competitiontribunal
south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 15/CR/Mar10

In the application by:

Paramount Mills (Pty) Ltd	**Complainant/Applicant**
And	
The Competition Commission	**Respondent**

In the matter between:

The Competition Commission	**Applicant**
And	
Pioneer Foods (Pty) Ltd	**1st Respondent**
And 16 Other Respondents	

Panel	:	Y Carrim (Presiding Member),
		A Wessels (Tribunal Member)
		L Reyburn (Tribunal Member)
Heard on	:	26 May 2011
Order issued on	:	7 September 2011
Reasons issued on	:	7 September 2011

Reasons for Decision and Order

Introduction

[1] In this application we have been asked to dismiss a complaint referral against Paramount Mills on the basis that the Competition Commission's ("Commission") referral against it is incompetent. We have declined this application for the reasons set out below.

Background

[2] The applicant, Paramount Mills ("Paramount"), is the fourteenth respondent in a complaint referral concerning cartel behavior in the milled white maize market. White maize is a staple food for the vast majority of South Africans.

[3] The complaint was referred to the Competition Tribunal ("Tribunal") on 31 March 2010. The gravamen of the complaint is that during the period 1999 to at least January 2007 the respondents engaged in cartel activity in that they telephonically and in meetings directly fixed the selling price of milled white maize products to their customers as well as agreed on implementation dates of these price increases.

[4] In paragraph 93.3 of the Commission's referral affidavit the following is stated:

> *"during the period 2001 to September 2006, Gary O'Brien, Tiger Brand's Regional Customer Manager, Eastern Cape, had numerous telephone conversations with Phillip Poctier from Premier Foods, Grant Smith from Pioneer Foods and Bruce Spanyard (sic) from Paramount Mills during which they exchanged information about their pricing structures, fixed the selling prices of their maize meal products as well as the timing of future price increases."*

[5] On 16 April 2010 Paramount's legal representatives, Bowman Gilfillan ("Bowmans"), requested a copy of the original complaint and the Commission's initiation statement in order to "*understand the basis of the complaint against it and to be in a position to plead on a proper and informed basis*". This request was resisted by the Commission on the basis

that it had provided Paramount with all material facts and points of law relevant to the complaint in the referral affidavit.[1]

[6] Paramount filed its answering affidavit on 8 June 2010. It did not take an exception to the Commission's referral at the time and has still not done so. In its answer Paramount also did not raise a special plea but suggested that in its view the referral might be time barred.[2]

[7] A few months later, on 7 October 2010, Bowmans addressed a letter to the Commission advising it that in its view "*no prima facie evidence appears from the Commission's founding papers that Paramount Mills engaged in the alleged conduct as set out in the Commission's founding affidavit*". It went on further to state "*save for mentioning Paramount Mills in passing in paragraph 93.3 ...the Commission has not implicated any employee of Paramount Mills in any of the alleged conduct*".

[8] Bowmans requested that the matter be withdrawn against Paramount. The Commission declined to do so.

[9] On 13 December 2010 Bowmans advised the Commission that there is no basis in law or fact for the Commission to take this position and that the Commission had not made out a proper case against Paramount. On this basis it filed a dismissal application on 30 December 2010.

[10] Ms Le Roux, appearing on behalf of Paramount argued that –

1) The complaint is not legally competent because it does not meet the test of legality and intelligibility required by the recent SCA decision in *Woodlands* [3] and the subsequent requirement by *Loungefoam*[4] that the papers before us must meet the standard of an application in motion proceedings ("the legality test"); and

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[1] Commission's heads para 16-22. Paramount FA

[2] See par 10.4 of its Answering Affidavit dated 7 June 2010

[3] *Woodlands Dairy (Pty) Ltd v Competition Commission* 2010 (6) SA 108 (SCA)

[4] *Loungefoam (Pty) Ltd and others v Competition Commission of South Africa/ Feltex Holdings (Pty) Ltd v Competition Commission of South Africa* 102/CAC/Jun10 (6 May 2011)

2) The complaint referral is time barred because Paramount is only implicated in a telephone call in September 2006 and the Commission was precluded from initiating an investigation into that conduct by operation of s67(1) of the Competition Act ("the prescription point");

[11] We will deal with the prescription point later.

