Sugar Beans Case

IN THE COMPETITION COMMISSION OF THE REPUBLIC OF BOTSWANA

HELD IN GABORONE

CASE No. CC-CR/01/A/14I

IN THE MATTER BETWEEN:

COMPETITION AUTHORITY	APPLICANT
and	
CREATIVE BUSINESS SOLUTIONS (PTY) LTD	1ST RESPONDENT
RABBIT GROUP (PTY) LTD	2ND RESPONDENT

CONSTITUTION OF PANEL

TENDEKANI E. MALEBESWA	Presiding Member
GAYLARD KOMBANI	Member
DR JAY SALKIN	Member
DR SELINAH PETERS	Member
MRS THEMBISILE PHUTHEGO	

FOR THE APPLICANT

A. W. MODIMO (with T. M. RASETSHWANE, MRS G.T. MASIE, K. MODONGO)

FOR FIRST RESPONDENT

O.O. ITUMELENG

FOR SECOND RESPONDENT

M. M. CHILISA (with Ms G. O. IFEZUE)

PLACE AND DATE OF PROCEEDINGS

GABORONE

30TH MARCH 2015

DECISION

Issues

[1] This matter was referred to the Competition Commission ("Commission") in July 2014 by the Competition Authority ("Authority" or "Applicant").

[2] At a pre-hearing conference held on the 30th March 2015, the Respondents joined together in arguing their points in law, which in the main are:

(a) that the referral was made by a person who did not have the authority to do so;

(b) that the referral was made after the one year prescribed by the Competition Act (Cap. 46:09) ("the Act").

[3] There were other ancillary points which we will deal with below.

[4] The Applicant, on its part, argued that the Respondents had waived the right to raise the points above.

[5] All the parties gave different views on the nature of the proceedings before the Commission, and we will address this issue in this decision.

Background

[6] On the 23rd July 2014 the Authority referred to the Commission a matter it had investigated involving the Respondents. The Respondents were accused by the Authority of engaging in conduct that was "in contravention of Section 25(b) and (c) of the Competition Act, which prohibits market allocation and Bid-rigging respectively. The conduct of the Respondents of dividing the tender amongst

themselves by geographic area is prohibited under Section 25(b) and that of using price information to tender collusively is prohibited under section 25(c)." (sic)

[7] The tender was for the supply to the Ministry of Local Government of 7530 metric tonnes of sugar beans. The first respondent was awarded BWP 58,047,304.00 (value added tax included) as a portion of the split tender, and the second respondent got BWP 55,956,600.00 (value added tax included).

[8] When the matter was heard on the 10th September 2014 the Respondents raised points of law or points *in limine*. In essence, it was only one point raised by both Respondents, and it was to the effect that the Authority had failed to comply with Rule 12(2) of the Rules for the Conduct of Proceedings of the Competition Commission ("the Rules"). The Commission upheld the point raised by the Respondents. Since the Respondents had no objection, the Commission made an order and it said the Applicant could "reinstitute the matter if minded to do so within fourteen (14) days of the Order."

[9] On the 2nd October 2014, the Applicant again referred the matter to the Commission. When the matter came up for hearing the Respondents raised a point *in limine* again, arguing that the referral had been made after a lapse of fourteen (14) days. At a further hearing on the 3rd December 2014 the Respondents maintained that the fourteen (14) days in the Commission Order of the 10th September 2014 should be computed on the basis of court days. The Respondents also raised two further points which they did not pursue vigorously,

being that the referral was not done by the Chief Executive Officer (also known as Executive Secretary) of the Authority as required by the Act; and that the referral had not been done within one year.

[10] The Commission ruled that "days" as used in the Rules means working days, and therefore dismissed the point *in limine* raised by the Respondents.

[11] The Commission then requested the parties to file their documents. At a pre-hearing conference on the 12th March 2015, the Respondents again raised a point *in limine*, that the referral was improper and that a ruling on it could dispose of the whole matter.

[12] As there were issues that warranted discussion among the parties, the Commission adjourned proceedings to the 13th March 2015 in order to give the parties a further opportunity to hold discussions.

[13] On the 13th March 2015 the Respondents informed the Commission that they wanted to raise a special plea, or have a trial within a trial to resolve some outstanding issues. They also wanted to discover some documents, particularly search warrants and related documents. The Applicant indicated that these were civil proceedings and there existed no notion of trial within a trial in civil proceedings. However, the Applicant said that it was prepared to provide the Respondents with all the documents they required.

[14] The Commission then scheduled a hearing for the 30th March 2015, in order to hear the points *in limine*. The Commission asked all the parties to raise all points *in limine* that they still wished to raise, so that they could all be disposed of in one sitting. At the 30th March 2015 sitting the Respondents, in addition to the issues already outlined above (including the ones that had been raised but not pursued vigorously on 3rd December 2014), raised a further point to say that an investigation by the Applicant should be conducted within thirty (30) days after receipt of a complaint in accordance with regulation 10 of the Competition Regulations, 2011 ("the Regulations") published on 14th October 2011.

Functions under the Act

[15] Section 4 of the Act sets up the Authority, while section 6 creates the office of Executive Secretary. Section 9 establishes the Commission.

[16] In terms of section 5(1) of the Act, the "Authority shall be responsible for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market."

[17] specifically in terms of section 5(2), the Authority, inter alia, "shall –

(k) investigate and evaluate alleged contraventions of Part V;

(l) grant or refuse applications for exemption in terms of Part VI;

(m) authorise with or without conditions, mergers of which it receives notification under Part X;

(n) prohibit or refer mergers of which it receives notification under Part X;

(o) refer matters it has investigated under this Act to the Commission for adjudication;

(p) prosecute before the Commission, matters referred to the Commission under paragraph (o); and

(q) deal with any matter referred to it by the Commission under this Act." (emphasis added)

[18] These are among the functions singularly bestowed upon the Authority as set up under section 4 of the Act, and it performs these under the persona granted to it under section 4 to the exclusion of any other authority in Botswana.

[19] Section 9 establishes the Commission which, apart from governing the Authority and being responsible for directing its affairs "shall -

(a) adjudicate on matters brought before it by the Authority under [the] Act; and

(b) give general policy direction to the Authority." (emphasis added)

[20] Section 6(2) and (3) of the Act reads as follows:

"(2) The Executive Secretary shall, subject to the general supervision of the Commission, be responsible for –

(a) the day to day operations of the Authority;

(b) the management of the funds, property and business of the Authority; and

(c) the organisation and management of the employees of the Authority.

(3) The Executive Secretary may, subject to the provisions of this Act, delegate the exercise of any of the Executive Secretary's functions under this Act, to any officer of the Authority." (emphasis added)

[21] In Omni Fertilizer Ltd v The Competition Commission (77/CAC/Jul08, 31/CR/MAYO5, 45/CR/MAYO6) [2009] ZACAC 5 (16 October 2009), the South

African Competition Appeal Court (SACAC) had occasion to consider the meaning of the words "subject to". These words are also used in section 6(3) above. At paragraphs 11 to 13, the SACAC said:

> "[11] When dealing with interpretation, the history, purpose and social and economic context of the Act should be kept in mind. The Act's prime purpose is to promote an efficient economy and to provide consumers with competitive prices and product choices.
>
> [12] A primary rule of interpretation of statutes is that the language of the legislature should be read in its ordinary sense unless, if effect is given to the ordinary grammatical meaning of the words that fall to be interpreted, it could result in some absurdity, inconsistency, hardship or anomaly which, from a consideration of the enactment as a whole, a court is satisfied the legislature could not have intended (see University of Cape Town v Cape Bar Council and another 1986 (4) SA 903 (A) at 913 I – 914J). Regard must also be had to the decision of Dadoo Ltd and others v Krugersdorp Municipal Council 1920 AD 530 at 543 where Innes CJ remarked as follows:
>
> "Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language

> employed admits of doubt, it falls to be interpreted by the Court according to recognised rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances. I do not pause to discuss the question of the extent to which a departure from the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A Judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure."

[13] The phrase 'subject to' has no a priori meaning (see Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd [1995] ZASCA 110; 1996 (1) SA 1182 (A) at 1187J – 1188A). While the phrase is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by' (see Premier, Eastern Cape, and Another v Sekeleni 2003 (4) SA 369 (SCA) at para 14. And Megarry J stated in C & J Clark Ltd v Inland Revenue Commissioners [1973] 2 All ER 513 at 520:

"In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections.

When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.""

[22] The question therefore is whether there is any ambiguity between the functions of the Executive Secretary and those of the Authority. We will deal with this point later in the decision.

Public Interest

[23] In terms of section 5 of the Act, the Authority is clothed with very strong powers to investigate, refer and prosecute matters concerning restrictive agreements and abuse of dominant positions. Combined with its entry and search powers, as well as those entitling it to conduct dawn raids, the Authority possesses a very formidable arsenal.

[24] This is so because it always has to act in the public interest. In National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome (Pty) Ltd and Others (Case No. 45/CR Jul01), the South African Competition Tribunal (SACT), which has equivalent status to this Commission, said:

"75. On the other hand we take with the respondents that the Commission is intended to be the preferred plaintiff and hence parties cannot bring Complaint Referrals to the Tribunal directly without receiving a notice of non-referral. In this respect these proceedings are analogous to the private prosecution in criminal cases. A victim of crime cannot pursue a private prosecution without first receiving a certificate of nolle prosequi from the Attorney General.

76. In ***Du Toit*** the policy justification is explained as being:

"- - - in accordance with the general principle that it is desirable that prosecutions should be – where warranted by the facts – conducted and instituted by the State".

77. Likewise in terms of the Competition Act it is desirable that the Commission should in the first instance bring prohibited practice cases. Prohibited practices effect not just complainants but the larger public. There is a risk that actions brought by a private complainant may be fashioned, both in the manner that they are pleaded and the remedies sought, to achieve a private rather than a public end. <u>To that extent the Commission as guardian of the public interest should have the prior right to refer</u>." (sic) (emphasis added)

[25] In a footnote to the above passage it is noted that:

> "For this reason the Commission is useful in the legislative schema because unlike the privately animated complainant it can view the practice in a wider context as it affects the public interest. One party's small fight is often a symptom of a much bigger problem that the Commission is duty bound to investigate."

[26] This is the basic premise to competition (antitrust) law enforcement in Botswana as well. The Authority has the resources and the networks to fully investigate prohibited conduct. The Competition Commission in South Africa (CCSA) has the same status as the Authority.

[27] In Glaxo Wellcome (Pty) Ltd and Others v National Association of Pharmaceutical Wholesalers and Others ((15/CAC/Feb02) [2002] ZACAC 3 (21 October 2002)) the SACAC said:

> "[26] The Commission is thus the legislature's *"plaintiff of first choice"*. Only if the Commission decides not to refer or fails to

refer a complaint of a prohibited practice can a complainant refer that complaint *"directly"* to the Tribunal.

[27] The Commission represents both the public interest and the particular interest of a complaint. The Tribunal has recognised the status of the Commission as the primary party in prosecuting complaints before it in the public interest."

[28] In South African Breweries Limited v Competition Commission (Case No. 134/CR Dec 07) the SACT observed:

"108. The reason such a complex edifice was created was to regulate the inter - relationship between the complainants' rights to pursue relief *vis a vis* the Commission's duties as prosecutor of first instance in matters involving competition law infringements."

It further added:

"113. If the Commission was deprived of its entitlement to be the prosecutor of first choice the complainant would not be entitled to proceed with the action until subsequently non-referred."

[29] The approach adopted by the South African authorities has been further refined by the Supreme Court of India. In Competition Commission of India v Steel Authority of India & Another (Civil Appeal No. 7779 of 2010), the Supreme Court observed, referring to the Competition Commission and Competition Act of India:

> "The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called The Competition Commission of India (General) Regulations, 2009 (for short, the 'Regulations'). The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders

without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out."

[30] The Competition Commission in India exercises functions similar to those of the Authority. The Supreme Court went on to observe:

"The Commission, in cases where the inquiry has been initiated by the Commission suo moto, shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be."

[31] The Supreme Court further noted:

"The concept of necessary and proper parties is an accepted norm of civil law and its principles can safely be applied to the proceedings before the Tribunal to a limited extent."

[32] In rounding up its views, the Supreme Court of India said:

> "In the proceedings, which are initiated by the Commission suo moto, it shall be dominus litis of such proceedings while in other cases, the Commission being a regulatory body would be a proper party discharging inquisitorial, regulatory as well as adjudicatory functions and its presence before the Tribunal, particularly, in light of the above stated provisions, would be proper. The purpose is always to achieve complete, expeditious and effective adjudication. This Court in the case of Brahm Dutt v Union of India [(2005) 2 SCC 431], while considering the constitutional validity of Section 8 of the Act observed that the Commission is an expert body which had been created in consonance with international practice. The Court observed that it might be appropriate if two bodies are created for performing two kinds of functions, one, advisory and regulatory and other adjudicatory. Though the Tribunal has been constituted by the Competition (Amendment) Act, 2007, the Commission continues to perform both the functions stated by this Court in that case. Cumulative effect of the above reasoning is that the Commission would be a

necessary and/or a proper party in the proceedings before the Tribunal." (sic)

[33] Even though not all of the comments by the Supreme Court of India would apply with equal force to the Authority, the gist is that an agency in the role of the Authority is a most fundamental and critical cog in the competition or antitrust law enforcement machinery.

[34] The views expressed by the Supreme Court of India were embraced by the Fair Competition Tribunal of Tanzania in Tanzania Breweries Ltd v Serengeti Breweries and Others and Tanzania Breweries Ltd v Fair Competition Commission and Others (Tribunal Appeal No. 4 of 2010 and Tribunal Appeal No. 5 of 2010) when addressing itself to the Fair Competition Commission it said:

> "On the contrary, the FC Act, the FCT Rules as well as the FCC Rules contemplate and even the interests of justice demand that for complete and effective adjudication FCC be added as a necessary and proper party in an appeal before this Tribunal arising from its own decision. We are fortified in our view by the authorities from U.K., EU and India referred to herein." (sic)

Hybrid Nature of Proceedings

[35] It is imperative that we reproduce section 40 of the Act in full. It states:

"(1) Where the Commission determines that a hearing is to be held, the Commission shall give reasonable notice of the hearing, in writing, to the enterprises concerned and to any other interested third party –

(a) specifying the date, time and place for the holding of the hearing; and

(b) stipulating the matters to be considered at the hearing.

