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APPELLATE HIERARCHY: COMPETITION MATTERS

1. INTRODUCTION

During deliberations on the Constitution Seventeenth Amendment Bill [B7-2010] at a meeting of the Portfolio Committee on 25 July 2012 certain concerns were raised around Clause 4 of the Bill, which amends section 168(3) of the Constitution to provide 'the Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to a High Court of South Africa, *except where an Act of Parliament provides otherwise*.'

These concerns focused on the potential impact of the proposed amendment on the current appellate regime for the 'specialist courts' and in particular Competition matters including:

- The implications of the amendment on decreasing the influence and jurisdiction of the Supreme Court of Appeal (SCA).
- The need to eliminate excessive layers of appeal.
- Current problems within the competition hierarchy and the effectiveness of the existing regime.

This paper considers briefly some of the key cases that have impacted on the somewhat troubled dynamic that exists between the Competition Commission, Competition Tribunal, Competition Appeal Court and the Supreme Court of Appeal.

2. PURPOSE OF THE COMPETITION ACT

The stated purpose of the Competition Act 89 of 1998 (the Act) is to promote and maintain competition in South Arica in order to promote the efficiency, adaptability and development of the economy; provide consumers with competitive process and product choices; promote employment and advance the social and economic welfare of South Africans; expand the opportunity for South African firms participation in worlds markets; ensure small and medium sized enterprises have an equitable opportunity to participate in the economy; and promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[1]

Specifically the Act endeavours to restrain particular trade practices which undermine a competitive economy.

3. REGULATORY AUTHORITIES (BRIEF BACKGROUND)

The Competition Act provides for three agencies to enforce and implement competition regulations:[2]

[1] Competition Act 89 of 1998 section 2
[2] Hartzenburg T, Competition Policy, (TRALAC) http://www.npc.gov.za/MediaLib/Downloads/Home/Tabs/Diagnostic/Economy2/Competition%20policy%20review.pdf

- *Competition Commission* – is the investigatory agency which is empowered to investigate control and evaluate restrictive practices, abuses of dominant positions as well as mergers and acquisitions. The Commission investigates complaints that it initiates itself as well as those it received from members of the public. It is intended to be independent from the Department of Trade and Industry and its decisions can be appealed to the Competition Tribunal and the Competition Appeal Court.

- *Competition Tribunal* – is a specialist adjudicatory body of first instance with inquisitorial powers which adjudicates matters referred by the Commission and (in certain circumstances by a complainant under sections 51(3) and 51(4) of the Act). The key functions of the Tribunal are to grant exemptions, authorise and prohibit large mergers and adjudicate prohibited practices and mergers under Chapters 2 and 3 of the Act respectively. It is empowered to hear appeals from or review any decision of the Commission and may grant orders for costs on matters presented to it by the Commission.[3]

- *Competition Appeal Court* – has status equivalent to a high court and considers appeals or reviews of decisions rendered by the Competition Tribunal.[4] It is composed of sitting judges drawn from the various provincial divisions.

4. THE APPELLATE HIERARCHY: RELEVANT SECTIONS OF THE COMPETITION ACT

When the Competition Act was drafted the clear intention was that there would be two specialist bodies, the tribunal and the Competition Appeal Court (CAC). The CAC would be a court of final jurisdiction in matters dealing with the Act - save in questions of jurisdiction where an appeal lay to the SCA and in respect of an constitutional issue in which the Constitutional court was the court of final jurisdiction.

This is set out in Section 62 of the Act which deals with appellate jurisdiction:

- In section 62(1) the Act specifies matters in which the Tribunal and CAC 'share exclusive jurisdiction' in considering matters relating to Chapter 2 (prohibited practices), Chapter 3 (mergers) and Chapter 5 (investigation and adjudication procedures) of the Act. Section 62(3)(a) provides that the 'jurisdiction of the CAC is final over a matter within its exclusive jurisdiction in terms of section 62(1). 'As in the case of the relevant sections of the Labour Relations Act these provisions undoubtedly constitute a statutory endeavour to vest partial final appellate jurisdiction in the CAC.'[5]

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[3] The President, on the recommendation of the Minister of Trade and Industry appoints ten tribunal members to serve a term of five years. Each matter referred to the Tribunal will be assigned to a panel composed of three members of the Tribunal. Members of the Tribunal need not be qualified lawyers: they may have qualifications and experience in economics, law, commerce, industry or public affairs. However, when assigning any matter referred to the Tribunal, the Chairperson must ensure that at least one member of the three-member panel is a person who has legal training and experience. The Chairperson will designate one of the three members to preside over each proceeding.

[4] The CAC heard its first appeal on 11 September 2000. The court typically sits four times a year during the High Court recess. Current CAC judges are the Judge President DM Davis; Mr Justice CN Patel; Ms Justice LM Mailula; Ms Justice NC Dambuza (Acting); Mr Justice M Joffe (Acting); Ms Justice T Ndita (Acting); Mr Justice MJD Wallis (Acting) and Mr Justice D Zondi (Acting)

[5] American National Soda Ash case (2)

- Section 62 (3)(b) provides that while the CAC's jurisdiction is not exclusive or final in respect of section 62(2) matters which refer to jurisdictional matters or any constitutional matter. An appeal from the CAC in respect of a section 62(2) matter lies to the Supreme Court of Appeal (SCA) or the Constitutional Court (if it concerns a constitutional matter.) This, in terms of section 62(4), is subject to leave to appeal being obtained from the CAC (or if the CAC refuses leave with the leave of the SCA or Constitutional Court).[6]

However, the attempt by the drafters through section 62(3)(a) to vest final appellate jurisdiction in the CAC with respect to section 62(1) matters failed to take into account section 168(3) of the Constitution which provides the SCA is the highest court of appeal except in Constitutional matters.