The legality test

[12] The application brought here by Paramount is analogous to an application for absolution from the instance in civil proceedings or one in terms of s174 of the Criminal Procedure Act in criminal proceedings.

[13] In those proceedings an accused or defendant/respondent as the case may be is entitled to file such an application after evidence has been led and where it is alleged that the state or the plaintiff has failed to establish a prima facie case.

[14] In this application however we are asked to dismiss the Commission's referral against Paramount prior to the hearing of any evidence.

[15] In its founding affidavit to this application Mr Spanjaard on behalf of Paramount states that

1) *"I am advised that in a recent decision of the Supreme Court of Appeal Woodlands Dairy and Milkwood Dairy v The Commission (105/2010) [2010] ZASCA 104 13 September 2010), it was held that the Commission must at the very least have been in possession of the information concerning an alleged practice which objectively speaking could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the powers of the Commission to investigate, refer and prosecute complaints before the Tribunal.*

2) *To this end I am advised that the Commission must have reasonable grounds to believe that Paramount Mills has infringed the Act and Paramount Mills is entitled to understand the basis upon which the Commission reached its conclusion. To date, the Commission has not implicated any employee of Paramount Mills in any of the alleged conduct." (Our emphasis)*

[16] Ms Le Roux on behalf of Paramount argued that the decision in *Woodlands* creates a standard of legality and intelligibility that the Commission's referral against Paramount does not meet. She summarized the court's ratio as follows:

1) The complaint must be initiated against an alleged prohibited practice or an alleged contravention of the Act as specifically contemplated by an applicable provision thereof and not generally anti-competitive behaviour;

2) A complaint initiation must survive the test of legality and intelligibility.[5]

[17] She went on to conclude that paragraph 93.3 and the *complaint referral* as a whole does not meet this test of legality and intelligibility.

[18] Furthermore the CAC in *Loungefoam* required the Commission to refer a *prima facie* case on the papers to the Tribunal. A referral on affidavit by the Commission was equivalent to application proceedings and the Tribunal was required to conduct itself as a court in motion proceedings. If no *prima facie* case was made out in the Commission's referral then the matter ought to be dismissed.

[19] Mr Unterhalter on behalf of the Commission argued that Woodlands was not concerned with the legality of a referral but with the jurisdictional grounds for a referral. The jurisdictional ground for a referral was a valid initiation, which the court in *Woodlands* held was not present in that case. Furthermore the Act does not require the Commission to refer a *prima facie* case to the Tribunal. All that the Commission is required to do is to refer to the Tribunal a document consisting of a concise statement of the grounds of the complaint and the material facts or points of law relevant to the complaint.[6]

[20] We agree with Mr Unterhalter that the reliance by Ms Le Roux on the SCA's decision in *Woodlands* for launching an attack on the Commission's referral is misplaced. In that case the Court was not at all concerned with the *contents* of the Commission's referral. The Court in the first instance was concerned with the validity of a summons that had been issued by the

[5] See Heads 4.1.4 & 4.1.5

[6] Requirements of Tribunal Rule 15

Commission against the appellants and in the second with the validity of the Commission's initiation statement.

[21] We are minded in this discussion to once again delineate the differences between provisions of the Competition Act ("the Act"). In terms of section 49B of the Act, a complaint can be "initiated" by the Commission or third party (a complainant). Once so initiated the Commission is then required to appoint an inspector to investigate the complaint as quickly as possible. The initiation of a complaint is not equivalent to a summons commencing action or an indictment (charge sheet) against named respondents. Instead it marks the commencement of an investigation by the Commission of certain allegations in a complaint.

[22] During the investigation of a complaint the Commission is entitled to exercise its powers of search and summons.[7] For example the Commission has the power to enter and search (sections 47-49) and the power to summons any person who is believed to furnish any information on the subject of the investigation (s49A). It is precisely such a summons that was under consideration by the Tribunal (103/CR/Dec06) the CAC (88/CAC/Mar09) and finally the SCA in the *Woodlands* matter.

