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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR006May05//RVW108May17

In the matter between:

OMNIA FERTILIZER LIMITED	**Applicant**
And	
COMPETITION COMMISSION OF SOUTH AFRICA	**Respondent**

***In re:* complaint referral between:**

COMPETITION COMMISSION OF SOUTH AFRICA	**Applicant**
And	
SASOL CHEMICAL INDUSTRIES (PTY) LIMITED	**First Respondent**
YARA (SOUTH AFRICA) (PTY) LIMITED	**Second Respondent**
OMNIA FERTILIZER LIMITED	**Third Respondent**

Panel	:	Y Carrim (Presiding Member)
		E Daniels (Tribunal Member)
		A Ndoni (Tribunal Member)
Heard on	:	21 September 2017
Decided on	:	14 February 2018

REASONS AND ORDER

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[1] This is an application for a dismissal of a complaint referral brought at the instance of the third respondent Omnia Fertilizer Limited ("Omnia"). The

complaint referral was brought by the Competition Commission ("Commission") on 4 May 2005 against Sasol,[1] Yara[2] and Omnia in which it alleged that the three respondents engaged in collusion in the form of price fixing and market allocation in the markets for nitrogen derivative products used in the manufacture of fertilizer ("the complaint").

[2] Sasol has since settled the matter with the Commission and has provided the Commission with assistance in the prosecution of the matter.

[3] Omnia has previously attempted to challenge the validity of the complaint but ultimately failed in its endeavour by the decision of the SCA in *Competition Commission v Yara ("Yara").*[3]

[4] Notwithstanding the finding of the SCA in *Yara,* Omnia still persists in challenging the validity of the complaint on technical grounds, thereby seeking to avoid a hearing on the merits by bringing this application.

Background

[5] In *Yara*, the SCA held that the complaint referral and subsequent amendments brought by the Commission against the three respondents were valid on the basis of a tacit initiation by the Commission. After the SCA decision, Omnia corresponded with the Commission and requested clarity on what date the Commission relied on for its tacit initiation. In a letter dated 13 February 2015 the Commission responded to this request indicating that tacit initiation occurred on 29 April 2005. Interestingly it cited the following documents; the Commission EXCO Round Robin table dated 27 February 2004; the Final Report from the Enforcement and Exemptions Division dated 1 December 2003 and the Commission resolution dated 29 April 2005; as the basis for its reliance on this date.

[6] Omnia then launched this application in two parts.

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[1] Sasol Chemical Industries (Pty) Ltd.
[2] Yara (South Africa) (Pty) Ltd.
[3] *Competition Commission v Yara (South Africa) (Pty) Ltd and others* 2013 (6) SA 404 (SCA).

[7] In the Part A application which was heard first, Omnia requested access to the above-mentioned documents and relevant ancillary documents which proved initiation. The Commission resisted the production of these documents on the basis of privilege. The Tribunal, in its ruling in Part A, required the Commission to file a supplementary affidavit setting out the dates it intends to rely on as well as the documents it intends to use to support the inference of a tacit initiation as envisaged in *Yara*.

[8] Following the ruling in Part A, the Commission filed a supplementary affidavit and relied on the following for the inference of a tacit initiation:

8.1. For the s4(1)(b)(i) contravention the Commission relies on the date on which it referred the complaint to the Tribunal namely 4 May 2005 as the date of its tacit initiation against Omnia; and

8.2. For the s4(1)(b)(ii) and (iii) contraventions the Commission relies on the date when the first amendment was filed namely 20 November 2006 for the date of its tacit initiation.

[9] Once the supplementary affidavit was received, Omnia in line with its Part B application, challenged the Commission's tacit initiation on the basis that the formal requirements of s49B had not been met. Furthermore, the Commission had not been able to show any documentary evidence to support the inference that these requirements were met. The second ground of challenge was that the decision by the Commission to refer the matter was irrational. The third ground, contended by Omnia, in support of a dismissal of the complaint was that the proceedings on the merits against it would be unfair due to the lapse of time and unavailability of witnesses. We deal with these grounds *ad seriatim*.