4.1 APPELLATE HIERACHY FOR COMPETITION MATTERS RESOLVED IN THE ANSAC CASE

In **2005** the issue of the appeal mechanism for competition matters came to the fore in a case before the SCA of **American Natural Soda Ash Corporation and Another v The Competition Commissioner and Others.**[7]

In their judgement in the **American Natural Soda Ash** case Mpathi DJP and Cameron J endorsed a recent judgment they had written on the SCA's appellate powers in terms of the Labour Relations Act in **NUMSA v Fry's Metals (Pty) Ltd.**[8] They were of the view in **NUMSA v Fry's Metal** that:

- Any legislative endeavour to vest final appellate jurisdiction in an appeal court other than this court has to be judged in light of the appellate structures created by the Constitution.[9]
- The Constitution does not envisage that legislation can assign the jurisdiction of this court piecemeal or whole sale to other specialist tribunals with final appellate jurisdiction.[10]
- Once appellate jurisdiction falls to be exercised, this court is empowered to exercise it finally (apart from the CC).

The two judges then proceeded in **American Natural Soda Ash** to find in respect of competition matters that:

- Section 1(2)(a) of the Competition Act provides expressly that the Act must be interpreted 'in a manner consistent with the Constitution.'
- The apparent attempt to vest exclusive jurisdiction in the CAC in respect of the interpretation and application of Chapters 2,3 and 5 of the Act must thus be read so as to be consistent with the Constitution and the finality conferred on the CAC by s62(3)(c) is thus **subordinate** to the appellate powers the Constitution confers on the SCA.

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[6] Competition Law Lexis Nexis
[7] 2005 (6) SA 158 (SCA)
[8] NUMSA v Fry's Metals (Pty) Ltd 2005 (5) SA 433 (SCA)
[9] ANSAC para [11.1]
[10] Ibid para 11.5. In Numsa V Frys Metals the SCA referred to the possibility that if, despite the provisions of s168(3), the Labour Relations Act creates a final court of appeal in labour related matters to the exclusion of the SCA's appellate powers, it would have to follow that the legislature could create final courts of appeal also in other areas – crime, welfare, environment, land personal injuries....family law and administrative law. The list is theoretically endless. The entire jurisdiction of this court could on this approach be assigned piecemeal or wholly to one or more tribunals of similar authority. [para 26]

The SCA did, however, hold that it would only hear appeals from the Competition Appeal Court on application for **special leave to appeal** and **higher thresholds** than normal would apply in deciding to hear an appeal from the CAC on the basis that:

- The SCA's inherent constitutional power to protect and regulate its own process (as set out in section 173 of the Constitution) empowers it to require applicants for leave to appeal from specialist courts to demonstrate in addition to a 'reasonable prospect of success' that there are special circumstances indicating that a further appeal should lie.[11]

- The benefit of the institutional expertise and the imperative of expedition strongly indicate that the path from a specialist tribunal to this court should not be untrammelled - otherwise the expeditious resolution of disputes would be unconscionably delayed and the justified objects of the Act impeded.[12]Consequently, an application will have to be made to the SCA for the grant of a special leave to appeal from the CAC on the basis that:
    - not merely there is a reasonable prospect that the decision of the CAC will be reversed
    - but the applicants can establish some additional factor or criterion such as that the matter is of very great importance to the parties or of great public importance.[13]

The court emphasised the fact that applicants would already have had a full appeal before the CAC would normally weigh heavily against the grant of leave as well as the demands of expedition (based on public interest demands that disputes about competition issues be resolved speedily) would add further weight to the SCA's considerations for a grant of appeal.

SOME CONSEQUENCES OF THE ANSAC DECISION:

Davis JP has noted that although this may have been a correct determination of the law it has placed resolutions of disputes in terms of the Competition Act 'in a more cumbersome position'.

He contends that '*competition disputes raise issues of acute specialist complexity. They often represent the interface between law and economics and accordingly the legislature intended that specialist courts would deal with these technical questions.*'[14]

It is his view that both the role of specialist bodies and the expedition of resolution of disputes have been significantly diminished. He raises the concern that matters from the CAC may be appealed to either of the SCA or the CC. '*Forum shopping is not the best solution for a coherent jurisprudence.*'

David Lewis has commentated as follows:[15] 'any expedition that a specialist court may have brought was severely compromised when the SCA decided that it and not the CAC was the final court of appeal. So now there is a further stage of appeal in competition matters.[16]

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[11] ANSAC para [19.1]
[12] ANSAC para [19.2]
[13] Ibid
[14] The Competition Commission vs Yara SA (Pty) Ltd and Omnia Fertilizer Ltd (11/11/2011) (93/CAC/Mar10)

"it is rumoured that an imminent constitutional amendment will soon remove the SCA from the competition equation. This may free the CAC to take a more robust approach to the interpretation of the Act. However, I am not sure that this would resolve the issue of expertise although it may speed up decision making.[17]

5. THE HEART OF THE MATTER: CONSEQUENCES OF THE CURRENT APPELLATE HIERARCHY

As the SCA in the **American National Soda Ash** case made clear - the SCA will only hear appeals from the CAC through a grant of a special leave to appeal – so the critical issue is not one of the SCA overturning large numbers of CAC judgements but rather the perceived formalistic or restrictive approach taken by the SCA in respect of its interpretation of the Competition Act in certain key cases and the impact this has had on the CAC and Competition Tribunal jurisprudence.

The tensions that have developed between the competition authorities and appeal bodies have focused particularly on prohibited practice proceedings and the manner in which complaints relating to prohibited practices in terms of the Competition Act are initiated, investigated, referred and prosecuted by the Competition Commission as well as adjudicated by the Competition Tribunal. A number of complaint referrals by the Commission have been set aside on the ground that the Commission did not follow the procedure required under the Act or has exceeded its powers.[18] A brief discussion of these key cases will follow in the hope they might provide some perspective on the issues that have arisen.[19]

➢ **Woodlands Dairy cases[20]**

This matter concerned alleged 'cartel activities' in the milk industry. At the heart of the issue was the process of **initiating complaints** by the Commission.[21] The Commission issued summonses

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[15] Lewis D, Thieves at the Dinner Table: Enforcing the Competition Act (A Personal Account) 2012. It should be noted that Mr Lewis (who chaired the Tribunal for ten years) in his personal account of his time at the Tribunal has expressed views that are highly critical of the CAC. He notes that the upshot is that we have a specialist expert investigatory body (The Commission) and a specialist expert adjudicator of the first instance (the tribunal), but a court of appeal that is composed entirely of generalist judges which enjoys (or used to enjoy) exclusive appellate jurisdiction in competition matters and has shown inadequate deference to the Tribunal. When the Act was drafted it was decided a special division of the CAC would enjoy exclusive jurisdiction, however the structure and composition of the court differ significantly from that envisaged by the policy makers in that experts in economics and commerce should be appointed to the court.[15] However the JSC insisted on the appointment of Judges.