(2) The Commission shall decide whether to –

(a) hold individual hearings with each of the enterprises, and other interested third parties, separately, or to hold a single hearing attended by all the enterprises involved and interested third parties; and

(b) hold such hearings –

(i) in public, or

(ii) where the Commission considers that there is a need to protect commercially confidential information, in restricted session.

(3) A minimum of four members shall be present at a hearing.

(4) The hearing shall be governed by and conducted in accordance with the procedural rules published by the Commission under section 79 (1).

(5) For the purpose of conducting any hearing, the Commission may order any person to –

(a) attend before the Commission;

(b) give evidence on oath or otherwise;

(c) furnish, in writing or otherwise, such particulars in relation to the matter as the Commission may require; or

(d) produce any document which the Commission considers relevant for purposes of the hearing.

(6) An order given under subsection (5) may include a requirement as to the date on which or the time within which the order is to be complied with.

(7) Any person who without reasonable cause, fails to comply with an order given under subsection (5), commits an offence and is liable to a fine of P30000 or to imprisonment for a term not exceeding two years, or to both.

(8) The Commission shall keep such record of the hearing as is sufficient to set out the matters raised by the persons participating in the hearing."

[36] Part of section 39 of the Act provides:

"(7) A referral to the Commission, whether by the Authority or by a complainant, shall be in the prescribed form.

(8) The Chairperson of the Commission shall, by notice in the *Gazette*, publish each referral made to the Commission.

(9) The notice published under subsection (8) shall include –

(a) the name of the respondent; and

(b) the nature of the conduct that is the subject of the referral.

(10) The Commission may decline to hold a hearing requested under subjection (1) until the Commission is satisfied that it has obtained sufficient information for the purposes of the hearing from the inspector investigating the matter or other officers of the Authority assembling evidence in exercise of the powers specified in Part VII."

[37] For its part section 43 of the Act reads:

"(1) Where the Commission determines that a breach of the prohibitions under sections 25(1) and 26(1) has occurred, the Commission shall give an enterprise or enterprises involved in any of the activities prohibited by sections 25 and 26 such directions as are necessary to bring the breach of the prohibition to an end, including a direction to determine or modify the agreement in question if it is still in force.

(2) The Commission may, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise or enterprises concerned.

(3) The Commission shall not impose a financial penalty unless the Commission is satisfied that the breach of the prohibition was committed intentionally or negligently.

(4) The amount of a penalty imposed in terms of subsection (2) shall not exceed 10% of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years.

(5) An order imposing a penalty under subsection (2) shall specify the date before which the penalty is required to be paid, which date shall not be earlier than the period within which an appeal against the order may be brought.

(6) Where the penalty has not been paid by the specified date and –

(a) no appeal was brought against the order; or

(b) such an appeal was made but dismissed or withdrawn, the Commission may apply to the High Court for an order enforcing payment, which order if granted, may be enforced as if it were a civil judgment granted by the Court in favour of the Government.

(7) A financial penalty payable in terms of this Act shall be paid into the Consolidated Fund." (emphasis added)

[38] The above provisions govern the exclusive powers granted to the Commission once a referral has been made to it in accordance with section 39 of the Act, as read with sections 5 and 9.

[39] These provisions are supplemented by the Rules for the Conduct of Proceedings of the Competition Commission ("the Rules") published in October 2012 pursuant to section 79 of the Act.

[40] In part the preamble to the Rules reads:

"In terms of section 16 of the Act, the Commission shall regulate its own proceedings, having the power to determine any matter of procedure for a hearing, with due regard to the circumstances of the case. The Commission is not enjoined to

follow any formalised rules of procedure found in civil and criminal proceedings, but may condone any technical irregularities arising in any of its proceedings." (emphasis added)

[41] Section 16 (1) of the Act says:

"Subject to the provisions of this Act, the Commission shall regulate its own proceedings." (emphasis added)

[42] However, in circumstances where the Commission confronts a situation where the procedure is not clear and is not provided for in the Rules the Commission may rely on the Rules of the High Court. Rule 35 reads:

"(1) If in the course of proceedings, a person is uncertain as to the practice and procedure to the followed, the Chairperson of the Commission or any assigned member presiding over a matter –

(a) may give directions on how to proceed; and

(b) for that purpose, if a question arises as to the practice or the procedure to be followed in cases not provided for by these Rules, the Chairperson

or assigned member may have regard to the Rules of the High Court.

(2) Subject to these Rules, the Chairperson or an assigned member presiding over a matter may determine the time and place for the hearing before the Commission.

(3) The Commission may condone any technical irregularities arising from the proceedings." (emphasis added)

[43] In Kgatleng Land Board v Linchwe 2009 (2) BLR 293 (HC), speaking about the Land Tribunal, Kirby J (as he then was) said:

> "In my judgment it is the duty of the land tribunal to keep matters before it as simple and as non-technical as possible, notwithstanding the right of lawyers to appear before it. As a tribunal performing a quasi-judicial (and sometimes judicial) role, it should observe the principles of natural justice to ensure that proceedings before it are fairly conducted, but it should adopt a robust approach to ensure the achievement of its main objective, which is to provide expeditious and fair hearings of appeals brought before it."

[44] The above position was echoed in ZFC Ltd v Geza 1998 (1) ZLR 137 (S) where, writing for the Supreme Court of Zimbabwe, McNally JA said:

> "I think it is important to bear in mind what Baxter Administrative Law p 249 calls "the central principles of and fairness" in administrative law. He goes on to say:
>
> "A leading English administrative lawyer (Wade) has argued that one fundamental principle which should govern tribunal procedure is that it should be adversarial, not inquisitorial. It is submitted that this view is mistaken. It casts tribunals too rigidly in the mould of courts of law. An active role on the part of the tribunal in the gathering of evidence and assisting of unrepresented parties does not make the tribunal partisan, even though such a role might not be appropriate in a court of law. What is essential is that the tribunal should be impartial, and that persons affected by the tribunal's decision be given a full opportunity to present their cases and controvert those against them; this is the essence of fairness."
>
> I find Baxter's views strongly compelling.
>
> True, it is a fundamental rule of our law that the role of judge and prosecutor be clearly separated. But inroads may be

made into these well recognised principles, as was accepted in de Wet v Patch NO 1976 (1) RLR 65 (G) at 82, where authorised by statute or contract in quasi – judicial tribunals." (emphasis added)

[45] The basic principles set out by the judges in these cases are that the rules of natural justice should be observed, but rigidity or inflexibility should not be permitted by tribunals.

[46] In Competition Commission of India v Steel Authority of India the Supreme Court of India remarked:

"Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of Canara Bank vs Debasis Das [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of

unnecessary directions or impediments which are not postulated in the plain language of the section itself. 'Natural justice' is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Court. Every quasi judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of Krishna Swami vs Union of India [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies is normally inquisitorial in nature. The scope of such investigation has to be examined within reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial

Committee constituted, were neither civil nor criminal but sui generis.

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The exceptions to the doctrine of audi alteram partem are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure ex-parte injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance." (emphasis added)

[47] Evidently, therefore, the extent of the application of the rules of natural justice should be deduced from the circumstances of each case and, more importantly, from the empowering statute.

[48] It is also noteworthy that court proceedings can be neither civil nor criminal but sui generis. This has a huge bearing on the rules of procedure to be used in such sui generis proceedings. In Eagles Nest (Pty) Limited and Others v Swaziland Competition Commission (Civil Appeal Case No. 1/2014) Dr S. Twum J.A., writing for the Supreme Court of Swaziland said:

"There is considerable doubt about the classification of the Commission. Is it a subordinate court, a lower adjudicating authority or simply a tribunal. Applying the *ejusdem generis*

rule I will conclude that it is neither because it stands on its own."

[49] Martin Brassey, John Campbell, Robert Legh, Charles Simkins, David Unterhalter & Jerome Wilson in Competition Law (Juta Law, Eighth Impression (2010)) at page 308 have noted:

> "Complaint referral proceedings are *sui generis* in that they contain aspects of action and application proceedings. Like trial proceedings, the pleadings may be supplemented by evidence, but like application proceedings the pleadings are in affidavit form and may contain some, if not all, of the evidence that may be led in the proceedings. The hybrid nature of complaint referral proceedings has caused much confusion regarding the particularity and evidence required to be contained in the pleadings.
>
> The Tribunal has stressed that Tribunal proceedings should not be equated with a civil dispute between private parties and that they have as their principal objective the protection of the public from anti-competitive conduct. For this reason, the Tribunal adopts a more flexible approach to pleadings than does the High Court in civil proceedings. Accordingly, the High Court rules are not directly applicable in Tribunal

proceedings, although the Tribunal may take account of them." (emphasis added)

[50] Reference to the Tribunal in the above passage is to the SACT, and the rules it uses are, apart from the sequencing in numbering, in material respects similar to the Rules of the Commission.

[51] It is important to note that flexibility is not confined only to the pleadings, but to the whole nature and gamut of the proceedings themselves.

[52] Judicial authorities have emphasised the specialist role played by competition agencies, and have signalled their support for the approach adopted by such agencies because of this role.

[53] In Eagles Nest v Swaziland Competition Commission the Supreme Court observed:

"It is common cause that the Commission is a specialised body created by the Act."

[54] In The Competition Commission v Telkom SA Limited and Another (Case No. 623/2008) [2009] ZASCA 155 (27 November 2009) the Supreme Court of Appeal of South Africa (SASCA) addressed this point when it said:

"[36]" As will be shown, Parliament has conferred the competence to investigate, evaluate, refer and adjudicate complaints concerning infringements of Chapter 2 on a series of specialist bodies. The Competition Act creates a hierarchy of institutions to apply and enforce its provisions: the Commission, the Tribunal and the Competition Appeal Court. The Commission's functions include the investigation of mergers and the investigation and referral of complaints of prohibited practices to the Tribunal. The Tribunal is the adjudicative body of first instance. It is a specialist administrative tribunal adjudicating referrals from the Commission and by private individuals. It also has the power hear to appeals from certain decisions of the Commission and to review them. (sic) The Competition Appeal Court is a specialist court hearing appeals and reviews of decisions of the Tribunal. Where specialist structures have been designed for the effective and speedy resolution of particular disputes it is preferable to use that system.

[37] Determining whether a matter involves a contravention of Chapter 2 may be complex and technical. The Tribunal should not be lightly deprived of the authority to decide whether the complaints referred to involve such contraventions. It was submitted on behalf of the

Commission that it would have been appropriate, perhaps preferable, for Telkom to have raised the objection to the Tribunal's jurisdiction at the commencement of the proceedings. Exercising its specialist authority under the Act, the Tribunal would have been able to determine whether the matters fell within its authority, i.e. whether they involved contraventions of Chapter 2.

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[38] The Competition Tribunal is a specialist administrative tribunal created by s 26(1). Its functions must be exercised in accordance with the Act. It must adjudicate on any matter referred to it under the Act, and each matter will be referred to a panel of three. - - - The Tribunal does not function as an ordinary court does. Competition proceedings involve the public interest, and under the Act, the Tribunal has an active role to play in protecting that interest. The Tribunal may conduct its proceedings in an inquisitorial manner, calling its own witnesses, accepting evidence not normally admissible in a court, allowing a broad range of participants, and adjusting its procedures as its sees fit. It is a tribunal of record (s 26(1) (c)). Its functions include the power to adjudicate any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for by the Act (s 27(1) (a)). It

must conduct its hearings in public and in accordance with the principles of natural justice. Legal representation is permitted (s 53). Powers are given to it to summon and interrogate and to order the production of books, documents or items required for the hearing (ss 54(c) and 56). After the conclusion of a hearing it must make an order permitted by the Act and must issue reasons for the order (s 52(4))." (sic) (emphasis added)

[55] Institutions like the Commission are created by legislatures with the capability and capacity to run sui generis proceedings out of a deliberate and well thought out policy choice. In The Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others ((08/CR/Mar01) [2003] ZACT 43 (21 August 2003)) the SACT observed:

"The reasons for this are not hard to discern. When governments reserve new areas for public regulation they opt for enforcement by specialist, expert bodies capable of resolving issues speedily and efficiently. It is clear that, in so doing, they must have regard for a person's constitutional rights. Precisely how government must guarantee those rights, so that they are not sacrificed on the altar of administrative efficiency, is less clear. The answer, in our view, lies in situating

the transgression and its remedy in their proper place on the continuum."

The SACT further went on to say:

"Furthermore they believe that these transgressions are most efficiently policed and enforced by specialist agencies not by our already crowded courts."

[56] As the judicial authorities cited above have shown, the guarantee for the rights of alleged perpetrators lies in the observance of the rules of natural justice, to the extent they align with the empowering statute.

[57] The role of specialist bodies is cherished by the superior courts, as they filter, distil and crystallise issues. In Competition Commission v Loungefoam (Pty) Ltd and Others ((CCT90/11) [2012] ZACC 15; 2012 (9) BCLR 907 (CC) (26 June 2012) the South African Constitutional Court (SACC) observed at paragraph 26:

"On this interpretation, it serves the critical propose of ensuring that the decision – making of the higher appellate courts is informed by the expert views of the specialist CAC."

[58] It is evident, therefore, that apart from the safeguards of the rules of natural justice, competition agencies in the mould of the Commission are given broad

latitude to conduct their proceedings in a manner that best helps them achieve their mandate. This means, in particular, that they should not allow themselves to be held hostage to notions of their proceedings being seen as civil, or even criminal, since they are sui generis proceedings.

[59] In Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and Others ([2001] ZACT 15 (23 April 2001)) the SACT said:

> "28. The legislative policy emerging from all these provisions is clear – the Tribunal is given a discretion in terms of its empowering statute to run its proceedings as it deems fit subject to the observance of the core values laid out in section 52(2) viz. expedition, informality and in accordance with the dictates of natural justice. This legislative policy moreover vests in the Tribunal a discretion to conduct its own proceedings in a manner that is wholly consistent with the High Court common law rationale for ordering the joinder of defendants - - -.

29. This legislative intent is also consistent with the common law understanding of an administrative tribunal's powers. As Baxter puts it:

> "Except where the legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever

procedure is deemed appropriate, provided this does not defeat the purpose of the empowering legislation, and provided that it is fair.""

[60] It will be recalled here that section 16(1) of the Act says that "[s]ubject to the provisions of this Act, the Commission shall regulate its own proceedings."

