COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 91/CR/Dec09
2008Apr3682

In the matter between:

1time AIRLINE (PTY) LIMITED	**Complainant/Applicant**
And	
LANSERIA INTERNATIONAL AIRPORT (PTY) LIMITED	**1st Respondent**
COMAIR LIMITED t/a KULULA.COM	**2nd Respondent**

Panel	:	Norman Manoim (Presiding Member), Yasmin Carrim (Tribunal Member) Thandi Orleyn (Tribunal Member)
Heard on	:	02 July 2010
Order issued on	:	29 July 2010
Reasons issued on	:	29 July 2010

Reasons for Decision and Order

Introduction

[1] This is an application for leave to amend a complaint referral brought in terms of section 51(1). We have decided to grant the application and set out our reasons below.

Background

[1] The applicant is 1time Airline (Pty) Ltd ("1time"), which offers low-fare scheduled passenger services within South Africa. The first respondent is Lanseria International Airport (Pty) Ltd ("Lanseria") a company which owns and operates a private airport in Gauteng ("Lanseria Airport"). The second respondent is Comair Limited trading as Kulula.com ("Kulula"). Kulula competes with 1time in the provision of low fare scheduled services within South Africa.

[2] On 16 April 2008 1time filed a complaint with the Competition Commission ("the Commission") against Lanseria and Kulula in terms of section 49B of the Competition Act, 1998, as amended ("the Act"). In its complaint, 1time alleged that certain terms of an exclusive agreement and/or arrangement concluded between Lanseria and Kulula relating to Kulula's usage of Lanseria constituted a contravention of section 8(c), alternatively section 5(1), of the Act, and that this had the effect of substantially preventing or impeding 1times' growth within the relevant market.

[3] The Commission, upon completion of its investigation, issued a Certificate of Non-Referral.[1] 1time then proceeded with a direct referral, in terms of section 51(1) of the Act, read with Rule 14(1)(b) of the Rules for the Conduct of Proceedings in the Competition Tribunal. [2]

[4] In its complaint referral 1time alleges that an agreement between Kulula and Lanseria has precluded it from operating from Lanseria Airport.[3]

[5] On the basis of the allegations contained in its founding affidavit 1time sought an order from the Tribunal on the following terms:

[5.1] *"1.* *Declaring the exclusive covenant between Lanseria and Kulula to be a prohibited practice in contravention of section 5(1) alternatively section 8(c) of the Act;*

[5.2] *2.* *Declaring the exclusive covenant between Lanseria and Kulula void;*

[1] On 30 November 2009.
[2] On 21 December 2009.
[3] Complaint referral founding affidavit, par 33-48 (Complaint referral bundle page 10-19).

[5.3] *3.* *Ordering the Respondents to pay the costs of this matter;*

[5.4] *4.* *Granting further and/or alternative relief."*

[6] Lanseria and Kulula duly filed answering affidavits to 1time's self-referral, and 1time filed a replying affidavit thereto. Thereafter 1time filed an application to amend its referral, the subject matter of this decision.

[7] 1time seeks to amend its referral by the addition of the following paragraphs in its founding affidavit:

[7.1] *"A:* *By insertion after paragraph 1 under the heading "Concise Statement of the order of relief sought" on page 2 of Form CT1(2) of the following:*

[7.2] *1A.1* *the insistence by Kulula upon the inclusion of an exclusivity clause and a right of first refusal over certain routes in an agreement with Lanseria; and/or*

[7.3] *1A.2* *the conclusion by Kulula of an agreement with Lanseria that contained an exclusivity clause and a right of first refusal over certain routes; and/or*

[7.4] *1A.3* *the enforcement by Kulula of the agreement with Lanseria on the basis of an extensive interpretation of the terms of the right of first refusal".*

[8] It also seeks to amend its prayers by seeking a declaration that Kulula has contravened section 8(d)(i) of the Act together with an order requiring the payment of an administrative penalty.[4]

[9] Kulula opposed the amendment application on two main grounds, namely lack of jurisdiction and failure to disclose a cause of action.

