REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

HELD IN CAPE TOWN

CASE NO: 114/CAC/Nov11

In the matter between:-

THE COMPETITION COMMISSION	Appellant
and	
SOUTH AFRICAN BREWERIES LIMITED	First Respondent
AFRICA'S BEER WHOLESALERS (PTY) LTD	Second Respondent
BOLAND BEER DISTRIBUTORS (PTY) LTD	Third Respondent
ERMELO BEER WHOLESALERS (PTY) LTD	Fourth Respondent
GREYTOWN BEER DISTRIBUTORS (PTY) LTD	Fifth Respondent
MAKHADO BEER WHOLESALERS (PTY(LTD	Sixth Respondent
MIDLANDS BEER DISTRIBUTORS (PTY) LTD	Seventh Respondent
MKUZE BEER WHOLESALERS (PTY) LTD	Eight Respondent
SOUTHERN CAPE BEER DISTRIBUTORS (PTY) LTD	Ninth Respondent
STEFQUO (PTY) LTD	Tenth Respondent
VRYHEID BEER DISTRIBUTORS PTY (LTD)	Eleventh Respondent
MADADENI BEER WHOLESALERS (PTY) LTD	Twelfth Respondent
WESTONARIA BEER DISTRIBUTORS (PTY) LTD	Thirteenth Respondent
THOHOYANDOU BEER DISTRIBUTORS (PTY) LTD	Fourteenth Respondent

JUDGMENT: 14 November 2012

DAVIS JP

Introduction

[1] This appeal concerns a decision of the Competition Tribunal ('the Tribunal') in which it set aside a complaint referral by appellant against first respondent as well as against second to fourteenth respondents which was based upon ss 4 (1)(b) (ii), 5 (1), 5 (2) and 9 (1) of the Competition Act 89 of 1998 ('the Act').

[2] In essence, first respondent submitted that the referred complaint did not form part of a complaint initiated against it on 25 November 2008. Second to fourteenth respondents contended that they were not named in the CC 1 Form and that there was no mention made of them in documents attached thereto. Accordingly, they could not competently be cited as respondents in the complaint referred to the Tribunal in terms of s 4 (1) (b) (ii), alternatively s 5 (1), 5 (2) and 9 (1) of the Act.

[3] As is apparent from the determination of the Tribunal, it considered itself bound by the judgment of this Court in **Yara South Africa (Pty) Ltd v The Competition Commission and others** [2011] 1 CPLR 78 (CAC). Accordingly, it made the following order:

> "*After having heard the parties in relation to the application by the first respondent, the following is ordered: The purported referral [of] the complaint against the first respondent by the Competition Commission to the Competition Tribunal on or about the 20th of December 2007 under Sections 4 (1) (b) (ii), 5 (1), 5 (2) and 9 (1) of the Competition Act 89 of 1998, which complaints collectively make up the first separated complaint as referred to in the order of the Competition Tribunal date the 13th May 2010, is set aside on the grounds that the Tribunal has no jurisdiction. There is no order as to costs.*
>
> *The second order is in relation to the application brought by the second to the fourteenth respondents in this matter, also known as the appointed distributors. After having heard the parties in relation to the application by the second to the fourteenth respondents, the following is ordered: … the purported referral of the complaints against the second to fourteenth respondents on or about the 20th of December 2007 under Sections 4 (1) (b) (ii) and 5 (1) of the Competition Act 89 of 1998, is set aside on the grounds that the Tribunal has no jurisdiction. There is no order as to costs.*"

On the basis of this order, the complaint referral proceedings in terms of ss 4 (1) (b) (ii), 5 (1), 5 (2) and 9 (1) of the Act, were brought to an end. It is against this decision that the appellant has approached this Court on appeal.

The factual background

[4] On 25 November 2004, a group of companies comprising both retail and wholesale liquor operations located primarily in the Eastern Cape submitted a complaint in terms of s 49 B(2)(b) of the Act to the appellant. Following thereon, appellant conducted an investigation and referred the complaint to the Tribunal on 20 December 2007. The trial before the Tribunal commenced in 2010, after which fifteen days of evidence was led before the Tribunal.