[61] Nonetheless, competition agencies still have to borrow from the mature systems of the civil courts while eschewing the rigid formalities and technicalities that come with them. In Allens Meshco (Pty) Ltd and Others v Competition Commission and Others (delivered on 26 March 2015) the SACAC at paragraph 22 noted:

> "Section 37 (1)(b) draws a distinction between 'final' decisions and 'interim or interlocutory' decisions. In civil practice this distinction is one which is recognised as a matter of interpretation of the phrase 'judgement or order' in s 20(1) of the recently repealed Supreme Court Act 59 of 1959. Given the language of s 37(1)(b) of the Competition Act, there is every reason to have regard to the civil jurisprudence on this topic and this Court has indeed done so in earlier decisions - - -."
> (emphasis added)

[62] Even though the civil courts sometimes also take a dim view of technicalities, as Dingake J indicated in Matambo v Speaker of the National Assembly and Others (MAHGB – 000845 – 13 delivered on the 28th January 2015), it is standard procedure in competition law practice. He said at paragraph 69:

> "It is my considered view that justice should not be easily held hostage to technicalities. This is not a case of "three strikes and you are out." As it is often said the rules are made for the court and the court is not made for the rules."

[63] The SACT said in Federal Mogul (23 April 2001) at paragraph 24:

> "What seems to be clear from the Act is that the legislature did not want to burden the Tribunal within the strictures of judicial formalism."

[64] The SACC had occasion to advert to this point in Competition Commission v Senwes Ltd ((CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 687 (CC) (12 April 2012)) and it said:

> "69. The provisions indicate that there is indeed a material and significant difference between the Tribunal and civil courts. One of the functions of the Tribunal is to adjudicate on any conduct prohibited under Chapter 2 of the Act. In

order to do so, the provisions for hearings referred to the Tribunal place emphasis on speed, informality and a non-technical approach to its task. - - - Excessive formality would not be in keeping with the purpose of the Act."

It continued at paragraph 78:

"Even in ordinary civil courts the emphasis and trend is towards a court – driven case management so as to ensure that time and resources are not wasted and that only the real issues between litigants are adjudicated. In the case of hearings in terms of the Act, the Tribunal is in an even stronger position than ordinary civil courts in this regard. It may cut to the heart of the matter before it with expedition, informality and Tribunal – led intervention. Whatever the seniority of counsel involved, there is no justification for the Tribunal to allow a hearing to start and continue without clearly defining the issues that need to be adjudicated. If the ambit of the issues is disputed by the parties, as it was in this case, the Tribunal has a duty, firmly rooted in the provisions of the Act, to determine the dispute. Ideally these kinds of disputes should be resolved in pre-hearing conferences, but they are not, and if objections are raised at the hearing, then the Tribunal must make a ruling on them. Not to do so

increases the potential that affected parties will complain that they have been prejudiced, as is illustrated by this case." (emphasis added)

[65] The position taken by the SACC mirrors broadly the earlier views of the SACT in American Natural Soda Ash Corp and Another v The Competition Commission, Botswana Ash (Pty) Ltd and Another (1) [2001] ZACT 10 (27 March 2001) (also referred to as Ansac and Another v Botash and Others) where it noted:

"Apart from the language of rule 17 the complaint referral's function must be understood in the context of the Rules and the Act. A complaint referral eventually becomes the subject of a hearing before the Tribunal. It is here where the Tribunal has unique procedural powers, which differ vastly from those of a civil court in adversarial civil proceedings. The problem for Ansac is that it has relied on civil court decisions in application proceedings as authority for its criticism of the present pleadings ignoring not only the institutional differences between the High Courts and the Tribunal but also the different status that pleadings enjoy in each. We consider these differences below.

Some of the institutional differences between a civil court in adversarial proceedings and the Tribunal are –

The Tribunal is entitled to:

1. Conduct its proceedings inquisitorially - - -
2. Call witnesses itself and require documents to be produced - - -
3. At a pre-hearing to require the Commission to investigate specific issues or obtain certain evidence. - - -

This leads us on immediately to the second consideration, for if the Tribunal is entitled to enter the fray in this way, unlike its civil court counterpart, it suggests that the function of pleadings to determine the parameters of a dispute, as we understand them in civil actions is diminished. The policy rationale behind this is that prohibited practices do not just have private effects but also affect the broader public. The Tribunal as the guardian of the purposes of the Act cannot be constrained by the ambit of pleadings to the extent would a civil court in adversarial proceedings. The legislature did not intend to make the Tribunal a prisoner confined by the walls of opposing lawyers' pleadings. We must bear in mind that the primary purpose of pleadings is to define the issues between the parties so that each knows what case it must be prepared to meet and secondly so that the court is in a

position to identify the issues on which it must make its decision. In the Tribunal's proceedings pleadings serve this function as well, but their status is less elevated given the inquisitorial nature of the Tribunal and the public character of complaint procedures we alluded to above. Consequently our approach to pleadings will be more flexible than a civil court's. Furthermore in our proceedings the defining of issues is not the sole preserve of the pleadings and this function can be supplemented by a pre-hearing conference.

- - -

On the other hand the Tribunal must ensure fairness and compliance with the requirements of natural justice. This is an obligation that does not extend merely to the stage of pleadings but infects the entire process before the Tribunal. This means that the Tribunal must control its proceedings in such a manner to ensure that a respondent can rebut prejudicial allegations. To the extent that a respondent wants issues further clarified before a hearing it too can rely on this procedure and it need not have to resort to the procedural formalities that one would utilize in a High Court." (sic) (emphasis added)

[66] The above passage neatly sums up the approach of competition agencies to their proceedings and competition law practice generally. The issue of public interest is

of enormous importance, and in the event that the Authority non–refers and the complainant steps into the default role of prosecutor he or she should not be mired in a maze of technicalities, except those that are mandatory statutory requirements. This was recognised by the SACT again in Clover Industries Limited and Others v The Competition Commission ((Case No. 103/CR/Dec06) [2008] ZACT 46 (23 June 2008), when it observed at paragraph 20:

> "That decision makes it perfectly clear that we have adopted this flexible stance precisely to permit a layperson - as opposed to a competition law practitioner – to submit a complaint, an approach entirely consistent with our statutory requirement to conduct ourselves in as informal a manner as possible. However, our tolerance of informality as to the manner in which a particular complaint is articulated does not extend to the initiation of a complaint - - - And there is good reason for this: there can be no tolerance of informality in the submission of a - - - complaint if the *form* of the submission leaves the Commission uncertain as to whether a complaint has been submitted or information has been submitted and this is because important consequences – notably prescription – flow from the Commission's understanding of what precisely has been submitted, a complaint or mere information."
> (emphasis added)

[67] These are issues that are canvased in other authorities such as Loungefoam (Pty) Ltd and Others v Competition Commission and Others ((102/CAC/Jun10) [2011] ZACAC 4 (6 May 2011)); Netstar (Pty) Ltd and Others v Competition Commission and Another ((99/CAC/May10, 98/CAC May10,97/CAC/May10) [2011]ZACAC 1; 2011 (3) SA 171 (CAC) 15 February 2011).

[68] Even the approach to evidence is different in competition law adjudicating agencies. In American Natural Soda Arsh Corporation and Another v Competition Commission ((554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005]3 All SA 1 (SCA) (13 May 2005) the SASCA said at paragraph [60]:

> "It is for the Tribunal to consider, in the manner and in accordance with such procedure as it may decide, to what extent evidence may be admissible to establish whether the Ansac agreement falls within the prohibition contained in s 4(1)(b)."

[69] Again in Patensie Sitrus Beherend Beperk v The Competition Commission and Others (Case No. 16/CAC/ April 02), the SACAC made a similar point when it said:

> "Our Courts have repeatedly stated that where proceedings are conducted informally or in an inquisitorial manner the decision maker is placed in an active role to get at the truth and that the ordinary rules of evidence do not apply. Subject

at all times to the requirements of fairness, the Tribunal is not precluded from having regard to hearsay evidence."

[70] In competition law practice what compounds the situation further are the administrative penalties which are imposed, which some people deem to be criminal in nature. In Federal Mogul (21 August 2003) the SACT observed at paragraph 13:

> "There were few if any criminal prosecutions under the repealed 1979 Act. It is not hard to understand why. Competition cases are difficult to conduct not only because they are fact intensive, but also because they involve the application of both law and economics. - - - The administrative penalty became a feature of the new Act. What the Act sought to achieve was to improve enforcement by making a specialist agency and adjudicative tribunal solely responsible." (sic)

[71] Ian S. Forrester in Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures (The European Law Review (2009) 817 – www.whitecase.com/.../Article_Due_Process_in_EC_Competition_Cases) commented:

"The purpose of this digression into the amount of the fines and the goals of deterrence and disgorging of illicit profits is not to argue how much of a fine would be right in any given case. It is to point out that the logic and discourse of the enforcers is perfectly comparable to the logic and discourse of the criminal law: what penalties exist? Are they high enough to show society's disapprobation? Do they effectively deter? Do they match public concerns about the incidence of the repressed conduct?

- - -

Perhaps competition infringements, which may damage consumers over a lengthy period and which can cover several countries, are different to other economic crimes, and no doubt some would argue they are worse or at least more deserving of punishment."

[72] The same point made in the above passage is underscored by the SACT in South African Breweries Limited and Others v Competition Commission (CT Case No: 134/CR/Dec07) at paragraph 43 when it said:

"The SCA decision approached the validity of the initiation document in two respects; one is more general and the other more specific. In asserting the more general principle the SCA hold that as the actions of the Commission in respect of

> prohibited practice cases may lead to punitive measures including administrative penalties, which the court characterised as bearing a close resemblance to criminal penalties, its powers must be interpreted in a way that least impinges on a firm's constitutional rights to privacy, a fair trial and just administrative action."

[73] It is patently clear, therefore, that competition law proceedings sit at the confluence of civil law and criminal law proceedings. As a result, they are neither civil law proceedings nor criminal law proceedings, but merely sui generis.

[74] Martin Brassey et al at paragraph 49 above have referred to the "hybrid nature of complaint referral proceedings", and that they have "caused much confusion regarding the particularity and evidence required to be contained in the pleadings." In South African Breweries at paragraph 138, the SACT observed:

> "In this respect it seems that the exigencies of a competition prosecution are more demanding than their counterparts in criminal law despite the fact that these are civil proceedings."

> While in the above passage the SACT saw such proceedings as being close to civil proceedings, in National Association of Pharmaceutical Wholesalers and Others v Glaxo Wellcome

(Pty) Ltd and Others (Case No: 45/CR/Jul01) at paragraph 55 it said:

"Our Complaint Referral proceedings as we have observed previously in Botash (1) are sui generis and cannot be classified as either action or application proceedings as they have aspects of each. Like trial proceedings the pleadings may be supplemented by evidence, but unlike trial proceedings are in affidavit form and contain some if not all the evidence that may be led in the proceedings. It may well be that in some cases the matter can be resolved entirely on the papers and in this respect they resemble the High Court application procedures, but unlike those proceedings (except where there is a referral to oral evidence in exceptional cases) hearings are not necessarily confined to the pleadings and additional documentary and oral evidence is typically adduced."

[75] Even though in South African Breweries the SACT seemed to see these proceedings as being closer to civil proceedings, it provided a much clearer characterisation in Federal Mogul (21 August 2003) when it expressed itself in this manner at paragraph 70:

"The case law shows that courts no longer have a bipolar view of the law – that something is criminal or civil. With the

increasing trend of modern governments to extend administrative law and, at the same time, utilise administrative bodies to enforce it, that division has blurred. The courts recognize that administrative bodies will be enforcing the law though hybrids that are neither wholly criminal nor civil. Administrative bodies not only have the power to enforce the law within their domain but in some areas, competition law being one, are given their own tribunals to enforce it." (emphasis added).

[76] Mailula, AJA, writing for the SACAC was even more lucid on this point when at paragraph 47 in Sappi Fine Paper (Pty) Ltd v The Competition Commission and Another (Case No: 23/CAC/SEP02) he said:

"In my view the proceedings under the provisions of the Act are a hybrid between the criminal and civil proceedings."

[77] The Industrial Court in Botswana adjudicates labour disputes. It has also had to confront the question of the nature of proceedings that pertain to the Industrial Court. The late De Villiers J in Direng v Furniture Mart (Pty) Ltd 1995 BLR 826 (IC) observed:

"The Industrial Court is only empowered to determine trade disputes. It is therefore a court sui generis; it is one of a kind and is therefore neither a civil court nor a criminal court.

- - -

I am therefore satisfied that the proceedings in the Industrial Court are not civil proceedings, but are legal proceedings of a civil nature." (emphasis added)

[78] In Ditsele v BCL Limited 1995 BLR 838 (IC) De Villiers J noted:

"In its judgment in the matter of Direng v Furniture Mart (Pty) Ltd [1995] B.L.R. 826 the court found that the proceedings in the industrial court are neither civil nor criminal proceedings but are legal proceedings of a civil nature, which expression is used in the aforesaid definition of "action"." (emphasis added)

[79] The proceedings of this Commission are sui generis, having their own peculiar evidentiary and other rules, and practices. It is our conclusion therefore that they are simply legal proceedings.

[80] At different times during the hearing we were strongly urged, particularly by the Applicant, to rule against the Respondents as they were raising points *in limine* in instalments, which is unheard of in civil proceedings, or alternatively that they should be held to have waived the right to raise those points. All the parties

described the process differently as interlocutory proceedings, trial within a trial, or the raising of a special plea.

[81] Rule 13 (3) of the Rules states:

> "An answer that raises only a point of law must set out the question of law to be resolved."

[82] Rule 18 (2) for its part provides:

> "If a point of law has been raised, and it appears to the Chairperson at a pre-hearing conference to be practical to resolve that question before proceeding with the conference, the Chairperson may –
>
> (a) direct the Registrar to set only that question down for hearing by the Commission; and
>
> (b) adjourn the pre-hearing conference pending the resolution of that question by the Commission, or a Court, as the case may be."