[10] In relation to the jurisdictional ground Kulula contended that it is not competent for 1time to refer a complaint to the Tribunal against Kulula under

[4] Applicants' Notice of Motion in the Amendment Application.

section 8(d)(i) of the Act because the conduct complained of does not fall within the parameters of the complaint that was originally submitted by 1time to the Commission.[5] It argued that at the time when 1time lodged its complaint with the Commission[6] no contravention of section 8(d)(i) was alleged and that the averments that were made at that time by 1time cannot cognisably be linked with a complaint under section 8(d)(i). Moreover 1time by its own account had conceded that it had not complained of a section 8(d)(i) contravention at that time because it only became aware from the answering papers that "Kulula had insisted on the inclusion of an exclusivity clause and a right of first refusal over certain routes in an agreement with Lanseria". Accordingly the Tribunal lacks jurisdiction to consider such a complaint. Great reliance was placed by Kulula on the decision of the Competition Appeal Court in *Glaxo Welcome (Pty) Limited and Others v National Association of Pharmaceutical Wholesalers and Others*[7].

[11] In relation to the no cause of action ground, Kulula contended that that a complainant must satisfy two requirements in pleading of its complaint referral:

[11.1] A complainant may not simply refer to a complaint on the basis of a bald allegation – it must at least allege that the elements of the transgression that it seeks to prove are, in fact present[8].

[11.2] The factual averments contained in the complaint referral must, (if proved in due course) amount to a prohibited practice under the Act.[9]

[12] Mr Wilson on behalf of Kulula argued that 1time's complaint did not make out a case that the conduct referred to in its proposed amendment constituted a contravention of section 8(d)(i) of the Act because no "*factual foundation*" was laid for the claim made by 1time that the agreement was in fact "enforced" by Kulula. Secondly that the mere insistence by Kulula on the provisions contained in clause 5 of its agreement with Lanseria and its conclusion of

[5] Second Respondent's Heads of Argument page 2 par 3.1.
[6] In April 2008.
[7] Case No. 15/CAC/Feb02.
[8] *Sappi Fine Papers Limited v Competition Commission [2001-2002] CPR 486 (CT)* at para 33.
[9] Page 21 of Kulula's heads of arguments.

such an agreement on this basis could never amount to "*requiring or inducing a supplier or customer not to deal with a competitor*" within the meaning of section 8(d)(i) of the Act. There was nothing in 1time's complaint that supported the conclusion that Lanseria was somehow induced into the exclusive agreement. Absent an element of persuasion or inducement the requirements of section 8(d)(i) were not met and accordingly no cause of action had been shown. If 1time wished to pursue a section 8(d)(i) case now it had to first initiate a complaint with the Commission, which could then lead to a referral to the Tribunal, either by the Commission or 1time itself. In support of his argument Mr Wilson relied on the Tribunal' approach in *Competition Commission v Senwes Limited*[10] and *Competition Commission v South African Airways (Pty) Ltd.*[11] We understood this objection to be directed to both 1time's complaint lodged with the Commission and the referral.

[13] 1time's explanation for seeking this amendment is that at the time when it lodged a complaint with the Commission it had alleged that the agreement between Kulula and Lanseria contravened section 8(c) alternatively section 5(1) only. It did not at that time explicitly refer to section 8(d)(i). During the exchange of pleadings in this matter however it became apparent to 1time that the exclusive arrangement between Kulula and Lanseria came about at the insistence of Kulula and it was for this reason that it now sought to include the proposed amendments.[12] However, this was not the only basis upon which the amendment was sought. Ms Engelbrecht appearing on behalf of 1time, submitted that the *conduct* namely the exclusive arrangement between Lanseria and Kulula and the enforcement thereof, had been complained of by 1time to the Commission, although at that time 1time had not made any reference to a particular section of the Act. Moreover the conduct consisting of Kulula's insistence on exclusivity was already the subject of the complaint lodged with the Commission. In accordance with the dicta of the Competition Appeal Court a complainant was not required to quote a particular section for purposes of lodging the complaint with the Commission. All it had to do was complain about the conduct, which it had done. This conduct could rationally be linked to either section 8(c) or 8(d)(i). Thus the Tribunal enjoyed

[10] Case No. 110/CR/Dec06.
[11] Case No. 18/CR/Mar01. See also Nationwide Airlines (Pty) Ltd and Another v South African Airways (Pty) Limited, Case No. 80/CR/Sept06.
[12] Amendment founding affidavit, par 4-5, Amendment bundle page 5-6.

jurisdiction over the respondent and the proposed amendments did not create a jurisdictional problem. However in order for the applicant to obtain a declaratory order to the effect that the conduct constituted a contravention of section 8(d)(i) and ask for appropriate relief in these proceedings it was necessary to seek the proposed amendments.