[5] On 24 March 2011, first respondent filed its application to set aside the referral of the complaints under ss 4 (1) (b) (ii), 5 (1), 5 (2) and 9 (1) of the Act. Second to fourteenth respondents' application to set aside the referral was filed on 28 March 2011.

[6] Before proceeding to deal with the details of the complaints as they were submitted to the appellant, it is necessary to refer to the reasoning that was

adopted by the Tribunal in its decision and particularly its reading of the **Yara** decision *supra*.

[7] Briefly, in **Yara** a company called Nutri-Flo submitted a complaint to the Competition Commission against Sasol Chemical Industries (Pty) Ltd. The two appellants, were companies which were similarly involved in the production and supply of fertilizer. When Nutri-Flo formulated its complaint against Sasol, it referred specifically and exclusively to contraventions by Sasol of ss 8 (c), 8 (a) and 9 (1) of the Act. The complaint contained three paragraphs within the overall framework of an affidavit that ran to more than a hundred pages in which mention was made of the possibility of a cartel between Sasol and the two appellants which might constitute a contravention of s 4 (1) (b). Before the Tribunal, an application was brought to amend the referral, such amendment being designed to incorporate the complaint details referring to the contravention of s 4 (1)(b) by Sasol and the two appellants. The question arose as to whether the Commission had sought to introduce a new matter, which had not been covered in the Nutri-Flo complaint, and, in terms of which, the only case made out in Nutri-Flo's papers turned upon a contravention by Sasol of abuse of dominance provisions.

[8] This Court referred to the description of the complaint by Nutri-Flo in the CC 1 Form and the amplification thereof in an affidavit which served to extend the complaint. Reading these documents together justified the conclusion that the complaint focussed clearly on three prohibited practices, namely exclusionary pricing practices, excessive pricing practices and discriminatory pricing practices. This Court found, to the extent that any cartel activity had been mentioned, that this allegation fell to be classified as 'information submitted' in terms of s 49 B (2) (a) of the Act. After a careful examination of the complaint, which was unusual both in its length and detail of its exposition, it concluded that there was a clear absence of any intention on the part of Nutri-Flo to be a complainant in respect of a price fixing contravention by all three parties. See paragraph 35. It then went on to say at para 38:

> "*In competition cases, the parties look to the CC1 Form for details of the complaint(s) against them. Therefore, if it appears in the CC1 Form together with accompanying statements, where relevant, that no complaint lies against a particular party, such a party may assume that it is not a true party to the proceedings. It is therefore improper to bring such a party within the ambit of the complaint by way of either a referral or an amendment thereto*."

[9] In the present case, the Tribunal interpreted this approach, which it regarded to be binding on it, as follows at para 62 of its determination:

> "*The Commission may only refer that part of the submission from the complainant that it intended to complain about and not those that constitute mere information, and secondly, it offers a further rationale for the strict approach; because the initiating document is what respondents look to for details of the complaint against them, it is improper to bring a party before the Tribunal by way of a referral if the details of the complaint in the referral are not found in the initiating document*."

[10] Applying this test rigidly to the facts of the present case, the Tribunal held that the complaint made against first respondent in the initiating document had not been the one which was referred by appellant to the Tribunal. Furthermore, the initiating document did not contemplate any firm other than first respondent and accordingly no case had been made out against any of the other respondents, namely second to fourteenth respondents.

[11] This appeal therefore raises two fundamental questions which are critical for the disposition of this dispute, namely;

1. What precisely were the complaints lodged against the respondents; and

2. On the basis of this determination, does the judgment in **Yara**, *supra* justify the approach which was adopted by the Tribunal.

In order to so determine, it is necessary to engage in some detail in the complaints which were submitted to the appellant by the complainants.

Complaints submitted to the Commission

[12] On 25 November 2004 a CC 1 Form was completed and signed by one Nicolas Peter Pitsiladi, the head of the Big Daddy's group of liquor wholesalers and retailers, who was duly authorised to lodge the complaint.