[83] One of the points raised by the Respondents in the instant case is that the Authority has, in accordance with section 39 of the Act, non-referred. Non-

referral means that this Commission has no jurisdiction over this matter. It was observed in Ndlovu v Santam Ltd ((550/2003 [2005] ZASCA 41 (13 May 2005)) by the SASCA at paragraph [8]:

> "The defence raised in the present matter is independent of the appellant's claim. It concerns not the elements of the claim but the competence of the court to determine it – jurisdiction. If the plea as to jurisdiction had been upheld it would have disposed of the matter finally as contemplated in s 83(b) of the Act." (emphasis added)

[84] The points of law that were raised by the Respondents go to the heart of the matter before us and require a substantive and not technical ruling from the Commission. As the SACC cautioned in Competition Commission v Senwes Ltd, it is important to rule on such issues, and in our view it should be a substantive ruling. For the sake of emphasis and completeness, we repeat here what it said:

> "Ideally these kinds of disputes should be resolved in pre-hearing conferences, but if they are not, and if objections are raised at the hearing, then the Tribunal must make a ruling on them. Not to do so increases the potential that affected parties will complain that they have been prejudiced, as is illustrated by this case."

[85] It therefore behoves the Commission that when points of law are raised, whatever the nomenclature employed, they must be resolved expeditiously. The SACT said in Ansac and Another v Botash and Others:

> "At the commencement of our hearing into this application the Commission disputed whether it is competent for us to hear an exception. We advised the parties that our rules allow us to identify any legal issue that may be disposed of conveniently as a preliminary issue to be heard before the commencement of a hearing. Since this was an appropriate case to follow that procedure we decided to do so. It was therefore entirely academic for us to decide whether we have the power to entertain exceptions or for us to give such proceedings the label of either a special plea, in limine point or exception. The parties accepted this and we proceeded to hear argument on the remaining issues."

[86] In National Association of Pharmaceutical Wholesalers the SACT once again said at paragraph 56:

> "For this reason we do not consider it necessary to develop any hard and fast rule on exceptions or other forms of *in limine* objection. A rigid approach may make our procedures inefficient."

This approach is consistent with the philosophy of competition law adjudicating agencies of avoiding inflexibility which may stifle their aim of expeditious disposal of cases in the public interest.

[87] The preceding point was illuminated again by the SACT in Competition Commission v South African Airways (Pty) Ltd (SAA) ((18/CR/Mar01) [2001] ZACT 44 (16 November 2001) in this manner:

> "We are not going to provide a lengthy, elaborately reasoned response to a matter which has already occasioned considerably more agitation and cogitation than is warranted. Suffice to point out that the approach taken by the respondent to the status of pleadings before the Tribunal – and therefore to the amendment of these pleadings – ignores the fact that proceedings before this Tribunal are never simply civil disputes between two warring private parties. The Tribunal is a creature of a particular statute that has as its principal objective the protection of the public from anti – competitive conduct. This reality accounts for certain of the powers given us by the legislature including our inquisitorial power and it animates our approach to a range of simple and complex matters including the status of pleadings before us. In short it ensures that we adapt, if anything, a more flexible approach to the pleadings before us than would the High

Court in a civil matter. We are not refereeing a conflict between two private rivals; we are securing the objectives of the Competition Act.

Our concern is then simply that the substantive complaint be fully ventilated. We cannot allow our disquiet at the cavalier approach adopted by the parties to these proceedings to undermine our duty to the public, including its rights to have complaints that are referred to us fully ventilated. This consideration, more than any of the technical arguments made by the Commission or the respondent, dictates that the Commission be allowed to file its amendments and that the respondent be accorded the opportunity to respond to these amendments. This is, in our view, what a proper application of the Act requires. In *Whittaker v Roos & Another; Morant v Roos & Another* Wessels J laid out the position of the court, in the process expressing concerns not evidenced by the posture of either of the parties in the matter before us:

'This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a

true account of what actually took place, and we are not going to have a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties.'"

The citation for Whittaker v Roos is 1911 TPD 1092; 1912 AD 92.

[88] In view of the results of the above survey on the procedure that governs the operations of competition adjudicating agencies, and bearing in mind the Rules and the fact that the Respondents had always raised the points of law under consideration, we find that these points of law have been properly raised and argued.

Delegation and Referrals

[89] In terms of section 5 of the Act, some of the most important functions of the Authority are to:

> (a) "investigate and evaluate alleged contraventions of Part V" of the Act (paragraph (k) of subsection (2));
>
> (b) "refer matters it has investigated under this Act to the Commission for adjudication (paragraph (o));
>
> (c) "prosecute before the Commission, matters referred to the Commission under paragraph (o)." (paragraph p)). (emphasis added)

[90] Under section 9(2)(a) the Commission "shall adjudicate on matters brought before it by the Authority."

[91] The Interpretation Act (Cap.01:04) defines "functions" as including "powers and duties".

[92] Section 39(2) of the Act reads:

> "Within one year after an investigation is opened by the Authority, the Executive Secretary shall -

(a) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant, in the prescribed form." (emphasis added)

[93] The above section is supplemented by regulation 14 of the Regulations. Although regulation 14 in terms of its wording is supposed to expand on section 39(1), there is some incongruence between those two provisions. We will therefore treat regulation 14 as expanding on section 39 as a whole.

[94] Regulation 14(2) and (4) reads as follows:

"(2) After the Authority makes its decision under subregulation (1), the Executive Secretary shall –

(a) where the Authority determines that a prohibited practice has been established, refer the matter to the Commission within 14 days from the date the decision is made; - - -

- - -

(4) A referral to the Commission, whether by the Authority or by a complainant, shall be made in Form I set out in the Schedule." (emphasis added)

The most important task that subregulation (4) accomplishes is to confirm that under the Act referrals can only be made by two persons – either the Authority or the complainant, but only if the Authority has decided not to make a referral. With respect to the Authority it spells out the function set out in section 5(2)(o).

[95] The referral to the Commission on the 2nd day of October 2014 was not made by the Executive Secretary. The Respondents have contended that since the referral was not made by the Executive Secretary it means such referral is improper, and indeed invalid, in which event the Commission does not have the jurisdiction to be seized of the matter. This is premised on two points:

(a) that section 39(2) employs peremptory language and says "the Executive Secretary shall" refer the matter to the Commission, but in this instance he is not the one who referred;

(b) that even if he could delegate under section 6 of the Act in this instance such delegation would be irregular since no instrument of delegation has been exhibited, and that this would nullify such purported referral.

In sum, all this would mean that there has been a non-referral in accordance with section 39.

[96] It is apposite to consider the import of the word "determines" in both section 39 and regulation 14. In both provisions it is said that if the Authority "determines that a prohibited practice has been established", then the Executive Secretary "shall refer" the matter to the Commission.

[97] The High Court Act (Cap.04.02) defines "judgment" as including "any decision, decree, determination, finding, sentence or any order of any court." (emphasis added)

[98] The Essential Dictionary of Law (Barnes & Noble Books, 2004) defines "determination" as "the decision made by a judge, court, or agency that ends a lawsuit or controversy; a final judgment." (emphasis added)

[99] In Tsogang Investments (Pty) Ltd t/a Tsogang Supermarket v Phoenix Investments (Pty) Ltd t/a Spar Supermarket and Another 1989 BLR 512 (HC) Lawrence AJ noted:

> "On that decision, the Minister himself must make a decision. The word "decision" in the Act means conclusion. In Winter and Calder v Winter [1933] N.Z.L.R. 289 the court held that the word "decision" implies the exercise of a judicial

determination as the final and definite result of examining a question.

- - -

In White v Kuzych [1951] A.C. 585, P.C., it was held that "decision" in the bye-law concerned meant "conclusion".

- - -

Decision is not necessarily synonymous with opinion."

[100] The SASCA in Menzi Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another ((Case No. 480/2001; [2002] ZASCA 141; [2003] 1 All SA 82 (SCA); [2001-2002] CPLR 13) remarked:

"[40] The point here is the loose-standing one referred to in para [14]. The Act requires that the Commission decides on a referral. Seven – Eleven submits that the Commission did not decide – that either the decision was made by a committee called Exco, which is not the Commission – or that, if the Commission did purport to decide the referral, it is invalid because not all its members participated in the decision – which is what the Act is said to require.

- - -

[41] - - - The decision to refer was taken by the Commission, whatever may have gone before, and it was taken by all its members." (emphasis added)

[101] The SASCA again in The Competition Commission v Telkom SA Limited (Case No. 623/2008) said:

> "[11] The Commission must exercise its functions in terms of the Act - - - The Commission is independent subject only to the Constitution and the law - - - It must be impartial and perform its functions without fear, favour and prejudice - - - Its functions include the investigation and evaluation of alleged contraventions of Chapter 2 - - -, the referral of complaints to the Tribunal and appearances before the Tribunal - - - At any time after initiating a complaint the Commission may refer it to the Tribunal - - - However, it must within one year after the complaint (or an extended period - - -) was submitted to it, refer it to the Tribunal if it determines that a prohibited practice has been established - - -, or issue a notice of non-referral - - - In the latter event, the complainant may refer the complaint directly to the Tribunal - - - In my view the decision in *Simelane* that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative and not an administrative nature remains a correct reflection of the position under PAJA and the decision that PAJA does not apply in this review is correct." (emphasis added)

PAJA refers to the Promotion of Administrative Justice Act of South Africa.

[102] On a clear reading of sections 5 and 39 of the Act, taking into account regulation 14, the power to decide on referrals lies with the Authority. The Executive Secretary only performs the role of submitting such referrals to the Commission after the determination has been made by the Authority. In doing this the Executive Secretary does not act under his administrative powers conferred by section 6 of the Act as contended by the parties, but under the investigative powers of the Authority in terms of section 5 as read with section 39.

[103] The critical determination as to whether a contravention has occurred is made by the Authority in accordance with section 39(2)(a), taking into account regulation 14. This is why regulation 14 says "[a]fter the Authority makes its decision - - - the Executive Secretary shall –

> (a) where the Authority determines that a prohibited practice has been established, refer the matter to the Commission - - -". (emphasis added)

[104] Until the Authority has made its decision or determination the Executive Secretary is powerless, and cannot make any referral. Once a decision has been made by the Authority the referral is automatic, and not discretionary. He or she is then merely directed to make a referral. In essence, since he or she is not acting under section 6, any delegation of the power to refer cannot be located in that section

either since that section confers on the Executive Secretary administrative powers only.

[105] Apart from Telkom SA Limited, the point above is confirmed by the SASCA in The Competition Commission v Computicket (Pty) Ltd ((Case No. 853/2013; [2014] ZASCA 185 (26 November 2014)) where Brand JA writing for the Court said:

> "[18] The starting point, as I see it, is the concession by the Commission that, although a referral decision in terms of s 50 (2) of the Act does not constitute administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000, it is nonetheless reviewable on the basis of the legality principle. This concession was rightly made in accordance with this court's decisions (eg in *Competition Commission of South Africa v Telkom SA Ltd & Others* [2010]2 All SA 433 (SCA) paras 11-12; *Competition Commission v Yara (SA) (Pty) Ltd & others* 2013 (6) SA 404 (SCA) para 26))." (emphasis added)

[106] In Norvatis SA and Others v Main Street 2 t/a New United Pharmaceutical Distributors and Others [2001] ZACT 21 (2 June 2001), the SACT reflected on the extent of the word "determine" in this manner:

> "61. In order to get around the difficulties occasioned by the case law and in particular the **Brenco** decision the applicants

argued that in referring a complaint the Commission exercises a determinative action. Their argument revolves around the wording of section 50(2), which states that the Commission shall refer a complaint to the tribunal *"if it determines that a prohibited practice has been established"* - - - In the applicants' argument the use of the word "determines" is proof that a complaint referral by the Commission is a determinative function. In our view the applicants are emphasizing form over substance. On the basis of its investigation the Commission determines whether or not a prohibited practice has occurred. If the Commission determines that a prohibited practice occurred it cannot impose a fine or any other remedy, it must refer the complaint to the Tribunal. Referring a complaint to the Tribunal is not determinative of the complaint. All it means is that the respondent will have to face a hearing before the Tribunal where it will be given an opportunity to respond to the allegations that it has engaged in a prohibited practice. Even where the Commission decides not to refer a complaint this decision is also not determinative of the complaint – in terms of section 51 (1) of the Act the complainant has the right to refer the complaint to the Tribunal directly. We repeat what we have stated above that the decision by the Commission to refer a complaint is merely one of the steps in the resolution

> of a complaint; it may be the most important one but it is not determinative of the complaint. The respondent gets an opportunity to state its case before the Tribunal. The decision of the Tribunal is determinative of the complaint as a whole and this is why the Act entitles a respondent in Tribunal proceedings to the principles of natural justice. In the light of the above and the **Brenco** decision, we see no prospect of this argument succeeding in the High Court."

[107] We associate ourselves with the sentiments expressed by the SACT in the above passage, but in terms of our Act we would take a broader view of "determination" in section 39 and associated provisions. At paragraph 98 above, "determination" is defined as "final judgment". In our view, the determination in section 39 of the Act is not about a final disposal of the whole matter, but rather the taking of a final step or judgment that ends the investigation phase and, if a referral is made, leading to a hearing and prosecution before the Tribunal. As earlier stated, the Authority acts as guardian of the public interest. This final step or determination has to be a solemn occasion. Up to that point, the accused or respondent is somewhat generally shielded from public view. Once a referral is made, that veil is lifted, and what follows thereafter is life-changing for the respondent. In Loungefoam the SACAC made the observation this way at paragraph 49:

> "Whilst that enables the inspector to exercise the powers conferred by the Act in relation to an investigation it also

affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act. The consequences of a public charge that a firm is guilty of anti-competitive conduct are potentially far-reaching. Considerable reputational damage may flow from being charged with anti-competitive conduct. The ability of the public, via the lens of the media, to distinguish between an allegation of anti-competitive conduct and proof that anti-competitive conduct has occurred is by no means clear. If nothing else the firm so charged must devote resources that would otherwise be directed elsewhere to defending itself including, in many instances, fighting a public relations battle trying to clear itself of these charges."

[108] Upon receiving a referral, the Commission is required to publish this information in the Government Gazette. In Ansac v Botash (1) the SACT noted the requirement for publication in the Gazette in this way:

"Ansac next seek to place reliance on the fact that the Tribunal is obliged to publish the fact of the referral in the Government Gazette in terms of section 51(4). It is common cause that the purpose of this provision is to alert third parties to the impending proceedings. Ansac states that it is crucial

that the Tribunal pronounce only on the complaint of which notice is given to the world. Once again neither the logic nor language of the Act justifies such a conclusion. The purpose of the notice is to alert third parties to the broad parameters of a dispute so they can make further enquiries if they so wish. The choice of language in the section is itself instructive."

