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

Case No: 31/CR/May05

In the matter between:

THE COMPETITION COMMISSION	Applicant
and	
YARA SOUTH AFRICA (PTY) LTD	First Respondent
OMNIA FERTILIZER LTD	Second Respondent

In Re:

THE COMPETITION COMMISSION	Applicant
SASOL CHEMICAL INDUSTRIES	First Respondent
YARA SOUTH AFRICA (PTY) LTD	Second Respondent
OMNIA FERTILIZER LTD	Third Respondent

Panel	:	Y Carrim (Presiding Member), A Wessels (Tribunal Member) and T Madima (Tribunal Member)
Heard on	:	02 December 2009
Reasons issued on	:	24 February 2010

Reasons and order

Introduction

[1] The genesis of this matter dates back to November 2002 when Nutri-Flow CC and Nutri-Fertilizer CC ("Nutri-Flo") lodged a complaint with the Competition Commission ("the Commission") against Sasol Chemical Industries (Pty) Ltd, ("Sasol"). These allegations were that Sasol had made itself guilty of contraventions of certain of the provisions of the Competition Act, Act No.89 of 1998 ("the Act"). The Commission investigated these allegations, however did not refer the complaint to the Competition Tribunal ("Tribunal") because of lack of sufficient evidence. We shall refer to this complaint as the first complaint. Although Nutri-Flo was entitled to self-refer the complaint to the Tribunal, it elected not to do so.[1] This is common cause.

[2] On 3 November 2003 Nutri-Flo lodged another complaint. We refer to this complaint as the second complaint. The complaint documents consisted of a form CC1 and a founding affidavit, deposed to by Mr Lyle in preparation for an interim relief application brought against Sasol by Nutri-Flo (subsequently withdrawn). The complaint included allegations of collusive activities and/or cartel behaviour against Sasol, Yara South Africa (Pty) Ltd ("Yara"), and Omnia Fertilizer Limited ("Omnia"). As the Commission is wont to do when there is merit to a complaint, it investigated the complaint, and referred the complaint to the Tribunal in May 2005. This is also common cause.

[3] The Commission's referral alleges various forms of conduct by Sasol, Yara (previously known as Kynoch) and Omnia in contravention of section 4(1). As regards Omnia, the alleged conduct comprises the following:

[3.1] exclusive dealing arrangements between Sasol and Omnia as reflected in the ammonia supply agreement of May 1996[2] and LAN toll manufacturing agreements between Omnia on the one hand and Sasol and Kynoch on the other[3] which agreements are alleged to have had the effect of constructing

[1] See section 51(1) of the Act.

[2] Paragraphs 18.5-18.6 of the Commission's Founding Affidavit.

[3] Paragraphs 20.1-20.3 of the Commission's Founding Affidavit.

and dividing markets in contravention of section 4(1)(b), alternatively section 4(1)(a)[4] - product markets implicated: LAN;

[3.2] price-fixing and other co-ordinated conduct through the medium of the IPC[5] allegedly in contravention of section 4(1)(b), alternatively section 4(1)(a)[6] – product markets implicated: potash, urea, DAP and MAP;

[3.3] price-fixing and other co-ordinated conduct through the medium of the NBC[7] allegedly in contravention of section 4(1)(b), alternatively section 4(1)(a) – product markets implicated: nitrogen derivative products, LAN, urea, DAP and MAP;

[3.4] bid-rigging through the medium of the export club in contravention of section 4(1)(b), alternatively section 4(1)(a)[8] – product markets implicated: nitrogen derivative products (i.e. ammonia, ANS and ANS in dilute solution) and LAN.

[4] In June 2005 Sasol and Omnia launched an application with the Competition Appeal Court ("CAC") to review and set aside the Commission's referral to the Tribunal. The basis of the review was *inter alia*, that the Commission's referral included allegations not contained in the Nutri-Flo complaint. This application was dismissed by the CAC.[9]

[5] On 31 July 2006, Sasol and Omnia, apparently not satisfied with the CAC's decision, subsequently filed exceptions to the Commission's referral on the grounds that, *inter alia*, the referral lacked particularity.