Relevant provisions of the agreement

[14] The agreement between Kulula and Lanseria commenced on 1 January 2006 and expires in February 2011. Clause 5 of the agreement, referred to as an MoU by the parties, grants Kulula an exclusive right to operate scheduled airline services from Lanseria airport in the first year of the agreement (which expired in 2007), and thereafter grants Kulula a right of first refusal for the remaining period until its expiration in February 2011.[13]

Approach to amendment applications

[15] This Tribunal has previously set out its approach to amendment applications in a number of decisions.[14] Suffice to say that the approach taken by this body is a permissive one along the lines of that followed by the High Court in civil proceedings. While we are required to consider carefully jurisdictional objections in amendment proceedings we are cautioned not to convert these proceedings into trial proceedings. The strength or weakness of an applicant's case is to be tested in the context of trial and not amendment proceedings.

[16] At the outset we note that this matter has not yet been set down for hearing, nor have the parties engaged in any pre-trial preparations such as discovery or exchange of witness statements. Furthermore the respondents do not allege any prejudice that could be caused to them in the event that the application was granted. The only issue for consideration by us are the objections raised by the respondents.

[13] See clause 5 of the agreement.
[14] See *Competition Commission v Yara SA (Pty) Ltd, Omnia Fertilizer Ltd* Case No. 31/CR/May05, *The Competition Commission v SAA* Case No. 18/CR/Mar01, *Competition Commission v Sasol Chemical Industries (Pty) Ltd Kynoch Fertilizer (Pty) Ltd and African Explosives and Chemical Industries Ltd* Case No. 45/CR/May06, *Competition Commission v Loungefoam (Pty) Ltd & others* Case No. 103/CR/Sep08.

[17] In *Glaxo Wellcome & Others v National Association of Pharmaceutical Wholesalers and Others*[15] Hussain JA held that the submission of particulars of complaint to the Commission "is the jurisdictional fact or precondition which must be satisfied before the Tribunal can exercise its powers over a respondent".[16] In the event of a certificate of non-referral or a deemed non-referral a complainant was entitled to refer the matter directly to the Tribunal in terms of section 51(1), as has happened in this case. However when referring a complaint in this way, it was not competent for a complainant to add particulars to the complaint which had not previously been complained of to the Commission.

[18] At paragraph 22 the Court, referring to the provisions of section 50, stated that "it was not intended that in the event of a non-referral by the Commission that the complainant is given carte blanche in its referral and may thereby introduce a new complaint or particulars of complaint not mentioned in the conduct which formed the subject of the complaint in terms of section 49B."

[19] Further the Court stated that –

[19.1] "Section 51 cannot be interpreted to allow, where the Commission decides not to refer a complaint in its entirety, a complainant to add to the referral particulars of conduct which were not complained of or referred to the Commission in terms of section 49B."[17]

[20] Kulula relied upon the above dicta of the CAC to argue that 1time was precluded from bringing this amendment because it had not complained of a section 8(d)(i) contravention to the Commission.

[21] The Court in *Glaxo* explained the reason for this approach was because the Commission was –

[21.1] *"...the legislature's '<u>plaintiff of first choice</u>'. Only if the Commission decides not to refer or fails to refer a complaint of a prohibited*

[15] Case No. 15/CAC/Feb02.
[16] Para 29.
[17] Para 24.

practice can a complainant refer <u>that</u> complaint "directly" to the Tribunal". [18]

[22] The CAC has however, in that very same case, emphasised that in order to ensure that the objects of the Competition Act are not frustrated a complainant need only identify the "<u>conduct</u> of which it complained."[19]

[23] Indeed at paragraph 15 Husain JA states –

[23.1] "*Section 49B focuses on a "prohibited practice" and does not require a complainant to identify prohibited conduct with reference to various sections of the Act. A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act."*

[24] Furthermore –

[24.1] *"While the complaint need not be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Act, otherwise it will not be possible to say what the complaint is about and what should be investigated."*[20]

[25] Hence all that is required is that the conduct, which is the subject of a complaint to the Commission, be rationally linked to a section or sections of the Act. In order to address Kulula's objection to the amendment we are required to consider whether the conduct complained of in 1time's form CC1 could be rationally linked to the provisions of section 8(d)(i). Whatever our conclusion, we must then examine the provisions of the proposed

[18] See paragraphs 26 and 27
[19] Glaxo CAC, para 15 and see also *National Association of Pharmaceutical Wholesalers Others v Glaxo Wellcome Others* Case No. 45/CR./Jul01 and *Clover Industries Limited and Others v The Competition Commission* Case No. 103/CR/Dec06.
[20] *Glaxo CAC* para 16.