Therefore, given the scale of publicity and the consequences that emanate from a referral, we are firmly of the view that the determination contemplated in section 39 is one that should be viewed as bringing finality to the investigative phase, hence it is not an administrative action.

[109] Since a referral is not an administrative act and the Executive Secretary can therefore not delegate it under section 6 of the Act, the location of such power, if any, to delegate has to be found elsewhere in the statute book. Section 11 of the Public Authorities (Functions) Act (Cap.02:11) provides:

"Where a person is empowered to delegate to any other person functions conferred on him by any enactment –

(a) any such delegation may be made in respect of all or any of the functions concerned;

(b) the delegation may be made subject to such conditions or restrictions as the delegator may specify;

(c) the power may be exercised from time to time as occasion requires;

(d) any such delegation may be cancelled or amended as occasion requires; and

(e) the exercise of the power of delegation shall be without prejudice to the right of the delegator to exercise such functions himself."

[110] In Shri Sitaram Sugar Company - - - vs Union of India & Ors on 13 March, 1990; 1990 AIR 1277, 1990 SCR (1) 909, the Supreme court of India said:

"Where an authority to whom power is delegated is entitled to sub-delegate his power, be it legislative, executive or judicial, then such authority may also give instructions to his delegates and these instructions may be regarded as legislative. However, as pointed out by Denning, L.J., (as he then was) a judicial tribunal cannot delegate its functions except when it is authorised to do so expressly or by necessary

implication' see Bernard and Ors. v. National Dock Labour Board and Ors., [1953) 2 Q. B. 18 at 40."

[111] We have already concluded that in making a referral to the Commission the Executive Secretary is exercising neither determinative nor discretionary powers. In other industries, his or hers are merely pro forma functions at that stage.

[112] Kirby, J (as he then was) in Ker & Downey (Botswana) Pty Ltd v The Land Tribunal and Another 2001 (2) BLR 47 (HC) said:

> "I have already held that in adjudicating a tender for the allocation of tribal land in terms of section 24 of the Tribal Land Act, as in this case, the land board acts in a quasi-judicial capacity. Where the legislature confers discretionary duties of this kind on a particular person, they may not be delegated to another person. As Innes C.J. put it in Shidiack v Union Government 1912 A.D. 642 at p.648: "No doubt a public officer may for ordinary Ministerial purposes act through a Deputy (see Walsh v. Southworth, 6 Exch., p. 156 and Forsyth p.83). But where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and the language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged."

These cases demonstrate that, in most circumstances, delegation is possible. Critically though, they ringfence those instances in which certain duties can never be delegated whatever the circumstances.

[113] At paragraph 67 of Chairman: Board on Tariffs and Trade and Others v Brenco Incorporated and Others ((285/99, [2001] ZASCA 67 (25 May 2001)), Zulman JA of the SASCA said:

> "I now turn to consider the specific complaints against the second and third appellants. The functions complained of were carried out in this case not by the ministers themselves but delegated by them to their respective deputies. The attack on the validity of such delegation, previously made by the respondents, was abandoned in this court."

[114] Writing for the Supreme Court of Zambia in Attorney-General v Juma ((S.C.Z. Judgment No. 14 of 1984) [1984] ZMSC 12 (3 October 1984); (1984) Z.R. 1 (S.C) Silungwe, C.J. said:

> "The only issue that must now be resolved is: what is the effect of non-observance of the requirement aforesaid? The answer here turns on whether the requirement that the

grounds for detention shall be written in a language that the detainee understands, is mandatory or directory.

In discussing mandatory and directory provisions, Basu's Commentary on the Constitution of India, 5th Edition, Volume One, says this at pages 59 and 60:

"The distinction between mandatory and directory provisions applies in the case of constitutions as in the case of statutes. The distinction is that while a mandatory enactment must be obeyed or fulfilled 'exactly', it is sufficient if a directory enactment be obeyed or fulfilled substantially. Secondly, if a provision is merely directory, penalty may be incurred for its non-compliance, but the act or thing done is regarded as good notwithstanding such non-compliance; if, on the other hand, a requirement is mandatory, non-compliance with it renders the act invalid. The general rule about constitutional provisions is that they should be regarded as mandatory where such construction is possible."

However, it is a truism that there are exceptions to every general rule. Whether or not this case is an exception to the general rule remains to be seen.

In considering mandatory and directory provisions of statutes, including those of the Constitution, Doyle, C.J., said in *Attorney – General v Chipango,* (5) at page 6:

> "It seems to me the proper way to approach the problem is to be found in a passage on pp.314 and 315 of the 12th Ed. of Maxwell's Interpretation of statutes. 'The first such question is: when a statute requires that something shall be done, or done in a particular manner, or form, without expressly declaring what shall be the consequence of non-compliance, is that requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? In some cases, the conditions or forms prescribed by the statutes have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. In others, such prescriptions have been considered as merely directory, the neglect of them involving nothing more than a liability to a penalty, if any were imposed, for breach of the enactment. An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.' It is impossible to lay down any general rule for determining whether a provision is imperative or directory. 'No universal rule', said Lord Campell, L.C; 'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or

obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.' And Lord Penzance said: 'I believe as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter; consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon review of the case in that aspect decide whether the matter is what is called imperative or only directory.' Without impugning in any way the correctness of the decisions of the courts of other countries in relation to their own statutes and their own particular circumstances, I would approach s. 26A (now Article 27 of the Constitution) in the way pointed out in particular by Lord Penzance."

He continued - - -

"The courts have in the past held that where a provision laid down a number of requirements, some might be held to be mandatory while others might merely be directory. See for example, *Pope v Clarke* (6). These passages, in our view,

correctly state the law in relation to mandatory and directory provisions of statutes." (sic) (emphasis added)

[115] Section 45 of the Interpretation Act (Cap.01:04) provides:

"In an enactment "shall" shall be construed as imperative and "may" as permissive and empowering."

[116] In Swissborough Diamond Mines Pty Ltd and Another v The Commissioner of Mines and Geology and Others ((CIV/APN/394/91; [1999] LSHC 41 (29 April, 1999)) Chief Justice J.L. Kheolaon said:

"In Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) S.A. 678 at p. 683 C-D Van den Heever said:

"In the first place the sub-rule with which we are concerned is couched in peremptory terms: the messenger "shall cause the sale to be advertised - - -". The Afrikaans version has the categorical imperative "moet". If a statutory command is couched in such peremptory terms it is a strong indication, in the absence of considerations pointing to another conclusion, that the issuer of the command intended disobedience to be visited with nullity."

In Sehume v Atteridgeville Town Council 1989 (1) SA 721 (T) at p.724 E-H Stafford, J. said:

> "There is no doubt that the peremptory language used in the regulations mean that, where a local authority as in this case, is empowered to make by-laws which can encroach upon the rights of persons or affect their pockets, the formalities to bring such laws must be scrupulously observed. I refer to Maxwell The Interpretation of Statutes.
>
> 'Where powers, rights or amenities are granted with the direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is therefore probable that such was the intention of the Legislature.'

This passage has been quoted with approval in many judgments over the years. There is no point in mentioning all these judgments, save that of Van den Heever JA in Messenger of the Magistrate Court v. Pillay 1952 (3) S.A. 678 (A) at 683.

I am in agreement with what Roux J said in an unreported judgment in the Transvaal Provincial Division, Marcus v. Town Council of Mamelodi, case No. 12722/86, dated of February 1987:

> "If a statute is construed as peremptory, non-compliance with its prescriptions by a subordinate law-maker cannot bring about the consequences required. It results in a nullity. I have no doubt that the regulations must be held to be peremptory with all the consequences which follow upon such an interpretation."

In Sutter v. Scheepers 1932 A.D. 165 at pp 173 – 174 Wessels, J.A. said:

> "The word "shall" when used in a statute is rather to be construed as peremptory than directory unless there are other circumstances which negative this construction – Standard Bank Ltd v. van Rhyn (1925, A.D. 266.)
>
> (1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complied with certain conditions rather discloses an intention to make the conditions peremptory than directory: though even such language is not conclusive.

(2) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory. Thus is Cole v. Greene (L.J.C.P., vol. 13 at p.32) Tindall, C.J., approving of a decision of Lord Tenterden and dealing with this same question as to when "shall" is to be interpreted as peremptory and when as directory, says: "It may be observed here as it was by Lord Tenterden - - - in the case of the King v. Justices of Leicester that the words are in the affirmative only and that there are no negative words; nor are the words so stringent as in those of the Marriage Act 4 Geo. IV c.76, s.16 whereby it was enacted 'that the father, if living, of any party under twenty-one years of age (such party not being a widower or widow), or if the father shall be dead, the guardian or guardians, etc., shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorised to give such consent:' and yet in The King v. Birmingham it was held that those words are directory only. Lord Tenderden, in giving judgment, says: 'The language of this section is merely to require consent; it does not proceed to make the marriage void if solemnised without consent.' So here, the Act says, the contract shall be signed by the

commissioners, or three of them, or by their clerk; it does not say it shall be void unless so signed."

(3) If, when we consider the scope and objects of a provision we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(4) The history of the legislation will also afford a clue in some cases."" (sic)

[117] We find that the word "shall" as used in section 39 of the Act and regulation 14 of the Regulations concerning the Executive Secretary's referrals is only directory. We therefore hold that the Executive Secretary's functions under section 39 of the Act, taking into account regulation 14 of the Regulations, can be delegated provided all formalities are satisfied. The referral in this matter is in order.

[118] The Respondents strongly urged us to consider Mmolawa v Lobatse Clay Works [1996] BLR 1(IC), but we do not find it to be of assistance in this instance.

Investigations, Time-bar and Jurisdiction

[119] The architecture setting out the investigation, evaluation and referral processes of contraventions of Part V of the Act is straightforward. However, following the path it lays down towards a successful prosecution is hazardous and tortuous.

[120] Referrals can be stillborn due to, in the beautiful phrase of the Act, "non-referral". Some refer to this as a lapse of time, time-bar, time limitation or simply prescription.

[121] The Constitutional Court of South Africa in Road Accident Fund and Another v Mdeyide ((CCT 10/10) [2010] ZACC 18; 2011 (1) BCLR 1 (CC); 2011 (2) SA 26 (CC) (30 September 2010) while dealing with the specific matter before it, laid down the rationale for prescription in this manner:

> "2. In the interests of social certainty and the quality of adjudication, it is important though that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system – and others – for centuries.
>
> 3. At present prescription is provided for by the Prescription Act in general and by other Acts of Parliament regulating specific areas.

4. This matter requires the balancing of the right of access and the need for the fair and manageable prescription of claims.

- - -

8. This Court has repeatedly emphasized the vital role time limits play in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events given rise to disputes and must follow from sound reasoning, based on the best available evidence.

9. The precise manner in which prescription functions is determined through the application of a number of concepts. Some may regulate the scope of a particular prescription clause. The manner in which prescription begins to run may furthermore be determined in a number of ways, usually with reference to the scope of the prescription clause." (emphasis added)

[122] It is important to consider the steps that would lead to prescription or non-referral under the Act. The functions of the Authority in so far as they are germane to this matter have already been set out above. These relate to the investigation and evaluation of cases, their referral to the Commission, and ultimately their prosecution before the Commission.

[123] The centrepiece of this process is the investigation phase, which has to be carried out within a set time, or else a matter will be deemed to have been non-referred. Investigations are grounded on section 35 of the Act, augmented as necessary by the Regulations. It is appropriate that we reproduce part of section 35 here.

> "35 (1) The Authority may either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any practice where the Authority has reasonable grounds to suspect that –
>
> (a) the practice in question -
>
> (i) may constitute an infringement of sections 25 and 26 (1), and
>
> (ii) is prohibited after investigation in terms of sections 27 (1) and 30 (1); and

(b) the thresholds referred to under the provisions of sections 28 or 31 are, or may be, satisfied.

(2) Where the Authority decides to conduct an investigation, the Authority shall as soon as practicable, give written notice of the investigation to every enterprise which is suspected to be a party to the practice to be investigated and shall in the notice –

(a) indicate the subject matter and the purpose of the investigation; and

(b) invite the enterprise concerned to submit to the Authority, any representation which the enterprise may wish to make to the Authority in connection with the matter to be investigated, within such period as the Authority shall specify in the notice.

(3) Where the Authority considers that to give notice under subsection (2) would materially prejudice the exercise of its powers to enter and search any premises in terms of section 36, it may defer the giving of notice until after those powers have been exercised." (emphasis added)

The notice in subsection (3) is known as an *ex post facto* notice. It works in tandem with Form E of the Regulations. The Essential Dictionary of Law defines *ex post facto* as

"from the point of view of subsequent events; after the fact; retroactive." Dictionary.com defines it as "1. from or by subsequent action; subsequently; retrospectively; retroactively"; "2. having retroactive force; made or done subsequently", and rather somewhat uncharitably but much more poignantly as "[an] explanation or regulation concocted after the event, sometimes misleading or unjust: Your ex post facto defense won't stand up in court." See also ex post facto law.) From Latin, meaning "after the deed.""

[124] Subsection (5) reads:

"If the Authority decides not to conduct an investigation, having received a complaint or a request to investigate a practice in terms of subsection (1), the Authority shall, in writing, inform that person of the reasons for its decision." (emphasis added)

[125] Where the Authority decides to investigate, this sets the stage for a referral under section 39. Section 39(1) refers to the Authority "opening" an investigation. Subsection (2) states:

> "Within one year after an investigation is opened by the Authority, the Executive Secretary shall –
>
> (a) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or
>
> (b) in any other case, issue a notice of non-referral to the complainant, in the prescribed from." (emphasis added)

[126] In the above provisions the legislature elected to use four different words for the initiation of an investigation, these being "start", "conduct", "commence" and "open". In Competition Authority v Hi Pro Sales (Pty) Ltd t/a Dirang Motors and Another (Case No: CC–CR/02/A/13 (11th September 2014)) at paragraph 15 the Commission said:

> "Different words are used in the Competition Act to describe the initiation of investigations. Section 35 (1) uses the word "start", while section 38 (1) employs "commence". In section 39 (2) the word "open" is preferred. The Longman Dictionary

of Contemporary English defines "start" as "to begin"; "commence" as to "to begin; start"; and "open" as "to (cause to) start". In other sections, for example section 35(5), the word "conduct" is used. Needless to say, whichever way one looks at these different sections, the thread that runs through is that when each of these words is used that is when the investigation process is initiated. Therefore a single word could have been used consistently in the drafting of the Act to describe the initiation of investigations in all relevant parts of the Act."