Our Analysis

Referral invalid due to unlawful initiation

[10] The basic contention by Omnia was that the complaint referral was invalid because the initiation was unlawful in that the requirements of s49B had not been met. It was argued that the provisions of s49B(1) of the Act which empower the Commissioner - not the Commission - to initiate a complaint had

not been complied with because this power is reserved solely for the Commissioner, not the Commission[4] and cannot be delegated to others. Furthermore the appointment of the inspector, Ms Nomfundo Maseti, by the then Commissioner Mr Simelane was not in compliance with the provisions of s49B(3) because she had been appointed generally as inspector and not specifically to the Omnia complaint as was required by s49B(3).

[11] Mr Trengove on behalf of the Commission argued that the validity of the referral had already been decided by the SCA in *Yara*, Omnia was bound by this decision. It was therefore not open for Omnia to now once again challenge the referral.

[12] Omnia however insisted that the SCA, when it made that decision had in mind whether the Commission - and not the Commissioner as required by s49B(1) - had validly initiated the complaint. This is clear from the language used by the court throughout the judgement. Omnia argued further that their contention is bolstered by the Commission's supplementary affidavit. In that affidavit there are only references to the Commission and not to the Commissioner. As the Commissioner did not initiate, it was argued, the initiation by anybody else would be *ultra vires*. Since there was no valid initiation there cannot be a valid referral. Furthermore, the Commission had not put up the documentation as requested in Part A, to support the inference that a valid initiation had taken place.

[13] In our view, the challenge put up by Omnia suffers a fatal defect, both in fact and in law. To understand this fully we must turn to the decision of the SCA in *Yara* and unfortunately traverse once again the factual matrix underpinning that decision.

[14] The primary issue that the SCA had to consider in *Yara* was whether the Commission's broadening of a complaint that had been lodged by a private complainant was valid. In answering this question the SCA had to necessarily, by virtue of the provisions of s49B(1) of the Act, address the question whether

[4] The Competition Commission is defined in s19(2) as consisting of the Commissioner and one or more Deputy Commissioners appointed by the Minister.

there was a valid initiation by the Commissioner. This was the essential legal question in that matter.

[15] The salient facts underpinning that decision were the following. In November 2003, Nutri-Flo CC and Nutri-Fertiliser CC (referred to collectively as "Nutri-Flo") lodged a complaint with the Commission against Sasol.[5] In that complaint Nutri-Flo claimed that Sasol imposed price increases in respect of raw materials it supplied to Nutri-Flo. While the essence of Nutri-Flo's complaint was the price that Sasol charged, it stated in the complaint that these high prices were made possible by collusion on the part of Sasol, Yara and Omnia.[6] Having made these allegations Nutri-Flo nonetheless sought no relief against Omnia and Yara but cited them for the legal interest they may have in the matter.

[16] Following this complaint, the Commission investigated and referred a complaint to the Tribunal on 4 May 2005 in which it alleged that Sasol, Omnia and Yara had contravened s4(1)(b)(i). The referral was subsequently expanded by the Commission on three occasions through the filing of supplementary affidavits ("amendments"). In the first amendment on 20 November 2006, the scope of allegations against Omnia was broadened to include s4(1)(b)(ii) and (iii). This amendment was unopposed by the respondents and was granted by the Tribunal on 18 April 2007. In March 2008, the Commission applied for a second amendment which was an elaboration on Omnia's alleged contraventions. This too was unopposed by the three respondents and was granted on 9 July 2008.

[17] The third amendment was brought in October 2009. Its genesis was linked to the settlement struck between Sasol and the Commission. The Commission and Sasol entered into a settlement on 18 May 2009 in terms of which Sasol admitted that a pricing agreement had been reached by the three respondents

[5] The act of initiation of a complaint is different to the act of referral of a complaint. They are two separate juristic acts and the initiation will always occur before a referral. A complaint can be generated either by private parties, referred to as complainants, in this case Nutri-Flo or by the Commission directly. The Commission may decide to refer the complaint; or refer it, but add particulars to it; or non-refer it. The Commission is also entitled to initiate a complaint *mero motu*.