[16] Lewis D p69

[17] Ibid p74

[18] The Commission has the power to initiate a complaint against a prohibited practice. On receiving a complaint or information from a third party about a prohibited practice, the Commission must initiate an investigation (section 49B of the Act) the matter must be referred to the Tribunal or closed within a year. "On the setback side for the Commission, various recent higher court decisions have led to a very strict interpretation of the powers of the Commission to refer complaints to the Tribunal. As a result a number of important complaint referrals brought by the Commission have been dismissed by the higher courts on procedural grounds and will not be tried on their merits before the Tribunal.' Competition Tribunal, Annual Report 2010/11

[19] Please note that competition matters are highly complex and this paper simply tries to identify and provide a broad picture of what has emerged from key case law it does not pretend to provide an in-depth analysis of the issues of competition law and policy.

[20] The CAC upheld its validity making the point that in cartel cases the identity of all the members may be hidden at the time of the complaint initiation and hence a complaint into the industry as a whole was competent.

[21] A firm engaged in prohibited practices and cartel behaviour may be subject to investigation and complaint proceedings in terms of Chapter 5 of the Competition Act 98 of 1998 (Competition Act). A complaint may be initiated by the Competition Commission (Commission) or a private party. The Commission may initiate a complaint against an alleged prohibited practice of its own accord or after receiving information from another person. A private party (which includes a firm, an individual or association of firms or individuals) alleging that a firm has committed a prohibited

and subsequently initiated a complaint against Woodlands and Milkwood Dairies following a complaint that had initially cited other parties in the dairy industry. Neither Woodlands nor Milkwood Dairies had been mentioned in the Commissions initiation document that preceded a summons. Woodlands and Milkwood Dairies argued before the Competition Tribunal that the investigation by the Competition Commission had been undertaken under the umbrella of a generalised complaint that had specified the milk industry rather than the particular named companies and cited general rather than specific contraventions of the Act. In addition, the companies also argued that the summonses that were then issued by the Commission were overbroad and vague. The Tribunal did strike down the summonses on the basis they were overbroad and vague but dismissed applications to set aside the complaints initiated by the Commission.

Woodlands and Clover appealed to the CAC.[22] The CAC was unsympathetic to the concerns they raised around the process of **initiating complaints** and contended that there was no requirement on the Commission to specify the provision of the Act under investigation or to frame the investigation against a specific entity '*if the appellants submissions were correct it would be very difficult to initiate proceedings against cartels.*'

The companies involved then applied to the CAC for leave to appeal to the SCA. The CAC noted that:

> 'It is important before traversing the merits of this application to emphasise that in this matter it is special leave that is required from this court to proceed to the SCA. There is good reason for this onerous test. The Act envisaged that this court, save for constitutional challenges would be the final court for adjudication of competition disputes. The reason for this approach and the policy upon which they are predicated are, in my view manifestly correct. Briefly they can be set out thus: the Act set up a specialist body competition tribunal and a specialist court form which decisions of that body could be appealed and finally determined. Competition matters require expedition....Whatever the Act's design, however, the Constitution provided that the SCA has jurisdiction to determine appeals from this court. Mindful of the scheme of the Act, the principle of special leave was, however, instituted.'

In respect of the appellants argument that the Commissions approach to the initiation of complaints was too general the Court was quite unsympathetic:

> 'Cartel behaviour is not found in the behaviour of one firm. It is to be found in the behaviour of a number of firms. There is nothing in the Act to suggest that an investigation against an industry that is an industry consisting of a number of firms is not a matter which is envisaged by the Act...to the contrary. Consider if the appellants submissions were correct it would be very difficult to initiate proceedings against cartels...This kind of Austinian formalism is the kind of jurisprudence employed during apartheid and is not reflective of the

practice can either: submit information concerning the alleged prohibited practice to the Commission; or submit a complaint in respect of the alleged prohibited practice to the Commission. Once a complaint is initiated, the Commission appoints an inspector to investigate the complaint.

[22] Woodlands and Another v The Competition Commission (Case) CAC [para 26] The appellant argued that 'the initiation statement sought to invoke draconian powers of sections 49 A and B without specification against whom they may be applied.

purposive jurisprudence which seeks to balance the exercise of power, captured in the doctrine of proportionality which is central to the constitutional structure.'[23]

The CAC dismissed the application for leave to appeal to the SCA. However, the appellants were granted special leave to appeal upon approaching the SCA.

In the SCA case (Woodlands Dairy (Pty) Ltd and Another v. Competition Commission 2010) Harms DP[24] was not convinced by the CAC's approach '*that because it was difficult to establish the existence of prohibited practices a generous interpretation of the Commissions procedural rights would be justified. This approach would imply that the more difficult it is to prove a crime, such as corruption the fewer procedural rights an accused would have.*'[25]

The SCA upheld the appeal, finding the initiation document was invalid and made several findings that became crucial to informing the approach of the CAC in subsequent matters:

- The court held that as the actions of the Commission in respect of prohibited practices 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 firms constitutional rights to privacy, a fair trial and just administrative action.'
- The complaint must be initiated against an alleged prohibited practice. It may not be instituted against an industry. '*A suspicion against someone cannot be used as a springboard to investigate all and sundry*'.[26].'[27]
- There was no reason why an initiating document requires any less specificity than a summons and consequently must survive the test of legality and intelligibility.[28]

The appeal against the order of the CAC was upheld and the SCA set aside the complaints initiated by the Commission against the appellants on the basis that the Commission had relied on irregularly obtained evidence.[29]

➢ Impact Of The Woodlands Dairy Cases

The repercussions of the SCA judgement in the Woodlands case turned out to be notable.