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[4] Paragraph 22 of the Commission's Founding Affidavit.

[5] Paragraphs 24-26 of the Commission's Founding Affidavit.

[6] Paragraph 30 of the Commission's Founding Affidavit.

[7] Paragraphs 27-29 of the Commission's Founding Affidavit.

[8] Paragraphs 30-34 of the Commission's Founding Affidavit.

[9] See *Omnia Fertilizer Ltd v the Competition Commission et al case no: 51/CAC/Jun05 and Sasol Chemical Industries Ltd v the Competition Commission et al case no: 52/CAC/Jun05.*

[6] On 20 November 2006, the Commission made an application to the Tribunal for an amendment of its referral papers in terms of Tribunal Rule 18. The amendment application was unopposed and was granted on 18 April 2007.

[7] On 28 March 2008 the Commission filed an application for leave to amend, for the second time, its founding papers. The application was again not opposed and was granted on 9 July 2008.

[8] From December 2008, the Commission and Sasol entered into settlement negotiations which culminated in a consent and settlement agreement in May 2009. In terms of this agreement, Sasol admitted that section 4(1)(b) of the Act had been contravened. The terms of this agreement were that -

[8.1] in 2001, at a meeting held between the employees of Sasol, Omnia and Kynoch (Yara) at a hotel in Johannesburg, an agreement was reached between the respondents as to:

[8.1.1] pricing formulae from which base prices would be derived for the fertilizer products sold by the parties to the agreement; and

[8.1.2] the range of discounts that the respondents would offer off the base prices

[8.2] in the period between 2001 and 2005, meetings were held between the respondents in order to address any instances of deviations by any of the parties to the agreement

[8.3] the existence of the committees (including the IPC and the NBC) facilitated the continued application of the pricing agreement reached in 2001.

[9] Preparations for trial commenced soon thereafter. The agreement between Sasol and the Commission meant that Sasol would no longer be considered as a party to the proceedings; however Omnia and Yara remained as such. A timeline for the filing of request for further particulars and response thereto was agreed between the Commission and Omnia and Yara ("the respondents") respectively. The trial was set down for 2 to 15 December 2009. In its response to the request for further particulars the Commission

included details of meetings that the Commission would be relying on in the main hearing. Neither of the respondents objected to the Commission's response.

[10] On 9 October 2009, the Commission filed its witness statements wherein allegations concerning the meetings described in the response to the request for further particulars were dealt with.

[11] On 23 October 2009, Yara raised concerns regarding the contents of the above witnesses' statements insofar as they related to issues that were considered to travel beyond the scope of the complaint referral. For its part, Omnia indicated that it was filing its witness statements out of time because it was responding to material that extends significantly beyond the scope of the initial referral. Omnia inter alia, stated that it reserved its rights to challenge the admissibility of the information contained in the Commission's witness statements.

[12] On the same day, that is, 23 October 2009, the Commission filed its notice of motion in terms of Rule 18 in which it indicated its intention to amend its complaint referral. In its notice of motion, the Commission sought to introduce allegations of a number of meetings held between 2001 and 2006 "directly or indirectly" facilitated by the IPC and NBC. These meetings are those described in the further particulars and the witnesses statements of 9 October 2009.

[13] The Commission seeks to amend its Nutri-Flo referral to the Tribunal. In so doing, it seeks to introduce paragraphs 29A and 33.3 which contain allegations of specific conduct by the respondents.[10] These include allegations of:

[13.1] specific instances of collusive conduct among the respondents that were concerned with information exchanges, the construction of the market and ultimately, compliance with pricing policies that were adopted collusively; and

[10] Amendment application: Commission's Founding Affidavit pp2-10.

[13.2] specific conduct concerning exports, by the respondents, in connection with tenders for the supply of material.

[14] On 29 October 2009 the respondents filed notices of objection to the Commission amendment set out in the notice of motion of 23 October 2009. On 30 October 2009, the Commission filed its founding affidavit in the application to amend.

[15] On 5 November 2009, Omnia filed its affidavit in support of its opposition to the amendment application, but also in support of its counter-application. We shall deal with the counter-application presently.