[13] Annexure A to the complaint set out the list of complaints. More significantly annexure B headed 'Description of the Complaint' reads as follows:

"1. The entities (collectively herein referred to as "the Complainants) are all holders of various liquor licences issued pursuant to the provisions of the old Liquor Act, the Liquor Act 27 of 1989.

2. *The Liquor Act, 59 of 2003 repealed the old Act and came into effect on 13th August 2004.*

3. *In addition various Provinces promulgated their own Acts, as for instance the Eastern Cape Liquor Act, 10 of 2003.*

4. *The Complainants either conduct business as retailers or have been issued with wholesale licences or have applied before the promulgation of, for instance, the provincial Act in the Eastern Cape (successfully so) for conditional approvals for wholesale licences.*

5. *In terms of the old Act, the wholesale liquor license was a license which entitled the holder to sell liquor to another license holder.*

6. *Effectively in terms of the new Act, one is either a manufacturer, a distributor (the old wholesale seller) or a retailer,*

7. *In the past South Africa Breweries ("SAB") sold their beer products (SAB is a dominant firm in that it has in excess of 80% of the beer selling market in South Africa) to liquor outlets which conducted the business of licensed outlets.*

8. *Recently (during the course of this year), SAB has changed their operations and as a result of the fact that they are now registered as a manufacturer and a distributor, they are selling as distributors, beer products to retail outlets at the same price that they are selling beer products to wholesale outlets which has the effect that all wholesale outlets within the Republic of South Africa cannot compete with SAB as no retailer would purchase a beer product*

from a wholesaler if effectively it is able to purchase the product directly from the dominant wholesaler (SAB) as a cheaper price.

9. *The price change by SAB (the wholesale component) to other wholesalers is the same price as charged to retailers. For a wholesaler to on-sell to a retailer, which is its only market and, bearing in mind that a wholesaler can only sell to another registered license holder such as a retailer, it becomes abundantly clear that SAB has embarked upon an active campaign to do away with all other wholesalers in the Republic of South Africa and eventually control themselves the entire wholesale division of selling beer within South Africa.*

10. *This of course is made possible by the fact that SAB as manufacturer of beer is passing on by means of a sale of beer to SAB the wholesaler at a lower costs or no costs at all in order that SAB the wholesaler may sell retailers and other wholesalers at the same price. Other wholesalers are prevented from purchasing directly from SAB the Manufacturer beer at the same price (or at all) that SAB the Manufacturer passes on to SAB the wholesaler.*

11. *Despite a request to desist in this anti-competitive action, SAB have declined. In this regard, annexed hereto are examples of a letter, dated 21st September 2004, addressed to SAB and a letter dated October 2004, sent by SAB to Mr Pitsiladi.*

12. *Accordingly the complaint is that there is an abuse of a dominant position as contemplated in Section 8 of the Act.*

13. Alternatively and in any event it is submitted that the conduct of SAB is prohibited practice either in terms of Section 4 or Section 5 or Section 9 of the Act.

14. The Complainants require the matter to be dealt with in terms of the provisions of the Act, together with the regulations formulated thereunder."

[14] In addition, two undated letters were generated, subsequent to the completion of Annexure B. The first was written on the letterhead of SAFWASM, one of the complainants, and was addressed to first respondent. It reads as follows:

"I am surprised that you now refer to SAB reviewing its "distribution arrangements" in the light of the new legislation and because of this you could not supply the price lists. At no time during our discussion was there ever any suggestion that you would be reviewing price lists. To the contrary, your attitude was that SAB as a distributor (wholesaler) would be selling its products to other wholesalers and retailers at the same price.

Prior to the 13th August 2004, being the date upon which the Liquor Act No. 59 of 2003 came into effect SAB had been actively involved in negotiations with DTI, had commented on the Bill and had been fully aware of the pending legislation. In addition, your representatives have been sitting with

representatives of the Liquor Board throughout the country, I understood, at public meetings, explaining the import effect of the new legislation. We thus find it extremely strange that you have not formulated a policy regarding distributors and retailers, a distinction, which is one of the fundamentals of the new legislation.