[23] The Commission may after investigating these allegations determine that a contravention of the Act has occurred. It may then refer this matter to the Tribunal for adjudication. It is this referral that becomes the basis of the case against the respondent and which the respondent is required to answer. The Commission may of course conclude that the complaint has no merit and therefore no referral will be made to the Tribunal. In such event a third party complainant whose complaint has not been referred by the Commission may itself refer it directly to the Tribunal.[8]

[24] It is important to bear in mind that an initiation statement or a complaint initiated by a third party is not a pleading, nor is it a charge that is put to a respondent. It merely leads to an investigation into a complaint which may or may not lead to a referral.[9]

[25] The essential criticism leveled by the SCA against the Commission in *Woodlands* was that s49B of the Act required the Commission to initiate a complaint against an alleged prohibited

[7] Part B of the Act.

[8] See sections 50 and 51.

[9] See section 50.

practice and not against general "anti-competitive" conduct. The court was not at all concerned with the contents of the referral. It set aside the referral because in its view the initiation statement of the Commission was not a rational exercise of power as a jurisdictional ground to support a referral against the two appellants.

[26] In this case the validity of the Commission's initiation statement has not been challenged and *Woodlands* has no application.

[27] Ms Le Roux however relies on a passage in the *Netstar (Pty) Ltd v Competition Commission of South Africa* 97-99/CAC/May10 decision to extend the ratio in *Woodlands* to the referral in this case. In *Netstar* the CAC stated that in *Woodlands* -

> *"the initiation of a complaint was likened to a summons in that it must contain sufficient particularity and clarity to survive the test of legality and intelligibility..."*

[28] But in *Woodlands* the court was not concerned with a summons as in summons commencing action and nor did it liken a complaint referral to a summons. At paras 34 and 35 the Court says –

> *"....The CAC did not take into account that the initiation must at least have a jurisdictional ground by being based on a reasonable suspicion.*
>
> *There is in any event no reason to assume that an initiation requires less particularity or clarity than a summons. It must survive the test of legality and intelligibility. There are reasons for this. The first is that any interrogation or discovery summons must relate to the information available or the complaint filed by a complainant. The scope of a summons may not be wider than the initiation. Furthermore the Act presupposes that the complaint (subject to possible amendment and fleshing out) as initiated will be referred to the Tribunal. It could hardly be argued that the commission could have referred an investigation into anti-competitive behavior in the milk industry at all levels".*

[29] Read in its proper context, it is obvious that the Court was discussing the scope of a summons as contemplated in section 49A and not a summons commencing action. The complaint after all in that case was that the summons was too wide as was the initiation.

[30] In sum *Woodlands* was not concerned with the contents of the referral. The court was of the view that the initiation was tainted because it was made against "anti-competitive behavior in general" and not against an alleged prohibited practice as was required by the Act. Because the 49A summons was based on a tainted initiation, the information obtained pursuant to that summons could not be relied upon by the Commission to refer a complaint against the appellants.

[31] In *Netstar* the validity of the initiation was not before the Court. It appears that the CAC in that discussion was concerned with the Commission's referral but elided this with an initiation statement. Nevertheless in that case the Court still makes it clear that the test of legality and intelligibility does not require "*a level of precision that is demanded in pleadings but does mean that the party against it whom that allegation is made must be able to know what the charge is and be able to prepare to meet and rebut it.*"

[32] Paramount has already demonstrated that it understands the charges against it and has been able to plead thereto. That it does so without any ambiguity is further supported by its raising of the prescription point, which we discuss later.

[33] Moreover it understands not only the charges leveled against it but also the Commission's complaint in its entirety as demonstrated by the following[10] -

1) In his answering affidavit Mr Spanjaard states that this is an answer to the founding affidavit of the Commission in the complaint referral and that he will first respond generally to the complaint referral and thereafter he will address the specific allegations contained in the founding affidavit.[11] He then proceeds to set out the history and nature of Paramount's business in general, the product and geographic markets that it is involved in and details of the industry and the market participants;[12]

2) In para 6.16 Mr Spanjaard states "*Accordingly the allegations in the complaint referral concerning the existence of a national cartel, with smaller regional cartels*