[16] On 10 November 2009 Yara also filed an affidavit in support of its objection to the Commission amendment application. Yara did not bring a counter-application although it sought to advance the argument that the complaint referral as proposed to be amended extended beyond the Nutri-Flo complaint.

[17] On 19 November 2009, the Commission replied to the objections to the amendment application of both respondents and also filed an answering affidavit to Omnia's counter-application. Omnia replied on 26 November 2009.

[18] In light of these developments the Tribunal convened a telephonic pre-hearing and after canvassing the views of the parties directed that the applications be heard on 2 and 3 December 2009. The trial was postponed *sine die.*

[19] Both applications were heard on 02 December 2009. After consideration of the parties' submissions we have come to the conclusion that the counter-application is without any merit and the amendment application should succeed. The reasons for our decision follow.

The Counter-Application

[20] Omnia's case is that the Commission's referral is not permissible in law on two grounds. The first is that Nutri-Flo's complaint was limited to abuse of dominance complaints against Sasol, and not section 4 complaints which the Commission has purported to refer to the Tribunal. Furthermore even if the

complaint included allegations of section 4 contraventions, the complainant, Nutri-Flo, had expressly stated that it intended to be a complainant only in respect of three alleged abuses of dominance by Sasol, namely [a] exclusionary pricing by Sasol in violation of section 8(c), [b] excessive pricing by Sasol in violation of section 8(a) and [c] price discrimination by Sasol in violation of section 9(1)(c). Since Nutri-Flo signalled no intention to be a complainant in respect of any alleged conduct prohibited by section 4, nor did it seek any relief against Omnia and Yara, the Commission, if it wished to refer any section 4 contraventions, ought to have initiated those complaints itself. Since it has not done so, the section 4 referral against these two respondents was impermissible under the Act.

[21] In support of its case, Omnia relies upon two statements made by Nutri-Flo. The first of these being the following statement on the CC1 form:[11]

> "*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*".

[22] The respondents in this statement are identified as the two Sasol companies, namely Sasol Ltd and Sasol Chemical Industries.

[23] The second statement relied upon by Omnia is a paragraph contained in Mr Lyle's affidavit attached to the CC1 form, where it is stated, *inter alia*, that:[12]

> "*Save for pointing out that Omnia was joined in the second complaint because of its legal interest in the matter and that none of the referred prohibited practices, as submitted by Nutri-Flo, is alleged to be arising from Omnia's conduct, the content of this paragraph is admitted*".

[24] However Omnia concedes that Nutri-Flo *did* state, as part of the background to its abuse of dominance complaints against Sasol, that potash and urea were imported by a cartel comprising Sasol, Kynoch and Nitrochem and that

[11] See TG 21: Omnia's counter-application bundle of documents.
[12] See TG22: paragraph 12: Omnia's counter-application bundle of documents.

the cartel collusively controlled or fixed the prices at which the products were sold in the local market.

[25] Indeed the affidavit of Mr Lyle reveals the following allegations:

[25.1] KCL and urea are said to be imported by members of a cartel of which Nitrochem is a member[13] and Omnia is the owner of Nitrochem[14];

[25.2] The cartel, which also includes Yara, collusively controls the prices of imported products.[15]

[26] We must stress here that Omnia's case is not that Nutri-Flo did not intend to be a complainant in terms of section 49B(2) or that the allegations made by Nutri-Flo in Form CC1 could not form the basis of a section 4 referral. Rather it argues that Nutri-Flo *intended* only to be a complainant in relation to the section 8 and 9 contraventions and only in relation to *Sasol*. This intention – namely that of a limited section 8 and 9 case - ought to have circumscribed the Commission's referral. If the Commission wished to *refer* a section 4 case, it ought to have *initiated* its own complaint (under section 49B(1)).