amendment to assess whether or not they introduce a new complaint or refer to conduct that was not the subject of the complaint to the Commission. When doing this exercise, importantly we must ignore the fact that in form CC1 the complainant may have alleged that certain sections of the Act have been contravened by the respondent. After all any legal conclusions that are drawn as to whether or not a particular section of the Act has been contravened are to be drawn ultimately by this Tribunal in accordance with the provisions of the Act. We then turn to consider the provisions of the proposed amendments to assess whether they seek to introduce a new complaint or particulars of the complaint not mentioned in form CC1.

[26] A similar approach was used by the Tribunal, which approach was met with approval by the CAC,[21] in *National Association of Pharmaceutical Wholesalers Others v Glaxo Wellcome Others*[22] - :

[26.1] *"Thus in approaching a jurisdiction problem of the kind raised by the respondent we examine the conduct alleged in the complaint and compare it with that alleged in the subsequent Complaint Referral. We ignore the fact that in the CC 1 the complainant may have alleged that certain sections of the Act have been contravened by the respondent inconsistent with the subsequent contraventions alleged in the referral. We then examine the conduct alleged in the CC1 and see if it is substantially the same as that alleged in the referral. If it is, the complainant has standing. If not the complainant does not and its remedy is to lodge a new complaint with the Commission containing those allegations. If the new complaint is closely linked to the pending referral the complainant would then have to persuade the Commission to refer or non-refer the additional counts on an urgent basis so that the subsequent Complaint Referral at whosever's behest could be consolidated with the pending referral."*[23]

[21] Glaxo CAC para 33.
[22] Case No. 45/CR./Jul01.
[23] Glaxo Tribunal para 88.

Jurisdictional objection

[27] In order to deal with this objection there is no need for us to compare the contents of the complaint referral with that of the form CC1 because the objection is directed to the amendment application and not the referral itself. If the conduct in the proposed amendments is substantially similar to that in form CC1 then there would be no basis for us to refuse the application.

[28] We first consider the relevant provisions of the Act.

[29] Section 8(d)(i) is found in that part of the Act that concerns itself with abuse of dominance prohibitions. In general the entire section 8 prohibits dominant entities from abusing their dominance in a particular market. Dominance is defined in section 7.[24] Section 8(a) prohibits the charging of an excessive price and section 8(b) prohibits the dominant firm to refuse to give a competitor access to an essential facility. Section 8(c) prohibits the dominant firm from engaging an exclusionary act other than that listed in 8(d). Section 8(d) then lists specified forms of exclusionary conduct that are prohibited.

[30] The Tribunal has previously set out its approach to sections 8(c) and 8(d)(i) in *Competition Commission v South African Airways (Pty) Limited.*[25] In general we first assess whether the conduct complained of falls within the wording of the section. Thereafter we assess whether the conduct had an anti-competitive effect on competitors. The differences between 8(c) and 8(d) are delineated by onus and consequences of contravention. The Tribunal's treatment of these two sections can be found at paragraphs 97 to 102.[26] It is not necessary for us to describe it in great detail here. What however is significant about 8(c) and 8(d) is that both sections fall within the realm of exclusionary as opposed to exploitative conduct.[27] As can be seen from the

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[24] Section 7 : Dominant firms
A firm is dominant in a market if –
a. it has at least 45% of that market;
b. it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or
c. *it has less than 35% of that market, but has market power.*

[25] Case No. 18/CR/Mar01.

[26] See also *Nationwide Airlines (Pty) Limited and Another v South African Airways (Pty) Limited* 80/CR/Sep06 *Competition Commission v Senwes Limited* Case No. 110/CR/Dec06.

[27] See our approach to sections 8(d)(i) and 8(c) in *York Timbers Limited and South African Forestry Company Limited Case* No. 15/IR/Feb01, *Competition Commission v Senwes Ltd, Case NO.* 110/CR/Dec06 and *Competition Commission v British American Tobacco South Africa (Pty) Ltd. Case No.* 05/CR/Feb05.

language of the two, section 8(c) concerns itself with exclusionary acts in general while 8(d) concerns itself with specific forms of exclusionary conduct. The sub-sections of 8(d) are considered to be a sub-species of the general species of exclusionary act contemplated in 8(c). The two may differ in relation to onus and sanction,[28] but *both* sections are concerned with the same species of conduct namely *exclusionary* conduct by dominant firms.