[6] Following a take-over, Yara was previously known as Kynoch Fertilizer (Pty) Ltd.

in 2001 and which was allegedly monitored in meetings between 2001 and 2005.[7] As part of the settlement, Sasol undertook to assist the Commission with its case against Omnia and Yara. During the pre-trial preparations of this complaint the Commission sought to include details of meetings, provided to it by Sasol, in its witness statements. Omnia objected to this on the basis that the evidence went beyond the scope of the Commission's referral, which eventuated in the Commission bringing the third amendment application. It was this amendment, and notably only this one, that Omnia opposed. Omnia also brought a counter-application contesting that the referral and subsequent amendments against it were invalid as there was never a valid initiation. The Tribunal granted the amendment application albeit on a different basis to that decided in *Yara.*[8] The Tribunal's decision was taken on appeal to the CAC by Omnia and Yara where they were upheld. The Commission then elected to appeal the decision to the SCA.

[18] The Commission's appeal and counter-application culminated in the SCA decision in *Yara.*

[19] The SCA in its decision at para 31 concluded that the there was a valid initiation and therefore a valid referral -

> *"[31] By deciding to investigate the additional complaints and by subsequently referring them to the Tribunal, the Commission in effect tacitly initiated the complaints not covered by the original Nutri-Flo complaint. It is not suggested that the Commission did not have reasonable grounds to initiate and refer these new complaints. It follows, in my view, that the referral by the Commission was not invalid and that its striking out by the CAC was therefore unwarranted. Moreover, counsel for Omnia conceded, rightly in my view, that the amendments sought by the Commission constituted no more than further particulars to complaints already covered by the referral and that if the referral were to be held valid, the amendment application must inevitable succeed."*

[20] When the SCA came to the conclusion it did in para 31 it did so by a careful analysis of the legislative framework in the Act, the prevailing jurisprudence

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[7] Confirmed as a consent order on 20 May 2009.
[8] *The Competition Commission and Yara South Africa(Pty) Ltd in re The Competition Commission and Sasol Chemical Industries and others* 31/CR/May05.

and the facts of the matter placed before it at that time, which by then included the alleged conduct of Omnia in the November 2006 and the 2008 amendment, as well as the certificate appointing Ms Maseti as inspector.[9]

[21] In para 10 of the judgement the Court sets out the provisions of s49B, s50 and s51 which constitute the essential framework for initiation and referral of a complaint. The Court then distinguishes between the framework for a private initiation and private referral to the Tribunal (where the referral rule in *Glaxo* would have application) and the framework for initiation and referral by the Commission. The court concludes that while Nutri-Flo's complaint was aimed exclusively at Sasol, it still intended to be a complainant (*Clover* distinguished) and states–

> "*[16] Once it is determined that what was submitted was indeed intended to be a complaint, it makes no difference at whom the complaint was aimed. If what was submitted amounts to a complaint that A and B were involved in an agreement of price fixing, or in a concerted practice of collusive tendering, it makes no difference that the complainant's quarrel was only with A and not with B. Ordinary language dictates that it also constitutes a complaint of a prohibited practice against B. And I can find no contrary indication in the wording of the Act. It follows, in my view, that the extension of the referral rule that the CAC subscribed to in this case cannot be sustained. I therefore found it of no consequence that Nutri-Flo's complaint was aimed exclusively at Sasol and not at Omnia.*"

[22] The SCA noted that s49B does not require any formalities for an initiation by the Commission. Once that is appreciated an initiation could be done *informally or even tacitly* to set the process in motion.[10] .

[23] The SCA concluded that the Commission had tacitly initiated the complaint against Omnia by relying on the following paragraph in the Commission's referral affidavit –

> "*The Commission has investigated the complaints [submitted by Nutri-Flo] and concluded that they have substance. The Commission has accordingly resolved to refer the complaints to this Tribunal in terms of this referral. In*

[9] Annexed to the complaint referral of 4 May 2005.
[10] *Supra* note 8 at para 29.

addition, the Commission has in the course of its investigations, uncovered further instances of ante-competitive conduct committed by the respondents, more fully described below. These activities are referred to the Tribunal herewith as well."[11]

[24] Once there was a conclusion by the SCA of a tacit initiation in terms of s49B(1), that conclusion could only mean a tacit initiation by the *Commissioner* in terms of s49B(1). No other conclusion can be drawn from the *dicta* of the SCA.