[10] See AA paras 8 –10.7

[11] Para 5 of the AA

[12] See paragraphs 6.1 – 6.21

...are simply inapplicable to Paramount. In other words to the extent that the nub of the complaint referral is that the there was a national cartel, albeit comprised of regional cartels....the fact that Paramount does not have a national market presence means that it could not participate in any national cartel."; and

3) At 6.17 - 6.20 he proceeds to set out in detail where and how Paramount has encountered its competitors - "*It is true that Paramount encounters representatives of its competitors in the white maize market for human consumption ....As set out below Paramount met with representatives of its competitors at meetings of the National ...No joint meetings were ever held....Further Paramount would telephone its competitors when it needed to buy .....As set out below the only other contact between Paramount and any of the major market players were limited telephone calls made in later 2006 between myself and Gary O'Brien, a sales representative of Tiger in the Eastern Cape ("O'Brien").*"

[34] Ms Le Roux argues that despite this, because the Commission does not set out further details in paragraph 93.3 - such as by whom and when the telephone calls were made, in respect of which products, how and where prices were fixed, etc, the referral is defective. This is argued despite the fact that Mr Spanjaard of Paramount Mills has been implicated in telephone conversations with competitors in the Commission's para 93.3.

[35] In any event even if we are to assume that the objection was validly raised, this is an objection to *insufficiency* not *legality* of pleading.

[36] When pressed as to why the proper remedy in such a case would not be a request for further particulars or an exception, a remedy available to parties in *both* civil and criminal proceedings, Ms Le Roux invokes the CAC's decision in *Loungefoam* in support of the argument that the Tribunal's proceedings are equivalent to motion or application proceedings in the High Court. In other words because the papers, namely the referral document and the answering affidavit before us do not make out a *prima facie* case, the referral must be dismissed.

[37] This argument can be rejected on two grounds.

[38] In the first instance no such decision was made by the CAC in *Loungefoam*. In that case the court was not concerned with the nature of the Tribunal's *proceedings* but rather with the proper procedure to follow when seeking to adduce additional facts on affidavit. The question before the Court was whether an affidavit, being a sworn statement under oath, was capable of amendment, as is a pleading or Notice of Motion. The Court in rejecting the Commission's argument that the nature of an affidavit was *sui generis* in our proceedings, makes the following remark–

> "*..An affidavit in competition proceedings has precisely the same character as it has in any other circumstances. It is a sworn statement on oath by a witness that is required by Rule 15(2) to set out a concise statement of the grounds of the complaint and the material facts and points of law relevant to the complaint and relied on by the Commission. It serves the same purpose as affidavit in application proceedings, which contains both the allegations necessary in a pleading including any relevant propositions of law and the essential evidence in support of those allegations.* "

[39] The Court may, in passing, have likened the *purpose* of an affidavit in Rule 15(2) to that of an affidavit in application proceedings but it did not equate the Tribunal's *proceedings* with that of motion proceedings in the High Court. That this is the case is supported by the Court's acceptance in para 14 of the *sui generis* nature of the Tribunal's proceeding –

> "*While… it is unclear why it is thought to alter the fundamental nature of an affidavit. There is no legal prohibition against an affidavit containing hearsay evidence. In certain circumstances and in certain tribunals such evidence is inadmissible but this does not mean that an affidavit in support of a referral to the Tribunal cannot contain hearsay evidence. It may be convenient for the Commission to cause the affidavit to be deposed to by the investigator who investigated the complaint. That is likely to be a sensible course, as the investigator will have the relevant facts and documents at her fingertips. However it is inevitable in those circumstances that the affidavit will largely be an affidavit of information and belief rather than direct evidence. That is immaterial bearing in mind the practice of the Tribunal to conduct a hearing at which witnesses with direct knowledge of the facts testify under oath and are cross-examined (our emphasis)…* "

[40] That the issue was a narrow issue of procedure is confirmed by the Court when it concludes that "*the proper procedure for the Commission to follow when it wishes to amplify or widen the scope of the referral to the Tribunal is to apply under Rule 18(1) to amend the referral form CT(1) and simultaneously to seek leave to deliver a supplementary affidavit in support of the amended allegations*". [13]

[41] In any event the Court declined to make a final determination of an alleged procedural irregularity and decided the case on its merits. Its passing remarks as to the purpose of an affidavit in competition proceedings cannot be elevated into a decision about the nature of the Tribunal's proceedings.