Lewis refers to it as:

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[23] Woodlands CAC second appeal. Davis JP noted further that the litigation was taking on the appearance of a *'jurisprudential chain novel'* when Clover came to court Woodlands and Milkwood said nothing. Milkwood and Woodlands now approach this court and the possibility is that others will raise the same argument. *How I ask will we ever implement the promise of the Competition Act with this kind of conduct?'*

[24] Woodlands Dairy (Pty) Ltd and Another v. Competition Commission 2010 (6) SA 108 (SCA)

[25] Woodlands v the Competition Commission (SCA) para [11].

[26] The SCA did indicate that this does not mean that the Commission may not during the course of a properly initiated investigation; obtain information about others or about other transgressions. If it does it is fully entitled to use the information so obtained for amending the complaint or initiation of another complainant and fuller investigation

[27] YARA CAC (14 March 2011) para [37]

[28] The Competition Tribunal in the SAB case note that the court here is referring to a summons in terms of section 49A (one to compel documents from a person or to require them to be interrogated.) The Tribunal notes this in later decisions appears to have been misunderstood to apply to a summons commencing action in the High Court.

[29] Langbridge S and Mackenzie M, Bell Dewar, South Africa: Supreme Court Milks CAC decision (24 October 2010) note that this decision bucks a recent trend where the competition authorities have tended to favour substantive concerns over procedural fairness in relation particularly to alleged cartel activity (www.mondaq.com)

'a judgement of which, I fear we will not hear the end until the Constitutional Court has pronounced or the Act has been amended in a constitutionally appropriate manner. The SCA acknowledges at the outset the lack of clarity in the act: 'as to the sequence of steps that have to be followed in relation to the initiation of a complaint, the investigation, the use of power to summon witnesses to testify and the referral of complaints to the Tribunal.' In the face of this lack of clarity the court elected to clarify matters in a way that was most restrictive of the Commissions powers. The Court makes the point – in opposition to its characterisation of a view expressed by the CAC that merely because it is difficult to investigate Competition Act contraventions those accused should enjoy no less constitutional protection than any other accused persons'[30]

Kariga has noted that:[31]

'The SCA's decision in the **Woodlands** case was a turning point in the jurisprudence of the CAC built over a decade...the CAC in response adopted a strict and unduly formalistic interpretation of the Act....The recent decisions of the CAC post **Woodlands** clearly show how the CAC has moved from a purposive interpretation to a more formalistic interpretation.'

Other commentators, notably from large law firms with substantial Competition departments have, perhaps unsurprisingly, disagreed with these concerns – contending that:

- 'the Competition Commission had been appropriately constrained in the exercise of its powers'[32]
- 'the SCA's decision provides welcome relief to firms under investigation and/or receiving summons. It requires the exercise of restraint by the Commission in its cartel busting and other enforcement endeavours and protects and preserves the rights of firms accused of anti-competitive conduct...It also reaffirms the SCA's position as the court of final instance in Competition Law matters ensuring a watchful eye remains over the decisions of the specialist competition bodies, the Commission, Tribunal and CAC.'[33]
- 'the decision bucks a recent trend where the competition authorities have tended to favour substantive concerns over procedural fairness in relation particularly to cartel activity.'[34]

It appears that the SCA's 'limited interpretation' of the competition authorities powers has encouraged several companies facing anti-competitive allegations by the competition authorities to challenge the authorities on procedural grounds.[35]

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[30] Lewis p242
[31] Kariga H, 'Between a Rock and Hard place? A closer look at the Competition Appeal Court, The Fifth Annual Competition Law, Economics & Policy in South Africa Conference Date: 04-05 October 211 p10
[32] "SCA sets aside admission milk referral, (September 2010) www.ens.co.za
[33] Crotty A, Concourt rules against Senwes in conduct case, April 13 2012, Business Report
[34] Langbridge S and Mackenzie N, (Bell Dewar), Supreme Court milks CAC decision (24 October 2010) www.mondaq.com
[35] Ibid

5.1 LEGAL KNOTS

The first case in which the CAC considered the approach of the SCA in **Woodlands** was in the **Netstar** case.[36] In this matter the court referred to the SCA in the **Woodlands** and its likening of an initiating document to a summons and noted that even though the Tribunal adjudicates over issues which are more general and less clear-cut than those that arise in a conventional civil case in High Court this did not mean '*broad and unspecified generalities should take the place of a properly articulated complaint before the tribunal.*'[37]

The Competition Tribunal has expressed concern that the CAC's finding in **Netstar** was taken even further in the **Yara** case[38] where the CAC held that the Commission could not amend an initiating document as there was no procedure in the Act for this. The CAC clarified that the initiation, investigation and referral by the Commission of complaints must relate to specific conduct of specified parties. The Tribunal believed this was contrary to the SCA approach in **Woodlands**. The Tribunal has labelled the **Yara** decision of the CAC as the '*apogee of the strict approach to the relationship between the initiation document and the referral*'.

However, increasing concerns by the Commission and the Tribunal around what was perceived as an overly technical approach to the Competition Act were dismissed by Wallis J in the (CAC) in the **Loungefoam** matter.[39] He commented that the Act does not provide 'short cuts' with respect to the statutory complaint scheme. Moreover, in response to concerns raised by the Commission that the CAC and the SCA have an unduly technical approach to the construction of the Act in contrast to the informality of the approach of the Commission and the Tribunal Wallis J expressed the view that the CAC rulings do not restrict the Commissions powers but rather protect the rights of those under investigation from those powers. In his judgement he noted the following:

> 'This 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 songsheet. 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.[40]

However, it is the comments by the Competition Tribunal in the reasons they provided for the Tribunal's decision in the **South African Breweries** case that reflects how problematic the situation has become.[41]

In the **South Africa Breweries** case the Tribunal ruled that it did not have the jurisdiction to hear a complaint brought against SAB by the Commission.[42] The Tribunal noted that '*this is a regrettable outcome but we are bound by recent decisions of the superior courts to come to this conclusion*'.