[31] An exclusionary act is defined in section 1 (x) as "an act that impedes or prevents a firm entering into or expanding within a market".

[32] Section 8(c) provides –

[32.1] *It is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain*. (our emphasis)

[33] Section 8(d) then prohibits a number of specified forms of conduct. Section 8(d)(i) states that it is prohibited for a dominant firm to engage in any of the following exclusionary acts.–

[33.1] *"(i) requiring or inducing a supplier or customer not to deal with a competitor"*

[34] An ordinary reading of section 8(c) shows that it does not include in its ambit exclusionary acts by dominant firms that "require" customers or suppliers not to deal with its competitors. That conduct is to be found in the ambit of section 8(d)(i). An ordinary reading of the provisions of section 8(d)(i) show that it is not only an act of *inducement* that is prohibited but also an act of *requiring*. While both must *have the same causation* or the same outcome in order for the requirements of the section to be met – namely that a customer or supplier must not deal with its competitors – the two cannot be elided into the same thing. In other words, and to avoid rendering the section meaningless, the conduct contemplated in the element of "requiring" cannot be identical to the conduct contemplated in "inducing". However the

[28] A first time contravention of section 8(c) by a dominant firm does not attract an administrative penalty whereas a contravention of section 8(d) does. See the provisions of section 59(1)(a) and (b).

consequence or outcome of that conduct, namely that of "not to deal with its competitors" should be the same for both.

[35] Hence section 8(d)(i) does not require that only an element of inducement or persuasion must be shown for the *facta probanda* of that section to be met. It is sufficient to show that there was a "requirement". An agreement between two parties which has the element of the one "requiring" the other not to deal with a third party is by definition an exclusive agreement and could easily fall within the ambit of 8(d)(i) in the first instance by being exclusionary in nature and in the second by having an element of one party "requiring" the other not to deal with its competitors.

[36] Such an agreement of course may not necessarily have an anti-competitive *effect* on a competitor. However the *conduct*, namely that of one party *requiring* the other not to deal with a third party through the conclusion of an exclusive agreement or some other mechanism, is clearly contemplated in the wording of section 8(d)(i).

[37] In *Competition Commission v Senwes Limited*[29] the Tribunal, in exploring the difference between section 8(c) and 8(d)(i), stated –

[37.1] *"In theory, every act of exclusion perpetrated against a competitor could be said to induce customers or suppliers not to deal with a competitor, because one has made such dealings commercially unattractive, for instance by raising the costs of rivals".*[30]

[38] Further at paragraph 162 of that judgement the Tribunal states that -

[38.1] *"It would seem that section 8(d)(i) requires that the exclusionary act complained of constitutes a process of enticing or persuading a customer or supplier not to deal with a competitor. Absence the features of persuasion or enticement to either a specific customer or supplier or a class of them, the requirements of this subsection would not be met".*[31]

[29] Case No. 110/CR/Dec06.
[30] Para 157.
[31] Para 162.

[39] It is this passage that Mr Wilson pounced upon to argue that absent an element of inducement or persuasion the requirements of section 8(d)(i) could not be met.

[40] However both *Senwes* and *SAA* are distinguishable from the facts of this case. In both those cases the conduct complained of did not consist of an explicit exclusive agreement or arrangement between two parties. In *SAA,* the conduct under consideration consisted of the incentive scheme offered by SAA to travel agents, the *operation* of which was the subject of the contravention. In *Senwes*, the conduct in question consisted of farmers allegedly being verbally promised "free storage" by Senwes' employees on an ad-hoc basis.

[41] Neither of the two cases dealt with an explicit agreed mechanism between two parties which by its very definition "required" one of the parties not to deal with the other's competitors. In both those cases the applicants argued an inducement case on the basis of conduct, which on the face of it was not exclusionary, but was in effect a contravention of section 8(d)(i). The "requirement" leg of section 8(d)(i) was never argued or considered by the Tribunal.

[42] Furthermore, we have to take into account that the enquiry in *Senwes* and *SAA*[32] was different to the one under consideration here. We must be careful not to conflate the relevant enquiry in this application with that of a trial proceeding. In those cases the Tribunal was considering the *effects* of conduct that was not inherently exclusionary and arrived at its assessment of whether or not section 8(c) or 8(d)(i) had been contravened after having the benefit of the evidence led in those matters.