Apart from the fact that SAB must have a distributor price list for its existing independent distributors (e.g. Southern Cape Beer Distributors (Pty) Ltd), we find it inconceivable that SAB is being involved in (at the very least) assisting third parties in establishing distribution businesses without having a policy in place.

Since our discussion, I have sought legal advice and it is our company's contention that SAB is not entitled to dominate the market to the extent of supplying its product to its own distribution division/wholesalers with its concomitant special benefits and then on-selling to other distributors/wholesalers at the same price that the SAB distributor/wholesaler is selling to retailers. We also contend that SAB is not entitled to favour certain distributors/wholesalers with special prices to enable them to supply at the SAB retail price list but to refuse those same prices to other independent distributors/wholesalers.

The above certainly would amount to unlawful acts in terms of the Competition Act. Accordingly we require your undertaking, within 10 (Ten)

days of today's date, that any benefit (whether by journal entry or otherwise), including any discount passed on by SAB, the manufacturer/supplier to its wholesale division or third party distributors/wholesalers must similarly be passed on to ourselves as distributors/wholesalers so that we can compete on an even footing with SAB distributors/wholesalers. If this were not the case, our company would not be able to sell to retailers, as retailers would hardly purchase from a distribution / wholesale division at a price which would have to be more than the price between SAB's distributors/wholesalers and retailers.

Unless a satisfactory response is received within the time period referred to above (which we trust will be forthcoming), we will have no option but to protect our interest and to institute proceedings pursuant to the provisions of the Competition Act."

[15] A response was received to this letter which was generated by first respondent. It reads thus:

"*Thank you for your letter of 11 October 2004. We do not intend to deal with every allegation which you make in your letter, and our failure to do so at this stage should not be construed as an admission thereof.*

We too have sought legal advice in relation to your claims. We certainly deny that SAB engages in any form of price discrimination in contravention of the Competition Act.

SAB supplies your business at the same price as it suppliers and other customers and thus your businesses are not discriminated against.

At present SAB does not have different prices for wholesalers or distributors. It does not have a separate price list for its existing independent distributors. SAB primarily distributes its beer through its own depots. These are all part of the same company and there is no sale between brewery and depot. A small amount of production is distributed through independent distributors, who have been specifically appointed to provide distribution service for SAB. These distributors make no margin in respect of products sold through them – they are paid a warehousing and distribution fee for their services. This is a cost picked up by SAB ad SAB customers pay the same price for beer, whether purchased through a depot or an independent distributor.

SAB has been advised that these arrangements are entirely lawful under the Competition Act.

Any proceedings instituted pursuant to the Competition Act will be defended."

[16] It appears to be uncontested that annexure B and the two undated letters set out above constitute the components of the complaint which was lodged by the complainants. That much is made clear from paragraph 11 of annexure B where it is stated expressly:

> "*Despite a request to desist in this anti-competitive action, SAB have declined. In this regard annexed hereto are examples of a letter dated 21 September 2004 to SAB and a letter dated October 2004 sent by SAB to Mr Pitsiladi*."

As this paragraph refers to the two undated letters which had been reproduced in this judgment, the appeal must proceed on the basis that all these documents, read together, constituted the complaint as initiated by the complainant.

Subsequent correspondence

[17] Subsequent to the generation of the CC 1 Form, Annexure B and the two undated letters, further correspondence was produced. Given the submissions of the appellant, regarding the amplification of the complaint as lodged, it is necessary to examine briefly the nature thereof.