[36] Netstar Pty Ltd and Others v the Competition Commission and Another (case 99/CAC/May 10) (judgement: 11 February 2011)]
[37] Ibid para [23]
[38] Yara v the Competition Commission (Case: 94/CAC/Mar10) (judgement: 14 March 2011)
[39] Loungefoam v the Competition Commission Pty Ltd (Case: 102/CAC/June 2010) (judgement: 6 May 2011)
[40] Ibid
[41] South African Breweries Ltd v the Competititon Commission (Case 13/CR/Dec07) (reasons issued on 16 September 2011)
[42] Press release: The Competition Commission and SAB – 7 April 2011

The Tribunal went further and stated that *'this case law may need re-consideration by superior courts in the future so that a complainant's right of access to justice and the Commissions investigative powers are not unduly compromised.'* Indeed, in the reasons it provided for the decision it had taken on the matter the Tribunal took the *'unusual but we hope not perceived disrespectful step of alerting higher courts to the problems created by the jurisprudence'*. The Tribunal noted the following:

> 'although the Tribunal is bound by precedent created by higher courts we are also the only full time adjudicative institution created by the Act. As such it is sometimes incumbent upon us to comment on issues that go beyond the resolution of a particular case when we have concerns about the effectiveness of the workings of our system.
>
> We believe that entirely unwittingly, decisions that impact on the legal requirements for a valid referral based on the prior complaint, have threatened to undermine the rights of complainants and the public as represented by the Commission to get access to justice.
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> The initiation document has been transformed into something it was never intended to be. It is not a pleading or initiation document in legal proceedings. Yet the implication of the current case law – although the cases that never say this are that unless the initiating document is as close in precision to an eventual referral, respondents will pick holes in it and the referral will be susceptible to dismissal or striking out.[43]
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> In **Woodlands** (SCA judgement) the argument is that as the initiating document precede an investigation and that a summons involves the Commission exercising rights of discovery and interrogation, the initiating document must be *intelligible* in the sense that this term has been used in the case law in relation to search warrants. However, this leaves out a crucial step. The Commissioner, who is required to authorise a summons in terms of section 49A of the Act, is required to apply a fresh consideration to the issue of the summons and this creates a distinct and new jurisdictional fact. It does not follow that because the issue of a summons has as a prerequisite the issue of a complaint that the requirements of a valid initiation document need to be the same as those for a valid summons. Each must be judged according to its own requirements and the fact that this must occur in a particular sequence does not alter their distinct and separate legal requirements.[44]
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> The next rationale for the strict approach and which was advanced during this hearing is that the initiating document must have a proper basis as it involves state action against a firm and the exercise of public powers against it in respect of an alleged act. For this reason so the argument goes, the initiating document must meet the requirements of the strict approach, as firms are entitled to know that the state is investigating them, and if so, about what.
>
> A fundamental problem with the rationale for the strict approach is that the act of initiation has been transformed into something it is not. It may precede a summons and complaint referral but it should not be confused with either. The Commission cannot simply with an

[43] SAB Limited v Competition Commission (Tribunal) paras [97-100]
[44] Ibid para [131]

initiating document search premises or subject persons to interrogations or seize documents. These are civil proceedings.

The strict approach ignores the fact that the initiating document marks the beginning not the end of the investigation. The danger with the strict approach is that it will too frequently require the Commission to refashion the complaint as its own.....that defeats one of the more important objectives of the Act in giving complainants some control over the outcome of their complaint.

Respondents are not prejudiced if the strict approach is jettisoned...the strict approach will have two outcomes, neither of which is desirable and in the interests of justice: the Commission will become over inclusive in its initiation policy – no firm will be ignored if susceptible of possible suspicion...;respondents lured by the enticing prospects that a case can be dismissed without ever going to the merits, will be incentivised to dissect the minutiae of initiation documents to find them wanting.

Access to justice and indeed the rule of law become casualties. Granted the public are not entitled to have complaints which are not related to prohibited conduct under the Act prosecuted. Granted they are not entitled to expect to have every complaint they make remedied. But they are entitled to expect if they make a complaint under the Act to the Commission, even if lacking in legal and economic articulacy, that it will be judged on its merits.'

The **Woodlands** case is not the only case where the SCA has applied 'strict legal principles akin to court processes' to competition matters which has been subject to criticism.[45]

- **Senwes Cases**

In the SCA judgement in **Senwes v Competition Commission of South Africa** (1 June 2011)[46] under consideration was section 8(c) of the Competition Act which prohibits a dominant firm from engaging in an 'exclusionary act' which is defined as an act that impedes or prevents a firm from entering into or expanding within a market.

Brand JA in the SCA upheld an appeal against an order made by the CAC (which had dismissed Senwes appeal against a Tribunal judgement. The Tribunal had found that Senwes had indeed contravened section 8(c) in that it was guilty of '*margin squeeze'.*[47])

Brand JA contended that as a creature of statute the Tribunal has no inherent powers and must act within the powers of the Act. He found the Tribunal had exceeded its powers when it ruled Senwes had contravened section 8(c) by engaging in 'margin squeeze'.

The SCA considered firstly whether the complaint referred by the Commission to the Tribunal covered the margin squeeze complaint and concluded that the margin squeeze complaint did not

[45] Kariga p21
[46](On Appeal from the Competition Appeal Court) (118/10) [2011] ZASCA 99
[47] 'Margin squeeze' may be used to describe instances in which a vertically integrated firm, dominant in the upstream market, supplies its own downstream operations at a preferable rate to its downstream competitors, to the exclusion of competition in that market.

form part of the referral. Secondly, the court considered whether the Tribunal was empowered to decide a complaint which did not form part of the referral. The SCA found the referral constitutes boundaries beyond which the Tribunal may not legitimately travel and by doing so it had violated the principle of legality.[48] As Brand JA described it Senwes had been 'convicted' of something it not been 'charged' with and this was a breach of the principle of legality.