[27] The procedure for initiating a complaint and its referral by the Commission to the Tribunal is regulated by section 49B and section 50. Section 49B(1) makes provision for the Commissioner to initiate a complaint against an alleged prohibited practice whilst section 49B(2) makes provision for complaints by third parties. Section 49B(2)(a) allows for the submission of information by "any person", whilst section 49B(2)(b) allows for the submission of a complaint. Once a complaint has been lodged, the Commissioner must direct an inspector to investigate the complaint.[16]

[28] If the complaint was initiated by a private party, the Commission must within one year (or such extended period as agreed with a complainant) after the

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[13] See TG 14 paragraph 4: Omnia's Counter-Application, bundle of documents.

[14] See TG 14 paragraph 11: Omnia's Counter-Application, bundle of documents.

[15] See TG 14 paragraphs 53 and 54: Omnia's Counter-Application, bundle of documents.

[16] Section 49B(3).

submission of a complaint, either refer the complaint to the Tribunal or issue a notice of non-referral.[17]

[29] If the Commission refers the complaint to the Tribunal in terms of section 50(2)(a), the Commission may refer all or only some of the particulars of the complaint to the Tribunal, and may also add particulars to the complaint as submitted by the complainant.[18]

[30] Furthermore the investigation and referral powers of the Commission have already been considered by the Competition Appeal Court.

[31] In *SAPPI Fine Paper (Pty) Ltd v Competition Commission of South Africa and Another*[19] the court stated –

> *"After receiving a complaint, the first respondent investigates the conduct forming the subject matter of the complaint. Thereafter it should formulate a view as to whether a prohibited practice has been established or not. If the first respondent is of the view that there is merit in the complaint and that it ought to refer same to the Tribunal, it may refer the complaint in its entirety or only some of the particulars thereof. The first respondent may, if it deems it necessary, add further particulars to the complaint referral (section 21(g) and section 50 of the Act."*[20]

[32] The Court further stated –

> "*The [Commission] is, of course ,empowered in terms of section 50(3)(a)(iii) to add further particulars to the complaint submitted by the complainant in the complaint referral to the Tribunal. It does not, nor did it in the instant case, have to initiate a fresh complaint."*[21] *(our emphasis)*

[17] Section 50(2)(a) and Section 50(2)(b) respectively.

[18] Section 50(3).

[19] [2003] 2 CPLR 272 (CAC) paragraph 38.

[20] Paragraph 35.

[21] Paragraph 38.

[33] The underlying rationale of the framework considered by the CAC in that case is patently clear. The Commission acts in the public interest. It seeks to enforce provisions of the Act through its powers of investigation and prosecution and not to pursue personal interests.

[34] In order for the Commission to ensure that it exercises its powers judiciously and efficiently it must enjoy a degree of discretion in assessing whether or not a complaint has any merit. Without such discretion, the Commission would be obliged to refer all manner and form of complaint to the Tribunal, regardless of its merits. This is why it enjoys the powers of investigation. At the same time, in order to ensure that complainants' interests are adequately addressed, the Commission is obliged to investigate a complaint lodged by a third party.

[35] That the Commission should enjoy such discretion is important for another reason. The Commission is the guardian of the Act and while it is enjoined to enforce it so it is under a duty to ensure that competitors do not abuse the resources and procedures of the Commission and the Tribunal. Furthermore while third party complainants may have a grievance against a particular respondent, they are not the guardians of the public interest. They are usually concerned with the impact of the conduct on their own commercial interests. What may be of critical importance to the Commission, who is the guardian of the public interest, may not hold the same weight with the complainant. This particular complaint is a case in point. For Nutri-Flo it may not have been of concern that Omnia, Yara and Sasol were engaged in collusive conduct. Yet, allegations of collusive conduct, the most egregious of all prohibited practices, would be of critical importance to the Commission.

[36] Once it has conducted such an investigation the Commission is then better placed to assess the merits of the complaint and whether or not to refer it to the Tribunal. Its investigation may or may not bring new facts to light. Here again the Commission enjoys a discretion. It may decide to refer all, some, none of the particulars or particulars additional to those contained in the CC1 form. Again the rationale for this is obvious. Different aspects of a complaint may after all have different merits. Moreover complainants generally do not

always have the full conspectus of facts related to the conduct complained of at the time of lodging the complaint.