[127] In Woodlands Dairy the SASCA noted as follows at paragraph 18 on the need to have a consistent use of words:

"It is conceivable that the commissioner, by virtue of facts submitted informally or from facts obtained by the commission in the course of another investigation, may wish to initiate a complaint and to dispense with a subsequent investigation. It would accordingly appear reasonable to assume that in this case one could read 'must' as 'may'. The problem is that Parliament chose to deal with the two cases in an identical manner. The same words cannot bear different meanings in the same sentence depending on the circumstances. Even recourse to purposive construction

superimposed on benevolent construction does not help. Furthermore, Parliament was quite particular in its use of 'may' and 'must' in this Act. In the preceding two subsections and the subsequent one the word 'may' is used. Why then the use of 'must' in this subsection if 'may' was intended? One finds the same pattern in other sections of the Act - - -"

[128] The same point was made by the SACT in South African Breweries when it said at paragraph 91:

> "The Commission in our view correctly, points out that the term 'particulars' is used uniformly throughout section 50(3). Section 50(3) contemplates four different scenarios. The term must therefore be given a consistent interpretation for all the scenarios. As the SCA has pointed out in *Woodlands,* albeit in a different context, the same term must be given a consistent interpretation in statute." (sic)

The difficulty in the sections of the Act referred to above is that different words are used to describe the same act; namely, the initiation of investigations. This undoubtedly can lead to confusion.

[129] In Clover Industries, the SACAC observed at paragraph 13:

"This interpretation is consistent with the accepted canons of interpretation, namely:

"It is a general rule of construction of a statute that a deliberate change of expression is prima facie taken to import a change of intention". (see Barrett NO v Macquet 1947 (2) SA 1001 (A) at 1012; Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Company Limited 1947 (2) SA 1269 (A) at 1279)."

[130] We do not see the legislature signalling any change of intention in the provisions under consideration. In our view, it is simply a lack of consistency and uniformity. We therefore confirm our views in Hi Pro Sales that all the four words used refer to the initiation of investigations. The point was famously rendered by the SACAC at paragraph 40 in Loungefoam:

"Throughout the argument on behalf of the Commission the refrain was sounded that to uphold the objection by Feltex involves an unduly technical approach to the construction of the Act and renders the task of the Commission and the Tribunal more difficult or event impossible. Implicit in this is a suggestion that this court and the SCA are being unduly technical in contrast to the informality of the approach of the Commission and the Tribunal. That is an unfortunate and

incorrect view of matters. The Commission, the Tribunal, this Court and the SCA are all engaged in applying the same statute – **the Competition Act**. In common parlance we sing from the same song sheet. The language of the statute and the architecture of the complaints system it establishes is set out in the Act and was determined by the legislature. If it suffers from defects the remedy is in the hands of the legislature."

[131] Just like the referral to the Commission, similarly the start of an investigation can have devastating consequences, and huge legal ramifications. Firstly, it is important for founding Competition Commission jurisdiction. Secondly, so that it is clear to the Authority when time has lapsed and that it has non-referred. Thirdly, so that in cases where there is a complainant, the complainant should know whether to refer the matter to the Commission directly. In South African Breweries Limited it was said that "the complainant complains, but the Commission refers". As already pointed, the legislature has made the Authority its prosecutor of choice and it is only when the Authority does not refer that the complainant assumes the right to refer. This point was again illustrated in National Association of Pharmaceutical Wholesalers v Glaxo Wellcome when the SACT, at paragraph 71, said that "[t]his is because the legislature intended to prefer the Commission, the public body tasked with investigating complaints, with the prior right to commence prohibited practice proceedings. Therefore it is given the opportunity to investigate a complaint of a prohibited practice for at least a

year. A private party can only commence a Complaint Referral if the Commission has issued or been deemed to have issued a certificate of non-referral." Fourthly, the enterprise being investigated should know when an investigation was started so that after a year it should know that there has been a non-referral, or to anticipate a hearing. The start of an investigation is therefore a significant event. In analogous situations it has been characterised as a juristic act.

[132] In Clover Industries Limited, Patel JA, writing for the SACAC said at paragraph 12:

> "I am in agreement with the Tribunal that "a 'complaint' is a juristic act necessary to bring alleged anti-competitive conduct within the ambit of the statute's formal procedures with Sections 49 and 50 being the first steps on the process".

[133] Brand JA in Yara (South Africa) (Pty) Ltd, writing for the SASCA observed at paragraph 35:

> "It is therefore not only the act of initiation, but also the date of that act that is of vital importance in applying s 67(1). Formal investigation of a new complaint or a direct referral of that complaint to the Tribunal, without a complaint initiation, would therefore deprive the operation of s 67(1) of its foundation. It is true that an informal or tacit initiation may render the establishment of its date problematic, but I

do not believe that difficulties of proof could relinquish the Commission from establishing a juristic act that is, in my view, required by both the wording and the scheme of the Act." (sic) (emphasis added)

[134] The SACT in Clover Industries Limited emphatically made the point this way at paragraph 18:

"We should clarify at once that, for the purpose of the Act, a 'complaint' is a juristic act necessary to bring alleged anti-competitive conduct within the ambit of the statute's formal procedures - - - In this specific context we are little availed by confining our interpretation of 'to complain' or 'complaint' to the ordinary English meaning because the Act gives meaning to the concept of a 'complaint' and serious consequences, not least the possibility of prescription, flow from the precise manner of its initiation, or, expressed otherwise, the precise form in which it is submitted." (emphasis added)

[135] The spectre of prescription or time–bar should therefore occupy the mind of the Authority when it ponders the start of a formal investigation. Applying this approach in Steel Authority of India, the Supreme Court of India said:

"The Director General is expected to conduct an investigation only in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced,

which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation suo moto. Then the Commission has to consider such report as well as the objections and submissions made by the other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its power vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an ex parte order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a prima facie view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the

information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party." (sic) (emphasis added)

[136] Three points emanate from the above passage. First, the Commission (in India) can have and is entitled to have prima facie views. Second, it has to apply its mind to the information before it and record its satisfaction with it, and if it wants an investigation it has to give the Director General a directive and it is only then that "the inquiry is more definite in its scope and may be directed against a party." Third, prior to the directive there can only be a "general examination or enquiry of the information/reference".

[137] In Hi Pro Sales (Pty) Ltd at paragraph 18 the Commission said:

"On the other hand, regulation 11(3) states:

> "Where the Authority carries out an investigation without giving notice, it may issue an *ex post* notice of investigation as set out in Form E as set out in the Schedule."

> In carrying out an investigation without notice this should be seen as an exception to the general rule encapsulated in both section 35(2) of the Act and regulation 11(1). This is an exception meant to simply preserve the integrity of the

investigation, not to hide the initiation of the investigation process itself. As such, at all times the Authority should have a record of when the investigation was initiated. Even then, the Authority *may* issue Form E. It is our view that in all circumstances as relevant either Form D or Form E should be issued as appropriate, as it would assist all parties concerned to determine when an investigation was initiated. Such form as has been issued by the Authority should be a part of the documents submitted to the Commission (or its successor as the case may be) and the other parties when a referral is made."

[138] We reiterate our views in the above passage, and confirm that they dovetail with those of the Supreme Court of India.

[139] In his submission to the Commission at the hearing, counsel for the Applicant intimated that what the Commission said in Hi Pro Sales (Pty) Ltd supports his position. We do not see how this is so. Nonetheless, in Yara (South Africa) (Pty) Ltd the SASCA said at paragraph 26:

"In Woodlands the focus of this court was therefore not on the degree of correlation there has to be between an initiating complaint, on the one hand, and ultimate referral on the other. Rather loose statements in the judgment on these

subjects should therefore not be submitted to a process of interpretation akin to the construction of statutory provisions."

A similar point was made by the Supreme Court of the United States of America (SCOTUS) in Humphrey's Executor v United States 295 U.S. 602 (decided on May 27, 1935) when it concluded:

"In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved, and, therefore do not come within the rule of *stare decisis*. Insofar as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens v Virginia,* 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury v Madison*, 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohen's* case, said:

It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the

judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

[140] It is in this regard that we therefore affirm our approach in Hi Pro Sales (Pty) Ltd, particularly for the Authority to have an objective record of when it started a formal investigation. In Steel Authority of India, the Supreme Court of India noted:

> "'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26 (1) of the Act, issues a direction to the Director General." (sic)

In Yara (South Africa) (Pty) Ltd the SASCA said at paragraph 21:

> "Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case.

That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty, that would be so. But it is not a requirement of the Act."

[141] We therefore urge the Authority to act in accordance with paragraphs 137 and 138 above as part of its best practices. Although this is not a requirement of the Act, it would provide an objective reference point for the parties involved; and the Commission would also use it and all other objective circumstances to consider when an investigation really formally started if there is a dispute about that.

[142] Among the weapons in the Authority's arsenal are search warrants. These are covered by section 36 of the Act, and part of it reads:

"(1) Where the Authority has reasonable grounds for suspecting that an enterprise has engaged in, is engaging in, or is about to engage in, a horizontal or vertical agreement prohibited in terms of section 25(1) and section 26(1) respectively or in the abuse of dominant position, the Authority may authorise the entry and search of that enterprise's premises, by an inspector appointed in writing by the Authority.

(2) Subject to subsection (3), an inspector appointed and authorised in writing by the Authority, may at any time during normal hours –

(a) - - -

(b) search any person on the premises if there are reasonable grounds for believing that the person has possession of any documents or article that has a bearing on the investigation;

(c) examine any document or article found on the premises that has a bearing on the investigation;

(d) - - -

(e) - - -

(f) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;

(g) - - -

(h) attach and, if necessary, remove from the premises for examination and safeguarding, any document or article that has a bearing on the investigation.

- - -

(5) Upon first entering any premises under a warrant, the inspector shall –

- - -

(c) provide on request, a document from the Authority indicating the subject matter and purpose of the investigation and the nature of the practice under investigation; and

(d) allow the enterprise under investigation a reasonable period within which to obtain legal advice." (emphasis added)

[143] A clear reading of section 36 shows that warrants are issued for ongoing investigations. It is instructive that in its wisdom the legislature chose to use the words "has a bearing on the investigation", rather than "may have a bearing on an investigation" if such an investigation could be contemplated in the future.

[144] Section 5(2) (k) says the Authority shall "investigate and evaluate alleged contraventions of Part V" of the Act. It is not clear whether the legislature was ordering any particular sequence of events in this provision. We take the view (without deciding the point) that such evaluation can be both pre-investigation and post-investigation. This is because the Authority will no doubt receive numerous complaints and information, some from bitter competitors and some from sheer busy bodies. The Authority has to look through all these, evaluate them and then make a judgment call on which ones to investigate. Similarly, after an investigation the Authority should apply its mind to the information that has been turned up to "[determine] that a prohibited practice has been established" (s 39(2)) and thus a referral would be in order.

[145] Section 28 of the Competition Act of Zimbabwe (Chapter 14:28; Acts 7/1996, 62/2001, 29/2001) subsections (1A) and (2) state:

> "(1A) For the purposes of subsection (1) the Commission may, through its investigation officers, make a preliminary investigation without notice, and section forty-seven shall apply to such preliminary investigation.
>
> (2) If the Commission considers an investigation to be necessary, whether or not after a preliminary investigation in terms of subsection (1), the Commission shall publish a notice in the Gazette and in such newspaper circulating in the area covered by the investigation as the Commission thinks appropriate –
>
> (a) stating the nature of the proposed investigation; and
>
> (b) calling upon any interested person who wishes to do so to submit written representations to the Commission in regard to the subject – matter of the proposed investigation."

[146] The Competition Act of Zimbabwe thus expressly provides for a preliminary investigation, which is done without notice, and a formal investigation, which is

preceded by notices in the Gazette as well as the newspapers. Our Act is not explicit about a preliminary investigation, but this is implicit as section 35(2) provides:

> "Where the Authority decides to conduct an investigation, the Authority shall as soon as practicable, give written notice of the proposed investigation to every enterprise which is suspected to be a party to the practice to be investigated - - -".

[147] In Steel Authority of India the Supreme Court noted:

> "The investigation is directed with dual propose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously." (sic) (emphasis added)

We are not privy to the internal processes of the Authority before launching a formal investigation, but we would imagine that it also follows such stringent guidelines.

[148] The Office of Fair Trading (OFT) in the United Kingdom says in the OECD Policy Roundtables – Procedural Fairness: Competition Authorities, Courts and Recent Developments (2011):

> "We respond to all complaints we receive. We aim to give an initial response within ten working days of receipt in at least 90 per cent of complaints. Where a competition complaint raises more complex issues, that require longer to assess, we will respond within 30 working days of receipt. All complaints that we receive are given a complaint reference number.
>
> - - -
>
> These take into account the likely *impact* of our investigation in the form of direct or indirect benefits to consumers, the *strategic significance* of the case, the *risks* involved in taking on the case, and the *resources* required to carry out the investigation. The Preliminary Investigations team carries out an initial assessment of whether a complaint satisfies our Prioritisation Principles.
>
> - - -

We aim to keep complainants informed of the progress of their complaint and share with them our expected timescale for dealing with it. In all cases we aim to communicate to the complainant within four months from the date of receipt of their complaint whether we have decided to open a formal investigation.

- - -

Once we have decided to take forward a case within Markets and Projects, we may gather more information from the complainant, the company/ies under investigation, and/or third parties on an informal basis. This may involve sending an informal request for information, a request for clarification of information already provided to us in the complaint, or an invitation to meet with us. In these circumstances, where we are not using our formal powers to gather information, we rely on voluntary co-operation.

In the case of suspected cartels, however, we are unlikely to contact the companies under investigation informally as to do so may prejudice our investigation. Instead, we typically use our formal information gathering powers from the outset.

On the basis of the information we have gathered at that time, if we consider we have reasonable grounds for suspecting that competition law has been breached, we can open a formal

investigation. This allows us to use our formal information gathering powers." (emphasis added)
(http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20Authorities)

In Mosebola v. Attorney-General 1988 BLR 159 (HC) the High Court said:

"[A]n investigation is defined as the ascertainment of facts. - - - A preliminary investigation is merely to ascertain whether a prima facie case exists - - -."