The matter did not, however, end there the Competition Commission appealed the SCA decision in **Senwes** to the Constitutional Court.[49]

In April 2012 in its first ever ruling on a competition case the Constitutional Court held that there was no doubt that there was a constitutional issue at stake, namely whether the Tribunal had exceeded its statutory powers, which would violate the principle of legality. Moreover, Jafta was of the view that it was in the interests of justice to consider the matter as:[50]

- The issue raised is of considerable public importance – the Tribunal was established to exercise powers in the interests of the general public by creating and maintaining 'markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire.'[51]
- One of the structures established to administer the Competition Act; the Tribunal plays a vital role in creating an open economic environment in which all South Africans can have equal opportunities to participate in the national economy. The elimination of prohibited practices and abuse of a dominant position fall within the jurisdiction of the tribunal. A correct interpretation of its powers is essential to its effectiveness in the fight against these practices.
- The prospects of success are fairly good. The interpretation given to the Tribunals empowering provisions by the SCA may seriously undermine the objectives for which the Competition Act was passed.

Jafta J[52] analysed the Tribunals functions and found that the SCA erred when it held that the Tribunal considered a complaint that was not covered by the referral.[53] The error the Tribunal made was the applying the label of 'margin squeeze' which the Tribunal had attached to the exclusionary act, however this error did not detract from the fact that conduct amounting to a contravention of section 8(c) had been established.

Jafta J noted as follows, '*while it is true that the Tribunal can exercise only those powers given to it by the Act, the flaw in the approach adopted by the SCA, in my respectful view lies in the fact that it conflates matters of jurisdiction and procedure.*' This interpretation is at odds with the scheme of the Act. The Tribunal is empowered to adopt an inquisitorial approach to a hearing and confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry.[54]

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[48] Relying on a judgement of the CAC in Netstar.
[49] The Competition Commission v Senwes Case CCT 61/11 (judgement: 12 April 2012)
[50] Ibid para[18]
[51] Preamble to the Competition Act.
[52] (Mogoeng CJ, Moseneke DCJ, Nkabinde J, Skweiya J, Van der Westhuizen, Yaccoob J and Zondo AJ concurring)
[53] Ibid para [39]
[54] Ibid para [50]

In a dissenting judgement Froneman J (Cameron J concurring) while agreeing with Jafta J that leave should be granted and the appeal should succeed differed on the remedy - contending that the matter should be referred back to the Competition Tribunal to allow it to make a ruling on the ambit of the referral. '*The Tribunal has an obligation to determine the proper ambit of the referral in accordance with the provisions of the Act.*'

Froneman J did express some concern at the SCA's use of the terms 'charge' and 'conviction.'[55] He noted that the Competition Act does not use the language of 'charge' and 'conviction' at all and even if they were used for the sake of brevity, 'the 'metaphor or analogy that they carry is inapposite to the tribunal's powers in conducting a hearing. They are suggestive of an approach that the tribunal's powers to determine the terms of reference must be narrow and restricted. The provisions of the Act do not justify that kind of restrictive approach' the provisions of the Act indicate that there is 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 Competition Act. In order to do so provisions for hearings referred to the Tribunal place an emphasis on speed, informality and a non-technical approach to its task. There is no indication in the Act that the interpretation and determination of the ambit of a referral should be narrowly or restrictively interpreted. Excessive formality would not be in keeping with the purpose of the Act.[56]

➢ **Impact of the Constitutional Court judgement in Senwes:**

Unsurprising, the Competition Commission indicated that it found the judgement of the Constitutional court in Senwes case 'enabling' by giving the Tribunal flexibility about what it can look into when deciding whether a company is being anti-competitive. "The first ever ruling by the Constitutional court on a competition case....on a broader perspective indicates that the court is supportive of the powers of the competition authorities.[57]

The response of the law firms has been less enthusiastic:

- "the potential impact of this case on competition law in general is far-reaching. Following this decision, firms that are called on the red carpet may face considerable uncertainty regarding the exact scope and extent of the possible charges which the Tribunal may consider against them.'[58]
- 'the judgement could make it difficult for those defending allegations of anti-competitive behavior – because it gives so much leeway to the Commission and Tribunal.'[59]

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[55] Brand J in the SCA judgment of Woodlands noted that, 'I refer, for the sake of brevity, to the conduct complained of in the referral as 'the charge' and to the conduct which the Tribunal found objectionable as 'the conviction'

[56] Ibid Senwes (CC) para [69]

[57] Crotty A, Concourt rules against Senwes in conduct case, April 13 2012, Business Report

[58] Adams and Adams, Senwes: A victory for the competition Commission but a potential Pandora's Box, (10 May 2012) www.polity.org.za

[59] H Irvine of Norton Rose as quoted in an article by F Rabkin and A Visser, 'Court broadens scope for competition tribunal, (13/04/2012) Business Day

6. THE SUDDEN APPEAL OF DIRECT ACCESS

In response to what the Commission perceives as a formalistic and incorrect approach taken by the SCA in **Woodlands** and the interpretation of this judgement by the CAC (in the cases of **Yara** and **Loungefoam**) - which the Commission contends has effectively compounded the legal uncertainty that exists around the Commissions powers of investigation and referral - the Commission decided to approach the Constitutional Court directly and applied for leave to appeal directly against a judgement and order of the CAC in two matters, namely **Yara** and **Lounge foam**.

- **The CAC and the Yara case**

In the original **Yara** matter before the CAC Dambuza J had upheld the appeal against the Competition Tribunal's decision and held that an amendment of an existing referral to the Tribunal could not introduce a new complaint that had not previously been submitted to or initiated by the Commission.[60] Following this decision by the CAC the Competition Commission then decided to appeal directly to the Constitutional Court, however, at the time there was also an application pending before the CAC for leave to appeal against the CAC's decision to the SCA.