[25] The SCA might have used the word "Commission" interchangeably with the word "Commissioner" but what was irrefutably clear was that when the court concluded that the complaint was validly initiated it did so in the explicit consideration of the requirements of s49B(1), not some other section of the Act.

[26] A cursory reading of the SCA judgement leaves the reader in no doubt that under evaluation are the very questions of law and fact that Omnia once again wishes to challenge, and which have *already* been decided in that judgement.

[27] One would expect this to be the end of the matter and for Omnia to abide by the decision of the SCA. Instead it persists in bringing this application in total disregard of the dictum in *Yara* and the binding effect thereof.

[28] Mr Trengove on behalf of the Commission submitted that Omnia's arguments bore the air of unreality. We agree. The matter has already been decided and Omnia simply seeks to put up a chimera by opportunistically pouncing on the language which the SCA used, which Omnia itself in argument concedes, may have been "loose" at times.

[29] It behoves us to remark at this juncture that some of the formulations in the Competition Act do tend to permit some elision between the words "the Commissione*r*" and "the Commission". Indeed the provisions of s49B, s50 and s51 are a case in point.

[30] Thus we see that s49B refers to the Commissioner –

[11] Para 11.

"*The Commissioner may initiate a complaint against an alleged prohibited practice.*"

[31] But then when dealing with the outcome of the complaint initiated by the Commissioner we see throughout sections 50 and 51 the use of the words "Competition Commission."

[32] A recent decision of the Tribunal in *Computicket*[12] deals with whether s50 of the Act requires the Commission or the Commissioner to refer a matter to the Tribunal. In that case the Tribunal found that the Commission as an *institution* could refer a matter to the Tribunal.

[33] However because we have already concluded that the SCA decision in *Yara* is binding on Omnia, there is no need for us to traverse that debate here save to state that the only sensible manner in which to interpret s49B read with s50 and 52 is to note that the provisions, read holistically and in context, set up a framework in which a distinction is drawn between complaints that are initiated by private parties (private complaints) and those initiated by the Commissioner as the head of an institution mandated to enforce the Competition Act (institutional complaints). The most significant difference being that the Commission is time barred in its investigation of private complaints and private complainants have the right to self-refer a complaint to the Tribunal in the event of a non-referral by the Commission.[13]

[34] Nevertheless the use of the word "Commission" does tend to be used as short-hand for referring to all matters institutional. Indeed in this very decision we use the word "Commission" in general to mean either the Competition Commission (the institution) or the Commissioner (the head of that institution) as the context warrants, but retain the distinction between the two where necessary.

Failure to appoint an inspector in terms of s49B(3)

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[12] *Computicket (Pty) Ltd v The Competition Commission* CR008Apr10/DSM022May11.
[13] *Netstar (Pty) Ltd v Competition* Commission 93/CAC/Mar10; *Astral Operations Ltd v Competition Commission* 74/CR/Jun08;*GlaxoSmithKline South Africa (Pty) Ltd v Makhaitni* 97/CR/Nov04.

[35] We turn to consider Omnia's recent and related challenge, namely that the Commissioner had failed to appoint an inspector in accordance with the provisions of s49B(3).

[36] Section 49B(3) provides that –

> "*Upon receiving or initiating a complaint in terms of this section, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable.*"

[37] A certificate signed by Mr Simelane dated 1 September 2004 appointing Ms Maseti as an inspector was attached to the complaint referral. In that certificate Ms Maseti is appointed for a period of five years from 1 September 2004 to 31 August 2005. Omnia's counsel argued that the appointment of Ms Maseti was invalid because s49B(3) required the Commissioner to direct an inspector to investigate "the complaint". Mr Simelane however had appointed Ms Maseti for a period of 5 years but not specifically to the Omnia complaint. Thus the appointment was invalid and so was the referral.