[149] In their heads of argument, counsel for the second Respondent at paragraph 12 said:

"Furthermore, in terms of Regulation 10(3) of the Competition Regulations, the Authority must within a period of 30 days from receipt of the complaint decide whether or not to open an investigation. If the complaint was received on 23 October, the latest, as a matter of law, the investigation would have been opened was 22 November 2012. It is therefore beyond any shadow of doubt that at least, as a matter of law there was an ongoing investigation as at 21 November 2012."

A similar point was raised by counsel for the first Respondent at paragraph 4 of their substantive points in their heads of argument.

[150] Regulation 10 reads as follows:

> "(1) A person may make a complaint to the Authority or request the Authority to investigate a practice under section 35 by telephone, electronic mail, in person or through any other legal means of communication and may choose to be anonymous.
>
> (2) After receipt of the complaint or information, the Authority shall record such information or complaint in Form C set out in the Schedule and make a decision whether to conduct an investigation.
>
> (3) If the Authority decides not to conduct an investigation, the Authority shall, within 30 days from the date the complaint or request is made, inform the person of its decision and reasons for the decision." (emphasis added)

[151] The Authority has to apply its mind to the information or complaint received and decide whether the information is sufficient for it to carry out an investigation. An investigation is started in accordance with section 35(2) of the Act and regulation 10 only deals with the interaction between the Authority and a complainant,

especially since a complainant enjoys the default status of prosecutor before the Commission. Regulation 10(3) does not in any way deem or create a presumption (rebuttable or irrebuttable) that the Authority shall start an investigation 30 days after a complaint is submitted. The point raised by the Respondents' counsel has no merit and is therefore dismissed.

[152] Although section 36(5) (d) says an inspector who has a warrant to search premises should "allow the enterprise under investigation a reasonable period within which to obtain legal advice" this does not apply to the whole investigation, but only to that stage of the investigation. The enterprise gets the opportunity to state its defence before the Commission in the event that a proper referral has been made and a hearing is held.

[153] In Ansac v Botash (1), the SACT said:

> "This does not lead to unfairness for Ansac. The Commission's decisions to complete an investigation and to refer a complaint are merely acts preparatory to a hearing before the Tribunal. The respondent retains its rights to defend itself including through the filing of pleadings, the right to raise preliminary objections on points of law and a full right of audience before the Tribunal during its proceedings. In a fair contest if the Commission is unprepared or has a flawed case it will lose, but

we cannot stop it from entering the contest because we are asked a priori to form an opinion that it is not ready to win."

[154] Addressing the particular provisions of the South African Competition Act, and the principles of natural justice generally, at paragraph 24 in Yara (South Africa) (Pty) Ltd Brand JA, writing for the SASCA, said:

> "But as I see it, the CAC'S motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in *Simelane NO v Seven- Eleven Corporation SA (Pty) Ltd* 2003 (3) SA 64 (SCA) para 17, which in turn relies on statements in the decision of the Tribunal in *Novartis SA (Pty) Ltd v Competition Commission* (CT22/CR/13Jun01 paras 35-61). What these statements of *Novartis* make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm the opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission

required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."

[155] The Supreme Court of Swaziland observed thus in Eagles Nest (Pty) Limited:

"The Commission's functions are onerous and enormous. See sections 31 to 36 of the Act. This set out a host of anti-competition practices to be investigated by the Commission. Lord Diplock said this about the duty of fairness in the context of an investigation by the monopolies and mergers Commission in *Hoffan-La Roche & Co AG v The Secretary for Trade and Industry* 1975 AC 295 at 368D:

"The Commission makes its own investigation into facts. It does not adjudicate upon a lis between contending parties. The adversary procedure followed in a court of law is not appropriate in its investigations. It has wide discretion as to how they should be conducted. Nevertheless, I would accept it is the duty of the Commissioners to observe the rules of natural justice in the course of their investigation - which means no more than they must act fairly in giving to the person whose activities are being investigated reasonable opportunity to put forward facts and arguments in justification of his conduct of

those activities before they reach a conclusion which may affect him adversely."

- - -

Lord Dening MR has said that the rules of natural justice must not be stretched too far *(R v Race Relations Board, ex p. Selvarajan* 1975 IWLR 1686. The position is summed up thus by Lord Mustill in *R v Secretary of State for the Home Department, ex Doody:* (1994) 1 AC 531 at 560:

"From [the oft—cited authorities], I derive that (1) where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair in all circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is

taken with a view to producing a favourable result; or after it is taken, with a view to producing a favourable result; or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."" (sic)

[156] In Steel Authority of India the Supreme Court of India articulated the position in these words:

"It is difficult to state as an absolute proposition of the law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non-compliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is of compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of

compliance to the principles of natural justice in light of the above noticed principles. In the case of Tulsiram Patel (supra), this Court took the view that audi alteram partem rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the scheme of the relevant statutory provisions warrant its exclusion." (sic)

[157] In Brenco the SASCA had this to say:

"[29] Upon a proper interpretation of the BTT Act and the wide powers conferred upon BTT, BTT has both an investigative function and a determinative function in deciding whether to request the Commissioner of Customs and Excise to impose provisional anti-dumping duties and in making its final report and recommendations to the second appellant. Whilst BTT has a duty to act fairly, it does not follow that it must discharge that duty precisely in the same respect in regard to the different functions performed by it. When BTT exercises its deliberative functions, interested parties have a right to know the substance of the case that they must meet. They are entitled to an opportunity to make representations. In carrying out its investigative functions, BTT must not act vexatiously or oppressively towards those persons subject to investigation.

[30] In the context of enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973, investigatory proceedings, which have been recognised to be absolutely essential to achieve important policy objectives, are nevertheless subject to the constraint that the powers of investigation are not exercised in a vexatious, oppressive or unfair manner (cf *Bernstein and Others v Bester and Others NNO*). In *Leech and Others v Faber NO* a similar conclusion was reached. The court held that fairness did not require that in an enquiry there was a general right to information in the possession of the interrogator (in that case a creditor).

By analogy, on the facts of this matter, when BTT carried out its investigative functions, such as an on the spot verification exercise, the respondents had no right to be informed or to be present. Furthermore, when BTT took steps to obtain information or was approached and given information, here too there was no requirement that the respondents must be present. Nor is it required that every piece of information yielded as a result of the investigation had to be made available to the respondents."

The SASCA continued, with Zulman JA stating:

"[50] I also agree with the appellants' submission that the respondents' approach, accepted by MacArthur J, is an instance of inflexible formalism in the approach to natural justice, which is at odds with *Zenzile*. A much "more context-sensitive and nuanced approach", in the words of counsel for the appellant, is demanded in assessing what is required by natural justice and the principles of fair play.

[51] There is no requirement that BTT in the investigation of a matter must inform the parties of every step that is to be taken in the investigation and permit parties to be present when the investigation is pursued by way of the verification exercise. There is no unfairness to the respondents in permitting the officials of BTT to clarify information without notice to the respondents. To hold otherwise would not only unduly hamper the exercise of the investigation powers of BTT, but would seek to transform an investigative process into an adjudicative process that is neither envisaged by the BTT Act, nor what the *audi* principle requires.

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[59] It is basic to BTT's functions that it must carry out investigations; which involve procuring information. BTT may do so in various ways, as the BTT Act indicates. Much depends

upon the co-operation of the parties - both the petitioner and the respondents. That BTT's offices are visited by parties to discuss an ongoing investigation simply forms part of the investigative process. Such visits are not an occasion upon which any form of determination or adjudication takes place which might require that all interested parties be present to make representations." (emphasis added)

[158] Finally, the SACT adverted to this point in Norvatis SA (2 June 2001) when, at paragraph 57, it said:

"Thus if one looks at the complaints procedure holistically, in accordance with the analysis in the **Brenco** case, and not in piecemeal-fashion, one comes to the conclusion that, on existing case law which is binding on the High Court, the applicants' argument that it is entitled to administrative justice at the complaint referral stage has no prospect of success before the High Court. Their application attempts to transform an investigative process into an adjudicative process which, in the words of the court in *the **Brenco** case "is neither envisaged by the BTT Act* (read **Competition Act**), **nor what the audi principle requires**." (emphasis added)

[159] Both the investigative process and the referral, as already pointed out in this decision, are threshold steps which require a serious application of the mind. The referral leads to the adjudicative process through a hearing before the Commission in consonance with section 9 (2) (a) of the Act which says the Commission shall "adjudicate on matters brought before it by the Authority under this Act". This could be qualified to say matters "properly brought before the Commission." This is because section 39 of the Act provides that a matter must be referred by the Authority to the Commission "[w]ithin one year after an investigation is opened by the Authority." In terms of section 39 if the Authority does not make a referral within one year of starting a formal investigation it "shall be considered to have issued a notice of non-referral." Since section 39 (5) uses the word "shall", it is an irrebuttable presumption. The Authority may, on its own, deliberately decide not to refer, in which case it has to conclude the necessary and prescribed formalities. This is important as this then, in both cases of non-referral by the Authority, bestows on the complainant the right to directly refer the matter to the Commission.

[160] The period of one year cannot be extended under any circumstances, except in accordance with the only two occasions set out in the Act in section 39(4) as follows:

> "In a particular case –

(a) the Authority and the complainant may agree to extend the period under subsection (2); or

(b) on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period."

[161] A referral properly brought before the Commission, that is, within one year of the start of a formal investigation, is what confers on the Commission the jurisdiction to hear the merits of the matter.

[162] Martin Brassey et al in Competition Law at page 306 have noted:

> "The one-year time-period may be extended by agreement with the complainant or on an application to the Tribunal. It may not, however, be extended after the one-year period has lapsed." (emphasis added)

In other words, the Authority has to apply to the Commission for an extension of the period for investigation before such period lapses. Secondly, no authority can resuscitate the period of investigation if it has lapsed, and no extension can be given once it has lapsed.

[163] In Loungefoam the SACAC at paragraph 33 said:

"If a complaint was made against Feltex in respect of the chemical cartel then it was not referred to the Tribunal within one year of the initiation. It would follow that in terms of s 50(5) there has been a deemed non-referral of this complaint and it is not open to the Commission to resuscitate it." (sic)

[164] The SACAC made the same point at paragraph 60 and it said:

"The second insuperable problem is that the application to amend and introduce this further complaint was only made on 16 February 2010. That was substantially outside the one year period for referring a complaint to the Tribunal prescribed in s 50(2) of the Act. Accordingly, insofar as that complaint initiation document embodies this particular claim of a breach of the Act, the Commission must be regarded as having issued a notice of non-referral in respect of it and it was impermissible for it to refer that matter to the Tribunal at that stage."

At paragraph 5 the SACAC observed:

"The date of initiation of a complaint is accordingly of vital importance in applying s 67 (1) of the Act . That is so whether the section is construed as the Tribunal has done as one akin to prescription or whether it is construed as going to the

jurisdiction of the Commission to initiate and the Tribunal to entertain a complaint of anti- competitive conduct. In either case the critical date for determining the three year period is the date of initiation of the complaint."

[165] In Sappi Fine Paper (Pty) Ltd (Case No.: 23/CAC/SEPO2), the SACAC simply addressed the point in these words:

"37. The first respondent is given a period of one year, which may be extended, to investigate and refer the complaint to the Tribunal. If the first respondent fails to do so within the prescribed period, it is in terms of section 50(5) deemed to have issued a certificate of non-referral."

[166] The period of one year is sacrosanct, and once it has lapsed it cannot be revived, condoned, extended or resuscitated. Similarly, prescription of this one year period cannot be interrupted.

[167] The SACT in SAD Holdings Limited and Another v Competition Commission [2001] ZACT 40 (23 October 2001) concluded:

"The rule it is clear does not allow that discretion post facto and we could only extend the period during the one-year

period if we were asked to do so on application in terms of Rule 19(3) (b).

This section however cannot be utilised to defeat non-compliance with threshold jurisdictional issues, which relate to whether the Tribunal or Commission have jurisdiction to determine a matter. The section applies to matters over which we already have jurisdiction and not those where jurisdiction may have lapsed. Nor does the express language of Rule 19 (3), which as we have seen above provides for a specific time extension remedy, suggest that any other is appropriate in those circumstances.

We come to the conclusion that the Commission was not precluded by operation of law from continuing its investigation and that in the absence of any discretion on our part to condone their non-compliance within the time period contained in Rule 19 (2) their referral was not made in time."

[168] Prescription is rarely interrupted, hence in Circuit Breakers Industries Ltd v Numsa obo Hadebe and Others (Case No: JR 1958/08), the Labour Court of South Africa at paragraph 11 observed:

"A number of decisions of this Court confirm that the filing of a review application does not interrupt prescription."

[169] At paragraph 101 in Road Accident Fund & Another v Mdeyide the SACC once again reiterated the rationale for time-bars or prescription:

"Time bars and prescription periods limit the right to seek judicial redress. The main object of these limitations is no doubt to create legal certainty and finality between the parties after a lapse of time ---".

[170] In Mohlomi v Minister of Defence ((CCT41/95) [1996] ZACC 20; 1996 (12) BCLR 1559; 1997 (1) SA 124 (26 September 1996), the SACC once again noted at paragraph 12:

"Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which section 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there ---" (emphasis added)

[171] The Second Chamber of the General Court (of the European Union) in KME Germany and Others v Commission (Case C-272/09 P) in its judgment of 8 December 2011 said at paragraph 104:

> " It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter parties*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas." (emphasis added)

[172] In Competition Commission v Pioneer Foods [2010] ZACT 9 at paragraph 86 the SACT said:

> "Section 67 (1) is silent on the issue of onus. However the position in South African law is abundantly clear. A court shall not of its own motion take notice of prescription. In other words if a party wishes to rely on prescription then it is required to raise it as a special plea. Moreover it is for a party

invoking prescription to allege and prove the date of inception of the period of prescription." (emphasis added)

[173] In short, a non-referral because of time-bar or prescription has to be pleaded specifically by the party seeking to rely on it, and then factually demonstrate why it contends that the matter is time-barred. As a result of this position, the Commission does not mero motu raise prescription or time-bar. In their papers the Respondents argued that the Commission can do so, but this is not supported by applicable case law.