[37] A complaint may simply describe the conduct of a respondent such as pricing or terms of supply without necessarily citing a contravention of a specific section of the Act. Alternatively, it could allege contraventions of any sections of the Act. Even in circumstances where complainants are assisted by lawyers they do not necessarily possess the investigating authority of the Commission to uncover facts relevant to the impugned conduct.

[38] Anti-competitive conduct is not always easy to identify and the explanation of such conduct, in the language of competition law is often not obvious. For example a price discrimination case may in fact be a margin squeeze case or what may appear to be a section 5 relationship is in fact a cartel. The power to add further particulars serves to promote the public interest by ensuring a proper enforcement of the Act. It allows the Commission to articulate and ventilate as many aspects of the complaint as possible in one prosecution and thus serves to promote both the complainant's and respondent's interests.

[39] Thus the power (and obligation) to investigate and the discretion to refer particulars – whether these be some, none, all or additional – are two sides of the same coin. Without the discretion to add or remove particulars, the Commission's power to investigate a complaint would be rendered futile. For the latter to have meaningful consequences the former must exist.

[40] The Commission is not only empowered in section 50(3)(a)(iii) to add further particulars to a complaint submitted by a complainant at any stage of its investigation but is also enjoined to investigate a complaint "if new facts came to light".

[41] In *Omnia Fertilizer v The Competition Commission et al*[22] and S*asol Chemical Industries Ltd v The Competition Commission*[23] the Court observed that-

[22] 51/CAC/Jun05.
[23] 52/CAC/Jun05.

"if new facts are placed before the Commission or if new facts come to light which were not previously known to the Commission, it is enjoined to investigate the complaint in order to properly fulfil its statutory function as the primary body responsible for prosecuting conduct which is alleged to be prohibited by the Act. To hold otherwise would preclude the Commission from properly fulfilling its statutory function".[24]

[42] The Competition Appeal Court has already found that the Commission enjoys the discretion to add further particulars to a complaint initiated by a third party and is not required to initiate a fresh complaint. In other words, even if we assume for arguments sake that the Nutri-Flo Form CC1 had not contained allegations of section 4 contraventions, and that during the course of its investigations the Commission happened upon possible section 4 contraventions it was obliged to investigate these and where it determined that a prohibited practice was committed, to refer this to the Tribunal. In this particular case, however the Nutri-Flo complaint in Form CC1 *did* contain allegations of section 4 contraventions and the Commission is both empowered and enjoined to investigate and refer these, irrespective of Nutri-Flo's intention, without initiating a fresh complaint.

[43] Does this mean that the intention of Nutri-Flo in relation to the ambit of its complaint has no relevance? Recall that it is common cause that Nutri-Flo intended to be a complainant under section 49B(2). All that the Commission has to demonstrate is 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".[25] The substantive approach set out by the Competition Appeal Court in the Glaxo Welcome case requires nothing more.[26]

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[24] Paragraph 25.
[25] *Glaxo Welcome (Pty) Ltd et al v NAPW case no 15/CAC/Feb02,* paragraph 16.
[26] See also *Woodlands Diary (Pty) Ltd v Competition Commission* case no 88/CAC/Mar09.

[44] In this case that the link between the section 4 referral and the conduct described referred in Nutri-Flo's CC1 Form is abundantly clear. The counter application is accordingly dismissed.

The Amendment Application

[45] The Commission seeks to amend its referral by the insertion of paragraphs 29A and 33.3. The proposed amendment contains the following:

'***29A Conduct consequent on the IPC and NBC exchanges:***

29A.1 On 3 July 2001 the respondents met at the Sandton Holiday Inn. Among those present at the meeting were the following representatives of the parties who, at that time, were incumbents of the posts here specified:

29A1.1 *For Sasol, specifically its Fertilizer Division:*

29A1.1.1 *De Wet Deetlefs, the Managing Director;*

29A1.1.2 *Jaco van Zyl, the Retail Manager;*

29A1.1.3 *Johan Coetzee, the General Manager: Marketing;*

29A1.1.4 *Danie Roode, the Manager: Wholesale and Industrial Marketing;*

29A1.1.5 *Wayne Degnan, the Supply Chain Manager; and*

29A1.1.6 *Hennie de Kock, an official in the Supply Chain Department;*

29A1.2. *For Omnia:*

29A1.2.1 *Derrick van Zyl; and*

29A1.2.2 *Werner Amsel;*

29A1.3 <u>For Kynoch:</u>

29A1.3.1 Uli Reese, Managing Director;

29A1.3.2 Willem Struwig; and

29A1.3.3 Alan Clegg.