[42] Second, by equating our proceedings with that of application proceedings in the High Court Ms Le Roux ignores one critical factor. The Tribunal is a creature of statute with statutory provisions regulating the conduct of its proceedings. While it is an adjudicative body and is permitted by its rules to take guidance from those of the High Court it is not a High Court. Its proceedings are *sui generis*, combining different elements of trial, application and inquisitorial proceedings. In order to fulfill its truth seeking functions as a specialist body the Tribunal must act in accordance with the provisions of its statute. In this it is granted a wide discretion to manage its proceedings so as to conduct its hearings as expeditiously as possible. It may also conduct hearings informally or in an inquisitorial manner in accordance with the principles of natural justice.[14] Even though in practice the Tribunal has exercised it only in limited circumstances,[15] given this inquisitorial power to summons witnesses and information, the papers placed before the Tribunal by the parties appearing before it can never be said to constitute the entire case before it.

[43] That the Tribunal's proceedings are *sui generis* has also been previously accepted by the CAC in previous decisions.

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[13] Para 16

[14] Sections 52- 55.

[15] See for example merger proceedings in Walmart & Massmart merger (CT Case No: 73/LM/Dec10), Sasol & Engen merger (CT Case No: 101/LM/Dec04) and Tiger Brands and Ashton Canning Company merger (CT Case No: 46/LM/May05) where the Tribunal requested certain witnesses to attend and testify at the hearings.

[44] In *Senwes Ltd v The Competition Commission* (Case No: 87/CAC/Feb09), the CAC in paragraphs 39-41 says the following –

> *"[39] These sections indicate that the purpose of the Act is to ensure that the Tribunal would not be constrained by the law relating to pleadings in the same way as would a civil court during a trial. The Tribunal is entitled to conduct its hearing 'as expeditiously as possible' and 'in accordance with the principles of natural justice'. Thus, it is empowered, if it so decides, to conduct its hearings in an informal manner or choose an inquisitorial model.*
>
> *[40] The Act does not view the Tribunal as functioning in the same way as would an ordinary court, inflexibly constrained by an adversarial model of adjudication. While a party, against whom a complaint has been lodged, is clearly entitled to sufficient information to determine the nature of the prohibited practice, in terms of which the complaint has been lodged, the enquiry as to the requisite level of understanding should not be sourced in principles which apply to the nature of adversarial proceedings employed in a civil case.*
>
> *[41] In this case, the facts revealed that appellant knew, prior to the commencement of the hearing, of the nature of the evidence which would be led as a result of the production of various witness statements. Furthermore, although the respondent did not employ the phrase 'margin squeeze', it set out sufficient facts to indicate to a reasonable reader of the referral affidavit, possessed of a reasonable level of knowledge of competition law, that the nature of the alleged practice was predicated upon conduct which was alleged to have been pursued by the appellant."*

[45] Furthermore in *Simelane & Others v Seven Eleven Corporation*,[16] the Supreme Court of Appeal, bearing the *sui generis* nature of our proceedings in mind, held that a referral which may be brief is acceptable as a matter of law –

[45.1] "[22] *Seven-Eleven contends that the Commission, already at the investigation stage, should have put its cards on the table, should have told it what its evidence was, and should then have held a hearing at which Seven-*

[16] 2003 (3) SA 64 SCA

Eleven would have been given the opportunity to refute the evidence. For the reasons set out in the Brenco and Norvatis judgments, as set out above, I consider that there is no merit in the submissions. Again, when it appears before the Tribunal, Seven-Eleven will have a full opportunity to view documents, hear the witnesses, cross-examine them and lead evidence and make submissions. According to the authorities all that it is entitled to at the investigation stage is the 'gist' of the case against it … and that, I think it has been told, by means of a copy of the referral document which it received in May 2000. This document is mentioned in para [9] above. Brief it may be, but it gives dates, sections and the alleged prohibited practices. As a matter of law I do not think that Seven-Eleven was entitled to more than it got. (own emphasis supplied)"