[43] In this application we are only dealing with a proposed amendment to a complaint referral and are not concerned with assessing the strength or the weakness of 1time's case. The allegations that are contained in the referral and the proposed amendment are yet to be tested in trial proceedings before

[32] See also J T International SA (Pty) Ltd v British American Tobacco SA (Pty) Ltd Case No. 55/CR/Jun05

we can arrive at a conclusion that the facts of this do or do not support a section 8(d)(i) contravention. All of this remains to be dealt with when the merits of the case are considered. In this case we only need to assess whether there is a *rational connection* between the conduct complained of in form CC1 and a section of the Act for purposes of pleading. An agreement of the kind complained of is susceptible to constituting a requirement with a supplier not to deal with a competitor; whether in fact it is, will be a matter for trial.

[44] Let us then consider the subject matter of the complaint lodged by 1time with the Commission.

[45] In its form CC1 of 14 March 2008, the attorney representing 1time sets out the background to its complaint, as was known to it then. Recall that at this stage 1time has not had sight of the agreement and could only infer the provisions of it through the utterances of the parties thereto. In paragraph 1 of Concise Statement of Conduct (which it seeks to amend) 1time states it seeks relief as follows -

[45.1] *"Declaring the exclusive covenant between Lanseria and Kulula to be a prohibited practice in contravention of section 5(1) alternatively section 8(c) of the Act;"*

[46] In paragraph 2 of the attached statement it states that 1time was informed in a meeting with representatives of Lanseria that Kulula had a "one year exclusivity agreement with Kulula which prevented other airlines from flying domestic services from Lanseria". In paragraph 12 it is stated that "On or about 4 March 2008 a Business Travel Now article reported that Mr Gidon Novick, executive director of Kulula acknowledged that Kulula had an exclusive agreement but denied that it was anti-competitive." Thus the exclusive agreement and the fact that it had been enforced – even though that word was not expressly used – was the subject of the complaint.

[47] In paragraph 4 it is stated that: "During August 2007 a further meeting was held with Lanseria however 1time was advised that Lanseria and Kulula were in disagreement on the interpretation of their exclusivity agreement. Kulula believed it was an exclusive agreement, the effect of which was that 1time

would be excluded from conducting operations from Lanseria. On the other hand Lanseria apparently believed that the agreement granted Kulula the right of first refusal." Again we see the conduct – namely the exclusivity agreement – being complained of. The dispute between Kulula and Lanseria as to the interpretation of their agreement lends weight to the inference that the exclusivity persisted beyond the first year of the agreement and that Kulula was requiring exclusivity from Lanseria.

[48] In paragraphs 2, 6 and 13 we see that Lanseria abides (in other words gives effect to) by the terms of the agreement between it and Kulula. In paragraph 2, we are told that Lanseria simply refused to talk to 1time on the basis of the exclusivity agreement. This amounts to nothing more than an act of enforcement. In paragraph 6, Lanseria does not agree to 1times' proposal of a daily flight to Cape Town and Durban on the basis that these were to be given to Kulula for approval. In paragraph 7, the attorney complains that to his surprise Kulula announced that it would be increasing its flights to Cape Town and Durban, implying that because no approval was forthcoming from Lanseria, Kulula had exercised its right of first refusal to the detriment of 1time. This is clearly a complaint about the agreement between Kulula and Lanseria being enforced. The attorney does not expressly say at whose insistence such enforcement took place. However in the later paragraph 4 quoted above infers that the agreement operates to Kulula's benefit. Since Kulula is dominant in the market for domestic scheduled low fare air travel enough is stated to suggest that Lanseria, the supplier, is being required by a dominant firm not to deal with a rival namely 1time.

[49] We see further that 1time, not having sight of the agreement and with limited facts at its disposal, complains about the exclusive agreement between Kulula and Lanseria even where these are not recorded in a written agreement.[33]

[50] Finally we see 1time requesting the Commission to investigate Kulula's and Lanseria's conduct on the grounds that the conduct "appears" to constitute a contravention of section 8(c) alternatively 5(1). The fact that the Commission was pointed to these two sections does not mean that the conduct complained of could not be cognizably linked to section 8(d)(i). Indeed the

[33] Para 16 of 1time's Form CC1 of 14 March 2008.

author of the form CC1 himself by using the word “appears” gives us an indication of the prevailing uncertainty with regard to the relevant sections of the Act. We see that same degree of latitude in para 17 when he states “Without limiting the basis for an investigation by the Competition Commission, it is submitted that the conduct that is the subject of this complaint ...”

