguishable. As the Competition Appeal Court has observed in *Paramount Mills (Pty) Ltd v Competition Commission:*

> "*The prohibited conduct does not end or cease with the conclusion of the agreement fixing the selling price. It continues to exist and its effect continues to be felt when the future prices, agreed upon pursuant thereto, are implemented.*"[25]

59. The amendment does not create any prejudice to the respondents. If the practice had in fact ceased in May 2008, then this defence is still open to the respondents to establish. Conversely, disallowing the amendment would unfairly prejudice the Commission by denying it, because of a semantic lapse in one paragraph of the referral, from bringing its case before the Tribunal; causing an injustice not only to

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[25] (112/CAC/SEP11) [2012] ZACAC 4 (27 July 2012) paragraph 44.

it, but the public interest it seeks it vindicate. Fairness requires reading the referral in its entirety not isolating a single paragraph.

60. We note further that proceedings are at a very early stage and the respondents have not, as of yet, filed affidavits to answer to the referral. This factor should undoubtedly mitigate any prejudice arising from the granting of this amendment.

61. The respondents submit that they run the risk of additional costs, exposure to criminal sanctions, adverse publicity and reputational harm and the notion that they have to plead to the Complaint referral.

62. These objections have no basis. The criminal provisions in the statute do not apply retrospectively and were only introduced in May 2016. This concern is therefore spurious. The contention of reputational risk was hard to understand. This prejudice if it is to be considered cognizable, must arise in any case where one party seeks an amendment in a matter where the others are accused of unlawful action. No authority was cited to support the proposition that courts take such a factor into account in considering whether the grant of an amendment should be considered prejudicial.

63. Finally any expense occasioned by the Pistorius respondents in opposing the amendment is due to their own decision to oppose the amendment. Like the seventh respondent they should have elected not to oppose the amendment which was seeking to rectify the objection they had raised.

64. We thus grant the application to amend the complaint in the manner requested.

ORDER

It is ordered that:

1. Ian McIntyre N.O. and Daniel Hendrik Du Plessis N.O are hereby joined in the Complaint referral proceedings, as the tenth and eleven respondents respectively, in their capacities as trustees of the Hendrik Pistorius Trust;

2. The Commission is given leave to amend its Complaint referral of 4 December 2014, in the manner set out in the paragraphs headed SUPPLEMENTED OR CLARIFIED FACTS in its amendment application dated 25 May 2016;

3. The respondents in the Complaint referral proceedings must file their answering affidavits within 20 days of the Commission's filing of its amended complaint referral; and

4. No order is made regarding costs.

Norman Manoim **24 October 2016**
Date

Andreas Wessels and Medi Mokuena concurring

Tribunal Researcher:	Alistair Dey-Van Heerden
For the Applicant:	H. Maenetjie SC *assisted by* P. Ngcobo *Instructed by*: the Competition Commission.
For the 1st to 4th, 5th and 10th-11th Respondents:	A.J. Coetzee *Instructed by*: Louw Attorneys for the 1st to 4th respondents and the 10th and 11th respondents; and Marinus van Jaarsveld Attorneys for the 5th respondent.