[46] As a matter of law, all that Tribunal rule 15(1) requires is for a party to complete one of three forms and to support that by an affidavit containing a concise statement of the grounds of the complaint and the material facts or the points of law relevant to the complaint and relied upon by the Commission or complainant as the case may be.[17] Thereafter the referral is supplemented by the filing of witness statements, evidence and cross-examination of witnesses, interrogation of documents produced at trial through a process of discovery and the exercise of the Tribunal's inquisitorial powers

[47] That the Commission's referral in this case meets the requirement of rule 15(1) is evident from the document read as a whole. The Commission's founding affidavit states that this is a referral in terms of section 50 of the Act, names the parties involved, states that the gravamen of the complaint is the operation of a cartel by the respondents in the milled white maize market, namely that the cartel operated during the period 1999 up at least until January 2007 and that the respondents (one of whom is Paramount) "acting through their respective representatives and/or employees engaged in cartel activities in milled white maize in that they telephonically and in meetings directly fixed the selling price of milled white maize products to their customers as well as agreed on implementation dates of such price increases" and that the aforesaid conduct contravened section 4(1)(b)(i) of the Act.[18]

[17] Tribunal rule 15

[18] Parapgraphs 1 -28 of the referral affidavit.

The Commission's affidavit then provides considerable detail on the industry and the maize milling process, the relevant product and geographic markets and background to the complaint and its investigation. Further details are given in paragraph 50 onwards as to the conduct of the respondents and we find in para 93.3 details about Paramount's involvement. These details are sufficient to at least provide the following information about the Commission's case – namely that Bruce Spanjaard from Paramount Mills was involved in numerous telephone conversations with employees of competitors to share pricing information and fix the selling prices of their maize meal products as well as set the timing of future price increase during 2001 to September 2006. In our view this also meets the standard established by both the CAC and the SCA.

Conclusion on legality point

[48] As we have said previously there was sufficient information in this affidavit to enable Paramount to understand the case against it and answer to it.

[49] As a matter of pleading if Paramount finds the Commission's referral to be inadequate the proper remedy for it is to object thereto and to provide the Commission with an opportunity to rectify it. Ms Le Roux would have us accept that the courts have established a standard of legality for a complaint referral that is so high that if not met must necessarily lead to a dismissal. If we were to accept this then we would effectively create a standard of legality for the Commission that is higher than that enjoyed by parties even in criminal proceedings. None of the decisions of the CAC or the SCA support the notion that a new standard of pleading has been established for the Commission that is yet higher than that applicable to criminal proceedings. If parties in both civil and criminal proceedings are able to object to deficiencies in each other's pleadings and are entitled to amend these in the face of objections or in the light of new information in criminal proceedings, why should parties in our proceedings be denied this right?

[50] Nor has the CAC created a new proceeding in our statute. The discretion to manage and conduct our own proceedings lies within the powers of the Tribunal. Indeed as recently as in *Southern Pipeline Contractors and Conrite Walls (Pty) Ltd v Competition Commission, CAC Case No: 105/CAC/Dec10 and 106/CAC/Dec10* the CAC has recognized that the Tribunal's proceedings are *sui generis* and that we are entitled to utilize our inquisitorial powers to request further evidence in appropriate circumstances.

Prescription Point

[51] This then brings us to the prescription point. Mr Unterhalter submits that the point was not properly pleaded and is therefore not available to Paramount. Notwithstanding this we permitted Ms Le Roux to argue it.

[52] The Commission initiated the complaint against Paramount on 2nd October 2009. It was argued that because the Commission alleges that Paramount was engaged in this "practice" in 2006, the Commission was barred by the provisions of section 67(1) from initiating a complaint against Paramount. Since the initiation was out of time the referral was not competent.

[53] Section 67(1) provides that a complaint cannot be initiated into a prohibited practice three years after that practice has ceased. The purpose of this section is obvious - it seeks to limit the expenditure of resources into investigations of conduct that has long ceased.