[38] A careful reading of the section demonstrates that the requirement in s49B(3) is not what Omnia would like us to adopt. The section does not say that "the Commissioner must appoint an inspector to investigate only the (Omnia's) complaint". Rather it requires the Commissioner to "direct *an inspector* to investigate the complaint as quickly as practicable". That is the thrust of s49B(3) namely that the Commissioner is obliged to spur on his or her inspectors to act without undue delay. Section 49B(3) like 49B(1) does not prescribe how the inspector should be directed by the Commissioner, nor does it limit an inspector to investigate only one complaint at a time.

[39] An inspector under the Competition Act has search and seizure powers as well as investigative functions. For example under s47(1) an inspector has the authority to enter and search premises other than private dwellings without a warrant. An inspector acting in terms of these powers is required to provide proof of identity and authorisation.[14] An inspector may also under s49B(3) be

[14] S47(2).

directed by the Commissioner to investigate a complaint. Inspectors are appointed by the Commissioner.

[40] While no formalities for the appointment of an inspector are provided for in the Act, Commission Rule 6 provides that the Commissioner, in writing, may assign any function or power to a member of the staff of the Commission, either generally or in connection with a particular matter. Ms Maseti's appointment as inspector was in writing and was attached to the referral. The direction by the Commissioner also does not require any formalities. Ms Maseti however confirms in the founding affidavit attached to the complaint that "*She is the lead investigator assigned by the Commissioner to investigate and evaluate the complaints (as described below) in term of section 49B(3) of the Competition Act, 89 of 1998 ("the particulars of which are the subject of this complaint referral by the Commission to the Competition Tribuna*l".[15] This is sufficient for the inference to be drawn that she was directed to investigate the complaint as required by s49B(3).

[41] Omnia's challenge accordingly fails.

[42] A further argument pursued by the Commission was that Omnia was precluded from bringing this application on the basis of the "once and for all rule" set out in *Shembe;* namely that it should have brought these challenges either when it took the Tribunal on appeal to the CAC or at the SCA. In light of our conclusions above, there is no need for us to consider this argument any further.

Failure to produce documents and 67(1)

[43] During argument Omnia reminded us that it required the Commission in Part A to indicate which documents it had relied on for its initiation precisely to assess whether it could launch a s67(1) challenge.

[44] Omnia contended that because the Commission has not produced any documentary evidence (as it requested under Part A) upon which the initiation was based, the initiation and the referral is unlawful. But this is a misplaced

[15] Para 1.1.

argument. Simply because the initiation itself has already been held to be valid by the SCA in Yara. The only relevant issue, and the purported basis for Omnia's Part A application, is to ascertain the date of that initiation for purposes of s67(1).

[45] The initiation by the Commissioner as confirmed by the SCA is nothing more than a decision to "set the process in motion" within the institution. As such it does not affect any rights of parties that may be the subject of the investigation.[16] However, the approximate date of that initiation is important because of the provisions of s67(1) which prevent the Commission (or any other person) from initiating a complaint in respect of a prohibited practice more than three years after the practice has ceased.

[46] The Commission has stated in its supplementary affidavit, deposed to by Mr Quilliam, that the *tacit* initiation took place on 4 May 2005, the date of the referral for its s4(1)(b)(i) case, and on the date of the third amendment being 20 November 2006 for its s4(1)(b)(ii) and (iii) case. The Commission had also put up an affidavit deposed to by Mr Menzi Simelane who was the Commissioner at the time. Mr Simelane confirms the contents of Mr Quilliam's affidavit.

[47] It was argued that this version of the Commission should not be accepted because it constituted a constantly shifting explanation. During the *Yara* matter, the Commission had pleaded that initiation was valid because the Commission was entitled to add further particulars in terms of s50(3)(a)(iii). The Commission was now in the supplementary affidavit moulding its initiation to fit into the SCA *Yara* decision. Omnia submitted that the Commission's reliance on the two dates for initiation was vague and amounted to a bare denial which is insufficient to defeat an applicant's right to secure relief.