[18] The relevant correspondence was generated between attorneys acting for the complainants and appellant. Complainants' attorneys, responding to a meeting that had been held between the appellant's representatives and those of the complainants, between the date of the filing of the complaint on 25 November 2004 and 16 February 2005, wrote as follows:

> "*We confirm our oral advices that as a result of our client not receiving a discount or distribution fee from SAB our clients are forced to on- and off-consumption outlets at a higher price they would pay if they purchased from SAB. Obviously this increased price would be passed on to the consumer.*
>
> *We also enclose a copy of a tax invoice from Southern Cape Beer Distributor (Pty) Ltd which is one of the SAB Franchise distributors (in fact as far as we understand the only distributor for SAB in the George area). The prices contained in the tax invoice from Southern Cape are the same prices as SAB Breweries sell direct in that particular area.*
>
> *This reinforces our client's contention that SAB are selling to their distributors at a fixed price with the agreement that such distributor on-sell at the same fixed-price without any mark-up.*
>
> *As disclosed to you during our meeting, this effectively prevents any wholesale distributor from competing independently.*" (emphasis added)

On the same day a response was received from appellant which contained the following:

> "*We notice that the invoice indicates that various forms of discounts have been given to your clients. Please explain the exact nature of each discount given in terms of the invoice, as well as the "allowance" mentioned. Further, please compare these discounts and allowances to the discounts obtained by the franchise form SAB, explain the difference (if any), and supply documentary proof if possible. The impression created is that your clients do not receive any form of discounts from SAB or its franchises. What makes this more difficult to comprehend is that the allegation made by your clients is that SAB fixes the price at which the franchises sell. This automatically means that the franchises are restricted as regards the issue of setting beer prices (including the giving of discounts), which appears to be contrary to what the invoice appears to be suggesting.*" (emphasis added)

[19] A further letter was then generated by complainants on 7 March 2005 which contained a series of annexures. In that letter, the complainants described the key issues contained in their complaint as follows:

"*As explained, the discounts indicated on the invoices are not volume based discounts but early payment discounts. The account discount, for instance, is 2.5% discount for customers who pay COD. The payment is a fixed discount of 0.5% for those customers who pay by means of electronic banking, whilst the ullage allowance is a percentage based discount for broken stock. These discounts are universal and apply to everyone.*

The real issue, however, is the question as to the price of beer, particularly 750 ml. The so-called independent distributors of SA Breweries such as Southern Cape Beer Distributors (Pty) Ltd operate in specific and non-variable areas. The only price difference in the delivered price of beer to retailers by either SAB or its independent distributors is influenced by distance from the SAB depot.

Another factor which is important is that the distributors (so-called "independent") such as South Cape Beer Distributors (Pty) Ltd, do not have independent reps who sell their products. It is in fact the sales rep of SAB who calls on retailers direct and furnishes then with a SAB price list and the product is then delivered by the distributor. Attached as Annexure 1 and 2 are SAB price lists and SAB independent distributors price list. All are on SAB letterheads.

An incomplete list of SAB independent distributors with addresses and telephone numbers is attached. (Annexure 3)

The major problem is that the SAB independent distributors and SAB itself both sell beer to our group distributor outlets at the same prices as they sell beer to any other retailers. This, as you know, is admitted by SAB to their undated letter which was received somewhere in October 2004, a copy of which we once again enclose for your information. (Annexure 4)

SAB are currently running a 750 ml beer promotion at tavern/shebeen level and in order to participate in the promotion the tavern/shebeener is forced to sell beer at a fixed prices as stipulated by SAB.

SAB has also fixed the price of Carling Black Label 450 ml cans and Castle Milk Stout 450 ml cans. The respective prices of R 4.50 and R 4.80 are printed on the cans and SAB are currently running and advertising campaign on television in which they advertise the selling price. Attached as Annexure 5 is an email from SAB instructing retailers to sell these products at the stipulated prices."

In an annexure to this letter, a list of the appointed distributors, which were known to the complainants was set out. Read as a whole, this documentation identified the second to fourteenth respondents as the firms which constituted the subject of their complaint. These appointed distributors were known as 'SAB independent depots'.