29A.2 In the course of the meeting the participants came to an agreement, arrangement or understanding that they would employ a common pricing model, an exemplar of which is annexed marked NM12A, the salient features being the following –

29A2.1 the list price of the fertilizer products supplied by them would be standardised so as to reflect –

29A2.1.1 in the case of LAN, the import parity price of urea and the Norsk Hydro Paris price for LAN;

29A2.1.2 in the case of the remaining products, the import parity price of the product;

29A2.2 the import parity price would, where appropriate, be determined in the following manner –

29A2.2.1 first, by taking the highest FOB price of the product from a designated geographical source as reflected in an identified publication relevant to the product;

29A2.2.2 then, by adjusting the price to reflect costs likewise determined by reference to designated sources, including freight, insurance, losses, port costs, and demurrage;

29A2.2.3 from which would be derived a factor for the costing of nitrogen, potassium and phosphate that would produce the governing price for a product comprising one or more of these elements;

29A2.3 the import parity price would be augmented by mark-ups, premiums, baggage charges and sales

commission agreed for each respondent separately;

29A2.4 each of the respondents would be entitled to offer discounts on the list price, but not higher than the ceiling agreed for each respondent separately.

29A.3. From time to time from early 2001 to late 2006, Van Zyl, Amsel and Clegg, representing the respondents as aforesaid, came to agreements, arrangements or understandings over the price of the product, the fine-tuned formulation of the model and, after the July meeting referred to above, the implementation of the model and the policing of its application -

29A.3.1 in meetings at the Randpark Golf Club;

29A.3.2 otherwise in telephonic exchanges between them.

29A.4 Within the regional divisions of the respondents, representatives of the respondents reached agreements, arrangements and understandings on the implementation of the standardised prices and/or the allocation of customers inter alia as follows: –

29A.4.1 at regular intervals within the KZN region, in meetings between Mark Hawksworth (on behalf of Sasol), Bruce de Gersigny and Douglas Stubbs (on behalf of Omnia's division known as Nitrochem) and Dudley Davis (on behalf of Kynoch);

29A.4.2 in 2001 or 2002 at the Riviera Hotel, Vereeniging, in a meeting between Arnold Otto and Koos Leonard (on behalf of Sasol), Ruben Eales and Abel Rudman (on behalf of Omnia), and a representative of Kynoch whose name is unknown;

29A.4.3 in 2001, 2002 and 2003 at the golf club in Vereeniging, in meetings between Johnny de Klerk (on behalf of Sasol), Reuben Eales and Martin van Jaarsveld (on

behalf of Omnia) and Sakkie Cronje and Hennie Gouws (on behalf of Kynoch).

29A.5 The meetings, communications and exchanges referred to above were directly or indirectly facilitated by the IPC and NBC meetings pleaded above and directly or indirectly gave effect to those meetings.'

B: <u>By the insertion after paragraph 33.2 of paragraph 33.3 as follows</u>:

'33.3 In addition, and from time to time, the respondents rigged the bids to be made by them individually by coming to an agreement, arrangement or understanding on the price that each would bid and the quantity of product that they would tender to supply. Such agreements, arrangements or understandings are recorded inter alia in the internal Omnia e-mail dated 21 May 2003 and annexed hereto marked NM12B.

[46] Omnia and Yara oppose the amendment on the following grounds:

[46.1] the amendment cannot be competently be granted;[27].