[51] Notwithstanding the fact that 1time’s representative referred only to sections 8(c) and 5(1) we find that the *conduct* itself – namely the requirement by Kulula that Lanseria not deal with its competitors, through either an exclusive agreement or some other mechanism such as a right of first refusal, in word or deed, was clearly the subject of the complaint to the Commission. Moreover the conduct involving the enforcement of the agreement between Kulula and Lanseria was also the subject of the complaint. This conduct can be cognisably or rationally linked to either or both section 8(c) and 8(d)(i) because it contains within it elements of both exclusivity and requirement.

[52] We see that this is also the conclusion arrived at by the Commission, when it conducted its investigation. In paragraphs 3 and 4 of its notice of non-referral the Commission states –

[52.1] *“the Commission considered that before Kulula launched flights at Lanseria, no scheduled commercial passenger airline had previously succeeded in sustaining a domestic airline service at the airport – launching at Lanseria posed a high degree of risk to Kulula. The Commission found that were it not for the exclusionary MOU, the risks would not have been mitigated, and Kulula would have probably chosen not to launch the service out of Lanseria. The Commission therefore concluded that the MOU was necessary to minimise risk and thereby make it feasible for Kulula to operate out of Lanseria.”*

[52.2] *“Although the MOU between Kulula and Lanseria was found to be anti-competitive gains arising from it outweigh the anti-competitive effects. The Commission also considers the five year period to be reasonable for the purposes of allowing Kulula to justify its investment but has strong concerns that any renewal of the MOU*

in its current form could be problematic to competitive forces in the domestic airline market as a whole." [34]

[53] Whilst we cannot use the Commission's letter to interpret the content of the CC1, the fact that the Commission, the "legislature's plaintiff of first choice" [35] had applied its mind to the question of the exclusive nature of the agreement indicates that our interpretation of CC1 is one that a reasonable reader would come to.

[54] We turn now to consider the proposed amendments ('the amendment").

[55] Kulula's objection was focused on paragraph 1A.1 of the amendment 1time which seeks to introduce the following paragraph –

[55.1] *"the insistence by Kulula upon the inclusion of an exclusivity clause and a right of first refusal over certain routes in an agreement with Lanseria"*

[56] Kulula contends that because this fact came to 1time's attention only after the exchange of pleadings (and that it is not contained in form CC1) and on the basis of the dicta in *Glaxo,* this amendment is not competent. In our view, this is a self-serving misreading of the CAC's approach in *Glaxo.*

[57] The Competition Appeal Court has already required us to adopt a purposive approach to section 49B. In *Woodlands Dairy (Pty) Ltd, Milkwood Dairy (Pty) Ltd v The Competition Commission*[36], the Court held that –

[57.1] *"The dictum of this court in Glaxo Welcome which was cited by Mr Bhana develops a substantive as opposed to a formalistic approach to the definition of a complaint. The question arises as to whether the complaint had to be against a specified entity as*

[34] Complaint referral founding affidavit, Annexure "C" (Complaint referral bundle page 29).
[35] *Glaxo* para 26
[36] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* Case No. 88/CAC/Mar09 [2009] ZACAC 3, Para 33.

opposed, for example, to an industry. The spirit of the Glaxo Welcome dictum seeks to promote the objectives of the Act."

[58] The Court in *Glaxo* made it abundantly clear that all that a complainant need provide was sufficient detail to the Commission that would enable it to assess "*what the complaint was about and what should be investigated*". Sufficiency is met when there is a "rational connection" or the conduct is "cognizably linked" to the prohibitions (not only one section) in the Act. A complainant could not be expected to state a fact or a particularity related to the conduct that it could not have known at that time. Indeed at that time, 1time could not for example have known particulars such as who all the parties to this agreement were (if there were more than two) or at whose insistence the agreement was exclusive. Obviously a complainant cannot enjoy carte blanche when it self-refers a matter to the Tribunal and it is necessary that conduct referred to the Tribunal must first be lodged with the Commission. But to require specificity of details such as time, dates or the identities of all the parties related to that specific conduct, in circumstances where the complainant has not been privy to the information obtained by the Commission in its investigation or has not had sight of the documents obtained that may been produced which could shed further light on the matter, is to render the workings of the Competition Act sterile.[37]

[59] The conduct which was the subject matter of the complaint lodged with the Commission – namely that Kulula was insistent on an exclusivity arrangement, by word or by deed, with Lanseria - is indeed rationally linked to section 8(c) or 8(d)(i). An examination of the conduct described in paragraph 1A2 and 1A.3 reveals that it is nothing more than a reiteration of the conduct in form CC1. The conduct as complained of in the form lodged with the Commission, let alone that in the proposed amendment, is unquestionably rationally linked to both sections 8(c) and/or 8(d)(i).