The CAC had delivered a judgment in the **Yara** matter on the 14 March 2011 which prompted an application by the Commission to the CAC for an appeal to the SCA which was set down for hearing by the CAC on 5 December 2011. On 27 September 2011 the CAC was informed by the Competition Commission that they had lodged an application for direct leave to appeal with the Constitutional Court and wanted the matter postponed. However, the respondent's legal representative indicated they had not been informed of the request for the postponement and that the Commission should have followed the procedure set out in section 63(2) of the Competition Act which provides the CAC should be approached for leave to appeal to the SCA or the Constitutional Court.

Davis JP was of the view that the situation placed the CAC in a somewhat invidious position and he expressed some exasperation at '*the plethora of fora which may near these cases*' and the fact that '*resolution of disputes in terms of the Act are now in a more cumbersome position that otherwise would be the case.*' He observed that the decision by the Commission to an appeal for direct access to the Constitutional Court before approaching the SCA may fall foul of section 63(2) of the Competition Act: 'what is certain is that it creates the difficulty that matters from this court may now well be appealed to either of two courts depending on the advice given to litigants.'[61]

➢ VIEWS OF THE CONSTITUTIONAL COURT ON THE DIRECT ACCESS APPROACH

- **Competition Commission v Yara South Africa Pty (Ltd) and Others (Constitutional Court)**[62]

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[60] Ibid
[61] Ibid
[62] Competition Commission v Yara case CCT 81/11 (judgement: 26 June 2012)

Zondo AJ[63] was of the view that an issue concerning the power of the Tribunal to grant or refuse an amendment in regard to the complaints referred to it in terms of the Act is a constitutional issue and the Constitutional Court had jurisdiction.

Zondi AJ focused quite extensively on the Commissions delay in its application for direct access to the Constitutional court. He also indicated that given the Commissions identification of the problem as being the interpretation of the SCA in the Woodlands judgement the preferable approach would be for the SCA to be afforded an opportunity to hear and pronounce on the merits of the Commissions complaints.[64] He found that he could not condone the Commissions delay and it was not in the interests of justice for the Constitutional Court to entertain the matter and he dismissed the Commissions appeal.

Cameron J and Yacoob (Moseneke DCJ concurring) in a dissenting judgement agreed with the main judgement that the court had jurisdiction to entertain the appeal since the Commissions powers of investigation and referral of complaints of anti-competitive conduct under the Competition Act plainly raise constitutional issues but differed from the main judgement in that they were of the view that leave to appeal should have been granted.

They were of the opinion that the while the main judgement placed significant emphasis on the Commissions delay and found its conduct so wanting that condonation was refused that they could not agree with this approach and found that the Commission had sufficiently explained the delay. The court noted that:

- The Commission performs an important public function: one essential to our democracy and to creating a competitive commercial sector.
- The Competition Act sets out both equity and efficiency based goals and the Commission is the lifeblood of the act.

However, they did not set out their views on the merits of the case given that the merits may come before the SCA and then in time before the Constitutional Court. They did, however comment as follows:

> 'Two other aspects are more important here. The first is whether the Commission should be permitted to come directly to this court, instead of first approaching the SCA. We think it should. We appreciate the opinion of the SCA would be of some value in determining the difficult question of what congruence is required between complaint initiation and complaint referral. But we do not think the value of the Courts views should preclude the Commissions appeal...The issues do not involve matters of common law, on which this court particularly values the views and experience of the SCA. It is true that even where common law matters are not at issue this court values the views of the SCA. Nevertheless the largely statutory and constitutional nature of the questions at issues counts against requiring an appeal to the SCA.[65]

[63] Mogoeng CJ, Jafta J and Nkabinde J concurring.
[64] Senwes para [39]
[65] Ibid para [62]

So does the delay these proceedings will entail – a delay the Commission says it cannot afford because the rulings it seeks to challenge have plunged its investigations into disarray. We think its assertion must be given not only credence but also substantial weight in affording it a direct appeal. Given the importance of these issues, the need for their speedy resolution and the Commissions plight until that happens, the weight of our systems multiplicity of appeals should not be made to fall too heavily on it.'[66]

In a second minority judgement Froneman J (Skweyiya J and van der Westhuizen J concurring) agreed with the main judgement that leave to appeal should not be granted on the basis that it was not in the interests of justice to do so.

However, Froneman J was of the view that because the issues 'lie at the complex intersection of law and economics' the views of the CAC would have been important. He indicated he would value as much articulation and debate of these issues as possible and that the issues should have been aired through the CAC process and therefore direct access would not be in the interests of justice.[67]

- **Competition Commission v Loungefoam (Pty) Ltd and Others (Constitutional Court)[68]**

In this case Maya AJ[69] commented that 'the legislature's object in conferring appellate jurisdiction on both the SCA and this court from the CAC is evident from the plain reading of sections 62 and 63 of the Competition Act.' The Commission had failed to show that the SCA will not deal with the matter expeditiously or give finality to some or all of the issues:

> 'In the absence of a challenge to its constitutionality in either these proceedings or before the CAC section 63(2) remains valid law in the absence of a declaration of invalidity. On this interpretation it serves the critical purpose of ensuring that the decision making of the higher appellate courts is informed by the expert views of the specialist CAC. Further until the legislature decides otherwise the SCA also serves as a further filter in the appellate hierarchy, even in matters that do not explicitly involve the development of the common law.'[70]

Maya AJ found that the Commissions steadfast assumption that it will not succeed before the SCA based on perceived difference between that court's decision in Woodland and the CAC's decision in Loungefoam' deserves no credence.[71] Consequently the application for leave to appeal was dismissed.