[20] This subsequent correspondence, unlike the undated letters, were the subject of contestation between the parties. While the appellants submitted that there could be no doubt that the complainants intended this correspondence to clarify, amplify and supplement the initial complaint, the Tribunal upheld the contentions of first respondent that the subsequent correspondence did not form part of the complaint which could be referred by appellant.

The complaint as referred to the Tribunal

[21] To recapitulate, the complaint which was referred to the Tribunal was based upon ss 4 (1) (b) (ii), 5 (1), 5 (2) and 9 (1) of the Act.

[22] The referred complaint can be summarised as follows: Appellant alleged that first respondent and second to fourteenth respondents are in a horizontal relationship with each other which falls within the scope of s 4 (1) (b) (ii). The allegation is that, in terms of the wholesaler and franchise agreements, first respondent has appointed distributors who are not permitted to compete with each other in territories allocated to them. As an illustration, clause 41 of the wholesaler agreement provides:

"4.1 *In return for the appointment set out under clause 2, and subject to the provisions of this Agreement, the Wholesaler agrees to use its best endeavours to maximise distribution and sale of the products within the Territory, which shall be achieved as follows:*

4.1.1 The sale and distribution of the products shall be confined to the Territory;

4.1.2 SAB shall not appoint the services of any other Wholesaler within the Territory nor will it solicit any orders for the products nor sell any of the products to customers within the Territory, provided that in the event of:

4.1.2.1 the Wholesaler failing to meet the Financial reporting requirements and/or operating performance standards; or

4.1.2.2 in the sole and absolute opinion, (which will be exercised reasonably) of SAB, the Wholesaler through its own cause and for reasons not attributable to SAB, not being able to supply or meet any demand for the products within the Territory; or

4.1.2.3 SAB's competitive position not being adequately served by the Wholesaler within the Territory at any time;

then, in any of the aforementioned event SAB shall without prejudice to any other rights and/or remedies which may be available to SAB in terms of this

Agreement or at law, alternatively be entitled to permit other SAB appointed Wholesalers or its nominated representatives, to distribute and sell products in the Territory."

Clause 4.3 reads:

"*Subject to the provisions of clause 5, the Wholesaler shall not solicit any orders for the products from customers situated outside the Territory nor deliver or knowingly sell the products directly or indirectly to customers located outside the Territory, (For the purposes of this clause – indirectly shall mean deliberate or wilful cross-border trading with third parties). Subject to the provisions in clause 4.1.2, SAB shall similarly endeavour not to engage in cross-border trading nor make its pricing outside the Territory so attractive that it encourages the Wholesaler's customers to purchase the products from SAB*."

[23] It was further alleged that first respondent will not make its prices outside of the allocated territories so attractive that it might induce the distributor's customers to buy directly from first respondent.

[24] Appellant thus brought a case on the basis of geographical exclusivity contained in the wholesaler and franchise agreements which, it alleged, was an impermissible division of markets and allocation of territories and/or customers. In the alternative, appellant relied on s 5 (1) of the Act. Here, as follows from clause 4.1 it is alleged that the arrangement of territorial exclusivity between first respondent and the further respondents constituted an agreement between parties in the vertical relationship with each other which, in turn, leads to a substantial prevention or lessening of intra brand competition in the downstream market.

[25] The complaint was extended to s 5 (2) of the Act. In this connection the allegation was made that first respondent was engaged in minimum retail maintenance in contravention of s 5 (2) of the Act, a contravention which had occurred both at the wholesale and retail levels. In support of this allegation, appellant relied on clauses 10.2 and 18.2 of the Wholesale and Franchise agreements which provide that the appointed distributor should not sell above the recommended selling price of first respondent. A further allegation was made that the appointed distributors were not permitted to make ‘a margin on the sale of products’. The second to thirteenth respondents, it was alleged, relied exclusively for their compensation on discounts and delivery fees.

[26] On 9 September, the Tribunal upheld appellant's application to join fourteenth respondent. According to the affidavit deposed to by Mr Majenge, on behalf of appellant, the fourteenth respondent, which had not been cited as a respondent in the referred complaint was one of first respondent's appointed distributors. Accordingly, fourteenth respondent is treated in this judgment as part of the class of respondents, hitherto described as second to thirteenth respondents.