[46.2] the amendment is sought at an "unacceptably late stage" and the Commission has not explained why the amendment is only sought at this point;[28]

[46.3] the amendment would introduce matter that did not form part of the complaint referred to the Commission by Nutri-Flo;[29]

[46.4] the amendment application is made mala fide;[30]

[46.5] the inclusion of the allegations of the collusion is time barred;[31] and

[27] Amendment Application: Omnia's notice of objection paragraph 1.

[28] Amendment application: Omnia's notice of objection paragraphs 2 and 3.

[29] Amendment application: Omnia's notice of objection paragraph 4 and 5.

[30] Amendment application: Omnia's notice of objection paragraph 5.4.

[31] Amendment application: Omnia's notice of objection paragraph 5.6.

[46.6] the proposed amendments are unacceptably vague and should not be permitted in their current form.[32]

[47] The approach taken by our courts in the civil law context towards amendments has been a permissive one. In deciding whether or not to grant an application for an amendment the court exercises discretion and, in so doing, leans in favour of granting it in order to ensure that justice is done between the parties by deciding the real issue between them.[33] Applications for amendments will not be granted if they result in prejudice to the other party which cannot be cured by an order of costs or postponement. The fact that an amendment introduces a new cause of action or may result in a loss of tactical advantage or even defeat of the other party does not constitute prejudice and will not outweigh the concern to determine the real dispute between parties.

[48] This Tribunal has in the past followed such an approach to applications for amendments brought in terms of Tribunal Rule 18. However the Tribunal has also made it abundantly clear that in exercising its public duty it would adopt a permissive approach to applications for amendments so that a complaint being prosecuted in the public interest could be fully ventilated.

[49] In *Competition Commission v SAA Case 18/CR/Mar01* the Tribunal stated as follows:

> "*We should make clear from the outset our disquiet at the controversy – not to mention the costs – generated by the Commission's desire to make certain amendment to its founding papers. This should normally be an uncontentious issue. In the practice of the High Court an amendment takes the form of a mere notice of intention to amend – to which the opposing party is entitled to object – rather than an application to which opposition is expected. In other words, the party wishing to make the amendment would simply inform the court and the opposing party of its decision to amend its papers.*

[32] Amendment application: Omnia's notice of objection paragraph 6.

[33] Harms page 188

This notice would usually be accompanied by a tender to cover additional costs, if any, incurred by the opposing party in responding to the amendments. Only under extreme circumstances would such an amendment be opposed, much less rejected by the adjudicator. The latter is naturally concerned to hear the best, the most competent, case that the respective parties are able to bring before it. Provided the amendment does not prejudice the opponent of the amending party the amending papers will simply be filed and the matter would, in due course, proceed to be heard on the basis of the amended papers.

Our concern is then simply that the substantive complaint be fully ventilated. We cannot allow our disquiet at the cavalier approach adopted by the parties to these proceedings to undermine our duty to the public, including its right to have complaints that are referred to us fully ventilated"

[50] Neither Omnia nor Yara could demonstrate that the prejudice suffered by them as a result of the amendment would lead to prejudice that could not be met with an order of postponement. Given that the trial has already been postponed, the grounds of objection advanced by the respondents do not hold much purchase. Should any of the respondents seek further information about the proposed amendments they are at liberty, if the application were granted, to seek further particularity and to file whatever supplementary documents they wish to address the allegations contained in the proposed amendments.. Indeed Mr Rogers indicated that should this Tribunal grant the application his client might wish to file additional pleadings and/or witness statements.

[51] As to the subject matter of the amendment not forming part of the Nutri-Flo complaint our discussion in the counter-application has addressed that sufficiently. However 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 this stage of the proceedings in order that the complaint be fully ventilated.

[52] As to the argument that the allegations of collusions are time barred in the manner equivalent to a plea of prescription, that is a substantive plea for the respondents to allege *and prove* at trial. The respondents have every opportunity to deal with the merits thereof during trial. That they may be put to extra effort and expend more time in defending themselves at trial can hardly constitute prejudice.

[53] We are then left with only one ground of opposition, namely that of competency or procedural irregularity.