[48] Omnia's counsel was highly critical of the Commission's affidavits and pointed to what was alleged to be two discrepancies. It was pointed out that Mr Quilliam deposed to the fact that he had personal knowledge of facts in both the consolidated complaint referral affidavit dated 26 November 2015 and the

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[16] *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA) and *Yara supra note 8.*

Supplementary Affidavit dated 23 March 2016 yet he was not an employee of the Commission at the time the complaint was initiated. Furthermore, the confirmatory affidavit of Mr Simelane was deposed to on a date before Mr Quilliam's signed affidavit. On this basis, Omnia argued, we should not admit the Commission's affidavit due to the alleged discrepancies. But this is a self-defeating argument. If we were to disallow Mr Quilliam's affidavit the only possible date that Omnia could rely on for initiation would be the *earlier* date of 29 April 2005 which the Commission pointed to in its correspondence. At the level of principle, the later the date of initiation the higher the probability of prescription, the earlier the date the lower the probability.

[49] The Commission's version over time may have changed but it is not in law prevented from relying on the *dicta* in *Yara*. Indeed at the time the *Yara* matter was argued at the CAC there was no notion of a "tacit" initiation in competition law jurisprudence and the Commission can hardly be criticised for not previously relying on it. As far as the discrepancies in the Commission's supplementary affidavit go, and without ruling out the possibility that some facts over this prolonged period of litigation may indeed be in Mr Quilliam's personal knowledge, the dates issue does suggest a level of shoddiness on the part of the Commission. The Commission has been previously admonished for its inability to properly organise its institutional knowledge in the context of a relatively high turnover of officials and prolonged delays in the finalisation of complex matters (such as the case in point) and if it does not get its house in order soon it will likely come short as a result. However this case is not one that warrants such an outcome. Simply because the history of this case is a matter of public record and the involvement of the Commissioner, Mr Simelane, from the inception of this complaint was evident in the certificate appointing Ms Maseti as inspector and which was attached to the complaint referral itself.[17]

[50] The notion of a tacit initiation necessarily implies that an inference of such must be drawn from documents or facts. However this does not mean that such inference must necessarily be drawn from only one document or one set of

[17] Page 458 of the record.

facts or that an exact date for initiation could be ascertained. For example, an inference of tacit initiation could similarly be inferred by an internal report of the Commission, a resolution of the Commission's Exco or the appointment of Ms Maseti as lead investigator to the complaint. It might also be that the inference could be drawn from a series of events taken together and initiation could be said to have taken place over the period in which the events took place.

[51] In *Yara*, the SCA was alive to the fact that there may be difficulties in obtaining proof of an *exact date for a tacit initiation* but concluded that such difficulty ought not to preclude the Commission from establishing a juristic act as the date of initiation is something that is required by the Competition Act.[18]

[52] When it concluded that there was a valid initiation the court drew the inference of a tacit initiation on the basis of Ms Maseti's statement that –

"*The Commission has in the course of its investigations uncovered further instances of anti-competitive conduct committed by the respondents, more fully described below. These activities are referred to the Tribunal herewith as well.*"[19]

[53] Ms Maseti the lead investigator at the time, stated this in both the referral of 4 May 2005[20] and in the amendment of 20 November 2006.[21] Ms Maseti's affidavits set out detailed descriptions of the Commission's investigations and the conduct on the part of Omnia that was the subject of those investigations.

[54] The Commission avers that the referral documents and the contents thereof, which were relied upon by the SCA for the inference of a tacit initiation, can also be relied upon for the *date* of the tacit initiation. It might be that other documents in the possession of the Commission could also support an inference of a tacit initiation but the Commission has elected to rely on the date of the referrals themselves. The Commission is not in *law* precluded from relying on the dates of these two documents and there is no basis for us to drift beyond the Commission's affidavit. Omnia on the other hand is also entitled to rely on these dates for its s67(1) argument. Arguably the later dates relied

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[18] See para 35.
[19] Para 30.
[20] Para 8.1.
[21] Para 10.

upon by the Commission would serve to the advantage, not to the prejudice of Omnia.

[55] We have shown why the SCA's decision in *Yara* is binding on Omnia and that Omnia's application for a dismissal on the basis of non-compliance with the requirements of s49B is nothing but another attempt by it to avoid the merits of the matter. The Commission on affidavit relies upon two dates for a valid tacit initiation against Omnia namely 4 May 2005 and 26 November 2006. If Omnia's conduct as alleged in the two documents had ceased three years prior to the any of the two dates the onus is on Omnia to show this and nothing prevents it from raising that defence in the hearing of the merits.