[174] The SACT again, this time in Norvatis SA (2 June 2001) made this point at paragraph 30:

> "In **Protea International (Pty) Ltd v Peat Marwick Mitchell & Co [1990] ZASCA 16; 1991 (2) SA 566 (A)** the Appellate Division of the Supreme Court of South Africa (the predecessor of the Supreme Court of Appeals) found that an extinction of a right by prescription is a matter of substantive law, and not of procedure. Clearly a decision that the Commission is time barred from referring the complaint means that the right of the Commission to refer the complaint, contemplated in section 50 of the Act as amended, has prescribed. Furthermore, it means that the right of the complainants, 2nd to 10th respondents in this matter, to have their complaint pursued by the

Commission on their behalf before the Tribunal has also prescribed. According to the decision of the AD in the **Protea** case, which is binding on the High Court, this is a matter of substantive law."

[175] Prescription of course has devastating consequences for the party against whom it is asserted. It immediately brings an end to its case and there is no further recourse. For the Commission, it means it no longer has jurisdiction to deal with the matter. This was illustrated by the Industrial Court in **Ditsele** when it said:

"The court therefore finds that any claim the applicant may have had against the respondent as a result of the termination of contract of employment --- has prescribed as a result of extinctive prescription, which means that any such claim has been rendered unenforceable by the lapse of time and that the court no longer has any jurisdiction to determine this trade dispute."

Prescription therefore simply shuts the door.

[176] In Norvatis SA (2 June 2001), the SACT said at paragraph 9:

"The parties appearing before us in this matter have devoted considerable time to a discussion of weighty jurisdictional

matters. In essence the applicants allege that the Commission acted ultra vires by referring this matter to the Tribunal outside the prescribed time limit. The determination of whether the Commission was competent or not to do so is a jurisdictional issue ---"

A successful referral means that the Commission has jurisdiction, and a successful plea of prescription means that the Commission has no jurisdiction.

[177] The SASCA in Woodlands Dairy made this point at paragraph 12:

"The Tribunal, after a hearing in relation to a prohibited practice, may make an appropriate order in terms of s 58 (1). Such a matter may reach the Tribunal as a result of a referral of a complaint to it by the Commission (s 50 (1). In other words, a complaint referral by the commission is --- a jurisdictional fact for the exercise of the tribunal's powers in respect of prohibited practices." (emphasis added)

[178] The above point was underlined by the SACAC in Glaxo Wellcome (21 October 2002) when at paragraph 29 it said:

"The submission of particulars of a complaint to the Commission is the jurisdictional fact or precondition which

must be satisfied before the Tribunal can exercise its powers over a respondent."

At paragraph 30 it observed:

> "The Tribunal may only entertain a referral properly referred to it and in terms of the Act. The Tribunal's inquisitorial powers cannot be extended to circumvent the clearly defined complaint procedures set out in the Act. If the Tribunal does not have jurisdiction to consider allegations of a prohibited practice, it cannot use its inquisitorial powers to empower it to determine whether or not a respondent has omitted that prohibited practice." (emphasis added)

[179] The above point is again made by the SACAC at paragraph 36:

> "If the Tribunal lacks jurisdiction then it makes no sense to put the respondents to the extent of filing answers to the alleged conduct only to have the allegations struck out at a later stage i.e. at a pre-hearing or the hearing itself."

[180] All this in all situations goes to the root of all matters that are referred to the Commission. It has to have jurisdiction. In Allens Meshco, again the SACAC said at paragraph 34:

"The judicial function, in contrast with the legislative function, is to determine live disputes between the parties properly before the court. Centuries of experience have also taught that this is the best way to determine and develop the law." (emphasis added)

In Computicket the SASCA noted at paragraph 13, in the words of Brand JA:

"I say that because, if the complaints were not properly referred by the Commission in terms of s 50 (2), the Tribunal would have no jurisdiction to entertain them."

[181] The SACAC made the following observation at paragraph 26 in Netstar (Pty) Limited and Others v Competition Commission and Another (99)/CAC/ MAY10, 98/CAC/MAY10, 97/CAC/MAY10 [2011[ZACAC 1; 2011 (3) SA 171 (CAC) (15 February 2011):

"Even where reliance is placed on the same evidence in support of these distinct cases it requires separate evaluation. There are also jurisdictional and procedural reasons for a careful observance of the distinction. The jurisdictional reason lies in the path by which a complaint reaches the Competition Tribunal. The process starts with the Commissioner initiating a

complaint in terms of s 49 B (1) of the Act or some other person submitting a complaint to the Commission under s 49 B (2) (b) of the Act. In either case the complaint must be investigated and, if the Commission concludes that a prohibited practice has been established, must be referred to the Tribunal under s 50 of the Act. The Tribunal's jurisdiction is confined to a consideration of the complaint so referred and the terms of that complaint are likewise constrained by the terms of the complaint initiated by the Commissioner or made by some other person."

[182] The Commission, therefore, being an institution set up to adjudicate competition or antitrust law matters in the public interest, will not decline to hear a matter unless it is proved that a matter is not properly before it. However, in the event that it is shown that it does not have the jurisdiction to deal with a matter, then it will consider that such a matter has been non-referred in accordance with the law.

[183] In their papers, counsel for the Applicant have argued that by giving its order of 10th September 2014 the Commission in essence extended the referral period. They have said:

"37. Even if the Commission were to disagree with this interpretation, there is yet another reason why the respondents' point cannot succeed. We have already referred

to the fact that the time period within which a complaint may be referred may be extended by the Commission on the application of the Authority. See: section 39(4) (b).

38. When this matter came before the Commission on 10th September 2014 the issue of late filing did not arise. It did not arise because the parties understood fully well that the referral had been within the stipulated one year period. That being the case, the Commission was only seized with the question of a non-compliant affidavit; (see paragraph 21 of the 1st respondent's heads of argument). As a consequence, the Commission as it is empowered under section 39 (4) (b) to do, extended the referral period by 14 days.

39. Not only are the parties bound by this order extending the referral period by 14 days, both sides have already acted on it. It can only be mischievous conduct on the part of the respondents to be arguing at this stage of the proceedings that the referral was out of time, when the Commission has already directed as it did.

[second paragraph] 39. It is trite learning that where time limits are prescribed by a statute, rules or regulations, if a court seized with the matter pronounces varied time lines (restricted

or extended) then the order of court takes precedence and the other time limits are automatically superceded." (underlining in original)

[184] No authorities were cited to support these contentions by counsel for the Applicant.

[185] Section 39 of the Act provides for the only two instances where the referral period may be extended and these are:

(a) where the Authority and the complainant agree; and

(b) in terms of section 39 (4) (b) where "on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period." (emphasis added)

The Authority did not apply to the Commission for the period to be extended. In terms of the law, the Commission does not have the power, on its own, to extend the referral period.

[186] The order of the Commission of the 10th September 2014 is very short and its relevant parts are reproduced below:

"1. The Points *in Limine* raised by both the 1st Respondent and the 2nd Respondent are upheld.

2. The Applicant is given leave to reinstitute the matter if minded to do so within fourteen (14) days of the Order."

[187] The Respondents themselves indicated that they would not object if the Applicant reinstated the matter since it had admitted that its affidavits were incorrectly drafted.

[188] The words "if minded to do so" are clear and simply gave the Applicant the opportunity to properly advise itself whether to reinstate the matter or abandon it. In the event, it chose to pursue the matter.

[189] It would be apposite here for the Commission to refer to a passage in Martin Brassey et al in Competition Law at page 306 where they discuss the case of SAD Holdings Limited and Another v Competition Commission [2001] ZACT 40 (23 October 2001) before the SACT where they say:

"There the respondents in a complaint accepted (under the old Act) by the Commission on 13 January 2000 applied to the High Court for an order declaring that the Act did not apply to the conduct in question. The High Court ruled in favour of the respondents on the 15 March 2000. The Commission

thereupon suspended its investigation of the complaint on grounds of lack of jurisdiction. The complainants then appealed the High Court ruling to the Supreme Court of Appeal (SCA). The SCA upheld the appeal on 29 September 2000, ruling that the High Court had erred in holding that the Act did not apply to the respondents' conduct. The Commission considered that the SCA's ruling had "reinstated its jurisdiction" and immediately recommenced its investigation. The Commission referred the complaint against the respondents to the Tribunal on 17 July 2001. In response to the respondent's argument that the complaint referral fell outside the one-year time provided for in s 50 of the Act, the Commission argued that this was not so if the period during which its jurisdiction had been 'suspended' was excluded. While expressing sympathy with the Commission' s argument, the Tribunal found it had no discretion to extend the one - year time limit after its lapse. The Tribunal accordingly ruled that the Commission had no jurisdiction to refer the complaint and that it must be deemed to have issued a notice of non-referral to the complainants."

It has to be pointed out that no court order had been issued ordering the Commission to suspend its investigations.

[190] In light of the authorities canvassed above and the clear terms of the order of 10th September 2014, we reject the argument advanced by the Applicant in this respect.

[191] The timelines in this matter are as follows:

(a) in terms of paragraph 9 of the Applicant's Founding Affidavit ("Founding Affidavit") (deposed to by Ms Goitseone Modungwa on 2nd October 2014), the first complaint was received on 23 October 2012, and a second complaint was received in December 2012 (paragraph 21 of the Affidavit);

(b) in terms of paragraph 12 of the Founding Affidavit, a docket was then opened in respect of the first complaint and preliminary enquiries commenced immediately. At paragraph 13 she says "[p]rocedurally, after receiving a complaint, the Authority will conduct a preliminary assessment of the allegations to establish whether a prima facie case of prohibited conduct can be sustained. Where the Authority has reasonable grounds for suspecting that an enterprise has engaged in a horizontal agreement prohibited in terms of s 25 of the Act, it will open an investigation by giving written notice in accordance with s 35 (2) of the Act. In the present matter, the initial preliminary assessment revealed that there was no adequate information to found an investigation. As such an investigation was not opened immediately after receiving the complaint referred to above.

14. However, on **21 November 2012**, notice in writing in terms of s. 35 (4) of the Act to the Public Procurement and Asset Disposal Board (PPADB), for the attention of the Chief Executive Officer Ms Bridget P. John, requiring PPADB to produce to the Authority with any document pertaining to the Tender in question.

[Section 35 (4) of the Act itself in part reads:

> "For purposes of an investigation under this section, the Authority may, by notice in writing served an any person considered by the Authority to be relevant to the investigation, require that person –
>
> (a) to provide the Authority with any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation ---" (emphasis added)]

- - -

17. As a result, the applicant then focused the attention on how the two respondents had won the tender. **In June 2014**, search warrants were sought and obtained from the magistrate court in Gaborone for purposes of conducting a search at the business premises of the suspected bidders.

[The relevant provisions on search warrants are at section 36 of the Act and in part state:

"(5) Upon first entering any premises under a warrant, the inspector shall –

(c) provide on request, a document from the Authority indicating the subject matter and purpose of the investigation and the nature of the practice under investigation;

(d) allow the enterprise under investigation a reasonable time within which to obtain legal advice." (emphasis added)]

18. --- The four offices were raided simultaneously on **10 July 2013**.

---

20. After the search aforesaid was concluded, an investigation was opened against the 1st and 2nd respondents on 25 July 2013 as there was prima facie evidence of collusion they were both issued with Expost Notice of Intention to Investigate in terms of s 35 (2) and (3) of the Act."(sic)

c) in the Applicant's Supporting Affidavit ("Supporting Affidavit") accompanying the application for search and seizure warrants at the Magistrate's Court in Gaborone, deposed to on the 14th June 2013 by Ms

Magdeline Gabaraane, in her capacity as the Acting Chief Executive Officer of the Authority, says at the following paragraphs:

> "10. The Applicant is desirous of obtaining documents from the said entities that are situated at different premises, as detailed in the draft order. The said documents will assist the Applicant in carrying out its investigations further.
>
> 11. The Applicant therefore prays that the Honourable Court grant warrants for search and seizure authorizing the employees of the Applicant to execute them accordingly." (emphasis added)

d) the referral from the Authority to the Commission was made on the 23rd July 2014.

[192] In Hi Pro Sales at paragraphs 16.3 and 16.4 we said:

> "16.3 The notice requirement under section 35(2) is not in our view a pre-requisite to the Authority's right to commence investigations. That notice is not a requirement to commencing investigations is more evident when regard is had to the provisions of section 35(3), which dispenses with the need to give notice if doing so shall be prejudicial to the investigations.

16.4 Section 35(3) is in consonance with regulation 11(2) of the Competition Regulations (2011), which provides that, "notwithstanding sub-regulation (1), the Authority may carry out an investigation **without giving notice of its intention to investigate**, where it considers that to give notice would materially prejudice its investigation". (emphasis provided) Thus, both by regulation and law, no notice is required to commence an investigation."

[193] Any step taken by the Competition Authority that directly implicates section 35(2) to section 38 of the Act, or from which under all objective circumstances can be deduced as invoking those provisions, whether notice has been given or has not been given, amounts to the start of a formal investigation.

[194] Section 35(5) deals with the steps to be taken by the Authority if it decides not to investigate after having received a complaint or a request to investigate. If it was intended that the Authority could take steps under section 35(2) to (4) and still not investigate the Act would have clearly said so. However, since section 35(2) to (4) marks the start of a formal investigation, this is why these are not covered by section 35(5).

Order

[195] In terms of the Act when the Authority wrote to the PPADB on the 21st November 2012, as well as applying to the magistrate's court on 14th June 2013 for search and seizure warrants, this was in furtherance of an ongoing investigation.

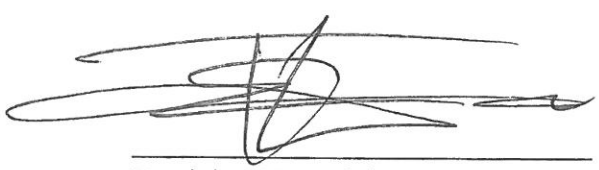
[196] We find that an investigation in this matter started on or about 21st November 2012, and a referral to the Commission should have been made by the 20th November 2013.

[197] There has been a non-referral and the Commission has no jurisdiction to hear the matter.

[198] There is no order as to costs.

[199] A party aggrieved by this decision may appeal within fourteen (14) days.

Decision read in public session in Gaborone on this 12th day of May 2015.



Tendekani E. Malebeswa
(Presiding Member)

I agree

Gaylard Kombani
(Member)

I agree

Dr Jay Salkin
(Member)

I agree

Dr Selinah Peters
(Member)

I agree

Mrs Thembisile Phuthego
(Member)