[54] It appears that the respondents' main point is that the notice of amendment by the Commission is procedurally defective.[34] The reason for the defect being that the Commission has sought to amend an affidavit by means of an unsworn notice of motion and further that the Commission has not indicated whether Ms Maseti, the deponent to the original affidavit would be willing to depose to the amended affidavit.[35]

[55] The Commission however did subsequently file an affidavit by Mr Dorasamy. Omnia conceded that this did address some of the concerns raised but that the Commission had not indicated whether Ms Maseti the original deponent would be willing to depose to the amended affidavit. Yara also noted the filing of the affidavit but complained that it was insufficient because it merely purports to explain the rationale for the proposed amendments without confirming the allegations contained therein as it was required to do.

[56] Recall that the respondents had not previously objected to the Commission's amendment applications. In our view all of these remaining grounds are completely without merit. Both Omnia and Yara know that the Commission enforces the Act in its juristic capacity and not in an individual investigator's name. Moreover the prosecution of prohibited practices commonly lasts over a considerable amount of time. Employees will come and go and officials will be succeeded by others over time. The Commission, like any other juristic person, is entitled to have its successive investigators/officials manage and

[34] Amendment Application: Omnia's answering Affidavit paragraphs 14-16.
[35] Amendment application: Omnia's answering Affidavit paragraph 15.

prosecute a case in the public interest and Ms Maseti's opinion or consent regarding the amendment is not required.

[57] In terms of Tribunal Rule 14 a complaint referral by the Commission must be filed in form CT1(1). This form provides for the name of the respondents, those of the complainant, the section(s) of the Act that has/have been contravened and a concise statement of the alleged prohibited conduct and the relief sought. Rule 15 provides for support by affidavit setting out a concise statement of the grounds of the complaint and the material; facts and law to be relied on.

[58] Rule 16 provides for an answer to the complaint referral. Rule 18, when allowing for the amendment to Form CT1(1), contemplates the amendment of documents, including the affidavits, comprehended by the process. Rule 18(2) allows for the filing of "additional documents consequential to those amendments." However rule 18(1) does not make provision that the Commission *must* file a supporting affidavit in its application to amend the complaint referral. The Commission argues that it was not as a matter of principle required to file an affidavit. This is an application for amendment brought on Notice of Motion. Once it is granted, the Commission will on affidavit file its amended pages. However the Commission has subsequently done so and requests that the Tribunal condone this irregularity, if any, in terms of rule 55(3).

[59] We find it unnecessary to decide whether or not rule 18(1) as a matter of principle requires the filing of an affidavit. It is sufficient that the Commission has subsequently filed one explaining the rationale for the amendment. The late filing thereof is hereby condoned. We find that the opposition to the amendment of the complaint referral is without merit and accordingly grant the amendment application.

<u>Order</u>

[60] Accordingly we grant the following order –

[60.1] The counter application brought by Omnia is dismissed;

[60.2] The Commission's application for leave to amend its complaint referral affidavit by the insertion of paragraphs 29A and 33.3 (the amendment) is hereby granted;

[60.3] The Commission must file its amended pages within 5 days of date hereof; and

[60.4] The Respondents must file their answer, if any, within 10 days of date or receipt of the Commission's amended pages;

[60.5] The Commission must file a reply, if any, within 5 days of receipt of the Respondents' answer; and

[60.6] The parties must approach the Tribunal for a pre-hearing date to deal with any further pre-trial issues and hearing dates for the matter.

______________________ **24 February 2010**

Y Carrim and T Madima Date

A Wessels concurring.

Tribunal Researcher : I Selaledi

For the Competition Commission : Adv MSM Brassey SC with Adv by G Engelbrecht and Adv O Mooki instructed by Cheadle Thompson Haysom Inc

For Yara South Africa (Pty) Ltd : Adv J Pretorius and Adv J Wilson instructed by Gerrit Coetzee Attorneys

For Omnia Fertilizer Ltd : Adv O Rogers SC with Adv P Farlam instructed by Deneys Reitz Inc

For Sasol Chemical Industries (Pty) Ltd : Adv D Unterhalter SC and Adv A Cockrell instructed By Bowman Gilfillan Inc