The decision to initiate and refer was irrational

[56] A further ground of challenge put up by Omnia was that the initiation was irrational.

[57] In order to satisfy the test for rationality the Commission would only be required to prove that there was a rational connection between the Nutri-Flo complaint and its decision to initiate. In the words of the SCA in *Woodlands*, all that was required was a "reasonable suspicion" arising from the Nutri-Flo complaint to warrant the investigation against Omnia.[22] It must be borne in mind at the same time that the Commission is required under the Competition Act to investigate *all* complaints are lodged with it, it may elect to non-refer a matter to the Tribunal after a period of investigation under s50 but it is not entitled to refuse to initiate an investigation into an alleged contravention of the Act.

[58] In the Commission's referral and subsequent amendment affidavits in this case it has indicated that the basis of its referral was the Nutri-Flo complaint which led to it investigating the conduct of the three respondents mentioned in that complaint.[23]

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[22] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* [2011] 3 All SA 192 (SCA) at Para 13.

[23] Para 13 of the supplementary affidavit dated 23 March 2016, para 13 of the consolidated complaint referral affidavit dated 26 November 2015, para 4 of the Commission's initial complaint referral affidavit dated 4 May 2005.

[59] We know from the Nutri-Flo complaint that there was an allegation that the three respondents Sasol, Yara and Omnia were engaged in collusive conduct.

[60] It would only be rational for the Commissioner to initiate an investigation into such an allegation. Indeed if he had not done so he might have been criticised for failing to carry out the duty imposed on him by the legislature and thereby acting irrationally or in dereliction of his statutory duty.

[61] But once again, as pointed out by Mr Trengove the challenge brought by Omnia is cloaked with an air of unreality, simply because the issue has already been decided by the SCA in *Yara*.

[62] The Court when it inferred that there was a valid initiation relied on the statement by Ms Maseti that –

> "*The Commission has in the course of its investigations uncovered further instances of anti-competitive conduct committed by the respondents, more fully described below. These activities are referred to the Tribunal herewith as well.*"[24]

[63] This statement by Ms Maseti was considered to be both a rational and sufficient basis for the SCA to conclude that the initiation was valid.

[64] Thus we find that the irrationality ground of challenge by Omnia has no merit.

Procedural unfairness due to a delay in ongoing proceedings

[65] We turn now to consider the last basis upon which Omnia seeks a dismissal of the complaint.

[66] Omnia argued that the continued hearing would be procedurally unfair because of the lengthy passage of time. This passage of time has affected the hearing of the matter as witnesses have become unavailable through death, immigration or leaving Omnia's employ to work for competitors. Omnia argued that the delays were largely attributable to the Commission and that if the case were to continue it would be prejudiced as it would no longer result in a fair

[24] Para 11.

trial. It argued that appropriate relief in the circumstances would be a dismissal of the complaint referral.

[67] The Commission on the other hand argued that the delays were instead attributable to Omnia's conduct as they had raised a number of *in limine* points. The Commission argued that the litigious nature of Omnia's conduct in this matter has resulted in a number of applications which have run through a gauntlet of hearings and appeals.

[68] We were referred to a number of cases in foreign jurisdictions by Omnia in support of its application for dismissal. However, we would approach such authorities with a degree of caution given our unique constitutional and competition law framework. In any event the Constitutional Court in *Sanderson v Attorney General, Eastern Cape*[25] has already set down guidelines for assessing an application like this. While *Sanderson* was decided in a criminal context and in relation to an accused's right to a fair trial,[26] the principles enunciated there are applicable *mutandis mutatis* to a civil context such as ours, where a respondent is alleged to have committed an administrative offence.