[54] We have previously said that whether or not an initiation is time barred cannot be decided on the basis of legal argument only. We have also held that a party wishing to rely upon the provisions of section 67(1) will have to put up some facts, which would ordinarily be within its own knowledge, to show that such conduct had ceased.[19] If Paramount alleges that the conduct had ceased in 2006, then it – and not the Commission - is best placed to put before this Tribunal evidence to that effect. It has failed to do so in its answering affidavit and in argument at the hearing of this matter. On this basis alone the application fails

[55] Even if we accept for argument's sake that section 67(1) does not create an evidential burden for a party seeking to rely on it, and that the onus is on the Commission to show that the conduct complained of went beyond the three year period, that enquiry still remains one of fact. It is axiomatic that in order to determine whether conduct which constitutes a prohibited practice has actually *ceased* – and therefore is properly the subject of section 67(1) – that conduct must in the first instance be fully *described*. Factual evidence must be led to that effect. For this reason one would expect a respondent who stands to benefit from the protection of section 67(1) to be incentivized to include as much of its conduct within the

[19] See our decision *Nationwide and Comair v SAA* (CT Case No: 80/CR/Sep06) and the recent decision in CAC: *SAA v Comair Ltd and Nationwide* 92/CACA/Mar10 on s67(1).

realm of that provision and for the Commission to exclude as much. However for us to conclude as a matter of law that the Commission cannot initiate against that conduct we must be satisfied as a matter of fact that that particular conduct had ceased.

[56] The difficulty for Paramount in this case is that it in the first instance it denies that such a practice has occurred at all and in the second relies upon the Commission's pleadings, and not its own facts, to argue the point. Recall that the papers before us at this stage of the matter (the Commission's affidavit and Paramount's affidavit) do not constitute the entire case before us and further evidence through witness statements has yet to be filed and in this respect the prescription point seems prematurely taken.

[57] In any event the Commission's pleadings do not assist Paramount.

[58] In paragraph 27 of its affidavit the Commission has pleaded that "the Commission's complaint is that during the period 1999, up at least January 2007, the respondents....engaged in cartel activities". In paragraph 69, after dealing with the industry and background to the investigation, the Commission states –

> "*As I indicated earlier the cartel arrangements endured until at least January 2007 but the Commission's investigation revealed that it may have continued after that date give the pervasive nature of the conduct and the extended period of time over it which it took place. The meetings included those set out below while extensive communications also took place by telephone*"

[59] The Commission then proceeds to set out examples of meetings that took place in different regions and of telephone conversations. In relation to Paramount the Commission cites the involvement of Mr Spanjaard (erroneously spelt as Spanyard) as an example of the telephone conversations in which prices and trading conditions were fixed. Significantly in 93.3 the Commission alleges that "*during 2001 to September 2006 ...during which they...fixed the selling prices of their maize meal products as well as the timing of future price increases*". Hence what is alleged is that the agreements involved future conduct.

[60] The pleaded case then is that the conduct persisted at least until January 2007 but could have endured for longer. It remains to be seen whether or not the Commission will be able to prove its pleaded case. However that is a matter for trial.

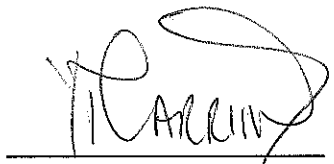
[61] The prescription challenge can only be determined after evidence has been led and the facts are fully ventilated. To decide this issue only on the basis of legal argument, and not through a factual enquiry, could well result in the unfortunate outcome that the party relying upon it may not get the fullest protection of the section. After all if the conduct is not properly and fully described that party may still be vulnerable to prosecution for conduct that ought to have been included under the protection of s67(1) but was not.

[62] For these reasons the application based on s67(1) fails. Obviously at the end of the hearing, after all the evidence has been led and tested, it will still be open to Paramount to raise the prescription point.

Conclusion

[63] In conclusion, we find that the challenge brought by Paramount is misconceived. We accordingly make the following order –

1. The application is dismissed; and
2. There is no order as to costs.



Ms Yasmin Carrim

7 September 2011
Date

A Wessels and L Reyburn concurring.

Tribunal Researcher:	Rietsie Badenhorst
For the Complainant/Applicant:	Adv MM Le Roux instructed by Bowman Gilfillan Inc
For the Respondent:	Adv DN Unterhalter SC assisted by Adv KH Shozi instructed by Cheadle Thompson & Haysom Inc