[66] Ibid para [63]
[67] Ibid para [81]
[68] Competition Commission v Loungefoam Case CCT 90/11 (judgement: 26 June 2012)
[69] (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweiya J, van der Westhuizen J and Zondo J concurring)
[70] Maya AJ CC para[26]
[71] Ibid para[27]

In a dissenting judgement Yacoob ADCJ and Cameron J differed from the conclusion reached by Maya J, for similar reasons as set out in their dissenting judgement in **Yara**, namely the importance of the Commissions public role; the significance of the issues it seeks to be determined in the appeal; the fact that there are prospects of success in the appeal and that this is not a matter at the complex intersection of law and economics, all combine to warrant a grant of leave to appeal.[72]

- **Interpreting the approach of the Constitutional Court**

It appears then that the Constitutional court refused to hear the cases based on strict procedural grounds, while tantalizingly suggesting that the Commission may be strong on merits. The Constitutional Courts decisions have not brought finality and are in effect tantamount to a rain-delay.[73] For the Competition law community, it seems the law as laid down in the CAC remains for now – which is fairly restrictive in terms of the Commission's powers of investigation. [74]

7. CONCLUSION

One commentator has summed up potential consequences of the proposed amendment to section 168(3) in the Constitution Seventeenth Amendment Bill as follows:[75]

> 'Proponents of the amendment contend that competition matters require specialised courts and judges as they involve complex matters of economics, law commerce, industry and public affairs, while the Supreme Court of Appeal is a generalist court, which deal with all areas of the law. The specialist bodies designated for this purpose are the Tribunal and the Competition Appeal Court. As specialist bodies involved in competition matters on a daily basis they have the required specialist knowledge and will be empowered by their exclusive jurisdiction to develop a consistent body of competition law precedent. An added benefit of the amendment is that it will allow for a more efficient finalisation of competition matters, and will avoid possible abuses that flow from the ability to appeal competition law matters to the SCA.
>
> Opponents of the amendment have noted that the removal of the ability to appeal a decision of the Competition Tribunal to the SCA effectively renders the first court of appeal, namely the CAC also the last court of appeal. An obvious benefit to an appeal process is that it allows for checks and balances. One of the benefits to having multiple avenue for appeal is that the greater the scrutiny, the greater the chance that the correct decision will ultimately be reached. In addition, competition law is governed by the competition act, which is a law subject to the same legal application as any other law. Therefore it is arguable that much benefit can be gained from allowing South Africa's senior judges an opportunity to play a role in its development.'

In summary the following points may be made:

[72] Para [36]
[73] Business Live, 'Competition Commission denied leave to appeal to Con court, (27 June 2012) www.businesslive.co.za
[74] Ibid
[75] Mendolsohn L, Constitution Amendment Bill has potential to significantly affect competition law in South Africa, 20 June 2012 (Director and Head of Department (Competition) at Edward Nathan Sonnenberg)

- Is the price being paid for what Cameron J and Yacoob J referred to as *'the weight of our systems multiplicity of appeals'* too high'? Competition matters are certainly not expeditious but under the current system it appears there are opportunities to draw matters out for many years.

- It is creating a particularly challenging situation for the Competition Appeal Court as it endeavours to carve out a jurisprudential framework within the ambitious purposes of the Act.

- Should some resolution be found through amendments to the Competition Act?

- No doubt it is far too simplistic to reduce an evaluation of the case law to one which supports either a purposive[76] or restrictive interpretation of the Competition Act – but one commentator has described the situation as a 'face-off between the Competition commission and the legal fraternity over the Commissions interpretation of the scope of its powers.'[77] Legal commentators argue that the right to procedural fairness is a fundamental principle of the law and due process is important to prevent agencies such as the competition authorities from abusing their powers.'[78] Generally it appears that the legal fraternity believes the judgements by the Supreme Court of Appeal are vital as they will scupper attempts by the competition authorities to abuse their powers when prosecuting offenders and force the Competition Commission to conduct more rigorous investigations to prevent the legal challenges it is facing in a number of cases.[79] A contrary perspective is provided by Kasturi Moodaliyar (Senior lecturer in Competition law at University of Witswatersrand) - she points out that this reflects:

> 'the rather one-sided legal perspective of the legal fraternity....and its implications on access to justice must be considered.[80] In South Africa, the inequalities are pernicious. The prospect of victims receiving compensation resulting from civil damages claims is slim...Also, in contentious competition law cases, the typical respondent has all the advantages that come with deep pockets. Not so for the typical complainant. Without a strong investigative agency, most victims of anticompetitive conduct are denied justice. The detection and prosecution of such conduct is the only way that we can begin to address the imbalances in economic power in South Africa's economy. But the detection of anticompetitive conduct is an enormous challenge for any agency, particularly when the imbalances in economic power go together with significant information asymmetries. The commission is only an investigative body. The Competition Tribunal must adjudicate and it can do so only on with hard evidence. Indeed, if there is evidence of anticompetitive conduct, it is surely in the interests of justice that the commission be given sufficient latitude to obtain it? Furthermore, if evidence is obtained, it is surely also in the interests of justice that the commission be given sufficient latitude to argue its case before the tribunal?

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[76] For instance Davis JP has stated that purposive interpretation does not mean that 'the adjudicator can evaluate the evidence, determine a result and then decide to dispense with the applicable statute and formulate a provision which provides the predetermined result. In the first place that breaches the rule of law in that a statute becomes completely what the adjudicator determines. Secondly it breaches the principle of separation of powers in that the adjudicator becomes the legislature and the judiciary.'

[77] Gedye L, Battle to firm up competition law, (6 July 2012) www.mg.co.za

[77] Ibid

[78] Ibid

[79] Ibid

[80] Moodaliyar K, 'Big Money Sways Lady justice', (13 July 2012) www.mg.co.za

The answers to these questions will ultimately depend on the precedents set by the higher courts, although the existing precedents give lawyers defending respondents a lot of ammunition to raise procedural issues when the commission investigates. But as long as cases are thwarted on procedural grounds rather than on the merits, the promise of access to justice for victims of anticompetitive conduct will remain unfulfilled.

Fortunately, the Constitutional Court did not close the door completely. By insisting on due process, the court affirmed that the Commission is not above the law, but now that the point has been made, one can only hope that the Commission will proceed with its appeals and that the higher courts, when called on to do so, will provide guidance that will balance the possibility of an abuse of power with the agency's mandate to ensure effective access to justice.'[81]

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