[69] The court in *Sanderson* set out the considerations that must be balanced in assessing an application for dismissal. Regard must be had to the nature of the delay, the length of the delay, the reasons for the delay, the prejudice suffered by the accused or respondent in this instance, as well as the nature of the case or offence.[27] The prejudice must be definitive and not speculative.[28] This is not a closed list of factors and each case must be decided on its own merits by a careful weighing up in a value judgement which must be reasonable in the circumstances.[29]

[70] Turning to the facts of this case, at the outset we must have regard to the fact that a dismissal equivalent to a permanent stay of prosecution is radical and

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[25] See also *Sanderson v Attorney- General, Eastern Cape* 1998 (2) SA 38 (CC) *Zanner v DPP Johannesburg* 2006 (2) SACR 45 (SCA); *Bothma v Else* 2010 (2) SA 622 (CC).
[26] S25(3)(a) of the Interim Constitution
[27] *Sanderson* supra para 28-30.
[28] *Zanner* supra note 25 para 16
[29] *Sasol Chemical Industries (Pty) Ltd v Competition Commission* 45/CR/May06.

would bar the Commission of the opportunity to ascertain the real effect of the delay on the outcome of the case even before a trial begins.

[71] Having regard to the nature of the offence, we note that Omnia seeks a dismissal of a case in which it is purported to be a member of a long standing cartel with Sasol and Yara. Sasol has already admitted to the alleged conduct. Cartel conduct is considered to be the most heinous offences in competition law where damage to consumers, customers or suppliers as the case may be is presumed to be egregious and far-reaching. This is why section 4(1)(b)(i)-(iii) of the Act affords a respondent no justification grounds once the conduct has been proved.

[72] While the Commission has taken a long time to investigate the complaint against Omnia, Omnia is not blameless in causing the delay. Accordingly, we make no finding as to fault on either side.

[73] The nature of the prejudice claimed is trial related but speculative. We don't know which witnesses Omnia intends to call and we are not taken into its confidence as to why it is precluded from calling witnesses who may have emigrated, moved to competitors or retired. In any event, delays of this nature cut both ways. The Commission might also be prejudiced due to memories fading, people emigrating and so forth. Hence it is not possible for us to assess what prejudice would adduce to Omnia in the abstract without the matter first going to trial.

[74] We consider the nature of the unique challenges which might accrue to the prosecution of cartels as a relevant factor in this exercise. While cartels are considered to be most egregious offences under competition law they are difficult to prove because by their very nature they are conducted in secret and under cover of some or other pretext. Cartel prosecutions are seldom successful without a whistle-blower's participation and this is why the Commission encourages firms to come forward through its corporate leniency policy. The facts of this case bear testimony to that. Until Sasol came forward and admitted its culpability, the Commission did not have the exact dates and places of the alleged collusive meetings. These details were handed over by Sasol as part of its settlement arrangements with the Commission. It was the

inclusion of these details in the Commission's referral that Omnia sought to oppose and which ultimately became the subject matter of the *Yara* decision. Omnia has a case to answer and it is not only the Commission that is pointing a finger at it. Its erstwhile cartel member has provided chapter and verse of the meetings that allegedly took place.

[75] In addition, the product markets under investigation in this matter are complicated and essential to the ultimate price of agricultural products, which in South Africa has been identified by the Commission as a priority sector. They involve intermediate inputs into fertilizer products as well as imports and exports of nitrogen derivative products, with pricing decided on the basis of complex formula. The Commission's investigation was likely to take long, notwithstanding the unique challenges discussed above.

[76] Finally there is the element of public interest in bringing litigation to finality. For more than 12 years Omnia has had the shadow of cartel conduct hanging over it. No doubt this might have had and continues to have adverse effects on its business. At the same time members of the public, consumers and customers of Omnia are all entitled to have an outcome on the merits of the egregious conduct that Omnia is accused of rather than on a mere technical point. The conclusion of this matter on the merits would be in the interests of all concerned.

[77] Having regard to all of these factors, we find that Omnia has not made out a proper case for a dismissal based on delay-induced prejudice.

[78] Accordingly we make the following order

ORDER

1. Omnia's application for review is dismissed
2. Omnia's dismissal application is dismissed
3. There is no order as to costs

14 February 2018

Ms Yasmin Carrim **DATE**

Mr Enver Daniels and Ms Andiswa Ndoni concurring

Tribunal Researcher:	Aneesa Ravat
For the Applicant:	P.B.J Farlam SC assisted by J Meiring instructed by Falcon & Hume Inc. Attorneys
For the Commission:	W Trengove SC assisted by MJ Engelbrecht instructed by Cheadle Thompson and Haysom