[60] In our view the conduct complained of in 1A.1 is also substantially similar to that complained of in CC1 and does not introduce a new complaint. The amendment refers to the conclusion of the exclusive agreement – which has already been the subject of the complaint to the Commission. It also refers to

[37] See also our discussion in *Omnia Fertilizer Ltd v The Competition Commission* Case No. 31/CR/May05, *Competition Commission v Loungefoam (Pty) Ltd & others* Case No. 103/CR/Sep08.

Kulula's insistence on exclusivity, conduct which has already been complained about in CC1. All that is new, if at all is the fact that the insistence is described in an earlier period. The amendment might introduce a new minor fact, hitherto unknown to the complainant, but the material elements of the amendment have already been the subject of the complaint to the Commission.

[61] We find that the conduct complained of in the 1time's form CC1 is rationally linked to section 8(c) or 8(d)(i) and the proposed amendments do not introduce a new complaint.

No cause of action objection

[62] In the above discussion we also highlighted that 1time's form CC1 contains sufficient averments to establish a cause of action under 8(d)(i). 1time alleged that Kulula required Lanseria not deal with its competitors through either an exclusive agreement or the enforcement of a right of first refusal. What remains to be dealt with is these objection in relation to the complaint referral itself.

[63] Paragraphs 13 – 25 of 1time's founding affidavit in the complaint referral are substantially similar if not identical to paragraphs 2- 13 of its statement in form CC1 and establish the following facts: Kulula and Lanseria had concluded an agreement in terms of which Kulula enjoyed exclusivity for the first year of that agreement, such exclusivity resulting in Lanseria not dealing with Kulula's competitors. They also establish that at the insistence of Kulula and through the enforcement of the right of first refusal, Lanseria did not approve any flight schedules for 1time. In paragraphs 42- 44.3, the complaint referral sets out possible market definitions and the basis of calculating either Lanseria's or Kulula's dominance depending on the how the market is defined.[38] This exercise is done under a heading "The section 8(c) infringement". As we have discussed above, the fact that 1time might have used this heading does not lead to the conclusion that we are limited to only examining an s8(c) infringement. The factual averment of Kulula's or Lanseria's dominance in a particular market would be relevant to either a section 8(c) or 8(d)(i) enquiry. In our view all the factual averments

[38] Clearly it had still not had sight of the agreement

necessary to establish a cause of action for purposes of section 8(d)(i) are present in the complaint referral.

Conclusion

[64] We find that the conduct which constituted the subject of the complaint lodged by 1time with the Commission and of the subsequent direct referral is clearly rationally linked to both section 8(c) and 8(d)(i) and the jurisdictional fact of initiation by the Commission has been met. The complainant had already laid a sufficient factual basis for pleading/alleging either a section 8(c) or 8(d)(i) contravention. The amendments do not introduce any new complaints to that lodged with the Commission on 14 March 2008. If the amendment were allowed, the Tribunal would enjoy jurisdiction. The respondent's objection as to both lack of jurisdiction and no cause of action directed at the form CC1 and the proposed amendments are without merit and the amendment application is hereby granted.

[65] Accordingly we make the following order:

[65.1] 1time's application for the proposed amendments contained in the Notice of Motion is granted; and

[65.2] 1time is required to file within 10 days of date hereof a comprehensive complaint referral document clearly indicating the amendments granted in this application ("the amended complaint");

[65.3] The Respondents may, within 20 days after the filing of 1time's amended complaint, file answering affidavits and if they do, they must also file a comprehensive document clearly indicating supplementary answers to the amended complaint referral ("the comprehensive answer"); and

[65.4] 1time may file a reply within 5 days of the filing of the answers in [65.3] above.

[66] There is no order as to costs.

_____ **29 July 2010**

Yasmin Carrim **DATE**

Norman Manoim and Thandi Orleyn concurring.

Tribunal Researcher:	Thandi Lamprecht
For the Complainant/Applicant:	Adv Engelbrecht instructed by Schindlers Attorneys
For the 1st Respondent:	Adv Wilson instructed by Weber Wentzel