[27] Appellant also alleged, in terms of s 9 (1) of the Act, that first respondent granted wholesale discounts and delivery compensation to second to eleventh respondents while denying these benefits to other distributors such as the complainants, which practice, it was alleged, was in breach of s 9 (1) of the Act. In other words, the prices at which entities, such as the complainants, can sell are alleged to be higher than those of first respondent's appointed distributors. In short, retailers can therefore purchase product from appointed distributors at the same price at which wholesalers, such as the complainants, purchase from the appointed distributors. As a result, independent wholesalers have lost contracts to appointed distributors which led to a substantial lessening of intra brand competition.

The key issue

[28] The crisp question for determination is whether, based on the complaint as formulated in the relevant CC 1 Form together with annexure B and the undated letters, the complaint, as referred by appellant to the Tribunal, is the complaint which was contained in the documentation formulated by the complainants.

[29] In order to answer this question, it is necessary, albeit briefly, to examine first respondent's distribution system which formed the basis of the referred complaint. Much of this description is sourced in the answering affidavit deposed to by Ms Sandra Vandewalle on behalf of first respondent. It appears that, with the introduction of the Liquor Act 59 of 2003, the position of traditional wholesalers changed, as manufacturers were able to obtain distribution as well as manufacturing licences. First respondent began to distribute its beer through its own depots, which were ex brewery warehouses, and through appointed distributors. The appointed distributors concluded wholesale and franchise agreements with first respondent, in terms of which they were allocated exclusive geographical territories in which they were permitted to sell beer but with no product exclusivity; that is they could sell anyone else's product. They assumed the logistical functions of warehousing and delivery and were not permitted to sell product above the prices recommended to them by first respondent. In connection with this case, Ms Vandewalle avers:

> "*First respondent has concluded wholesaler or franchise agreements with the second to thirteenth respondents as well as with Thohoyandou. The second to eleventh respondents hold wholesaler agreements. The twelfth and thirteenth respondents and Thohoyandou hold franchise agreements."*

These distributors could buy and sell at the same price and they were paid a handling and delivery fee by first respondent.

[30] It appears that first respondent ceased to offer a discount to independent wholesalers and sold products to them at the same price as it sold to the retail segment. Since the retailers were the wholesaler's customer base, they could hardly sell to them at higher price than that which they could obtain, if they bought directly from first respondent.

[31] Second to fourteenth respondents performed a distribution function. Unlike other wholesalers, they operate in terms of business model based upon the receipt of a fee for distribution services. They are restricted to certain territories in which they are obliged to operate and to serve any customer who places an order with them. They are restricted to distributing products of first respondent and are subject to certain performance standards. According to Ms Vandewalle:

"*Under their contracts, appointed distributors are constrained from charging prices above those recommended by SAB. This is to avoid appointed distributors' taking advantage of the special position that they enjoy on account of their exclusive territory and raising prices to the detriment of consumers*."

[32] This brief background permits a return to the complaint as it was formulated in the CC 1 the annexure and the two undated letters. In turn, this court is then required to examine the referred complaint against that formulated by complaints.

Evaluation of the complaint

[33] After setting out much of this background, Mr Pitsiladi, in annexure B to the CC 1 Form, contends that the price charged by first respondent to other wholesalers is the same price as charged to retailers. He complains that, as first respondent distributes beer products to retail outlets at the same price that they sell these products to wholesale outlets, and further, that the wholesaler can only sell to a retailer which is its only target market, independent wholesalers will be driven from the market because there would be no reason for the retailer to purchase product from these independent wholesalers. Mr Pitsiladi then states in paragraph 10 to annexure B that this development is made possible;

"*[b]y the fact that SAB as manufacturer of beer is passing on by means of a sale of beer to SAB the wholesaler at a lower costs or no costs at all in order that SAB the wholesaler may sell retailers and other wholesalers at the same price. (sic) Other wholesalers are prevented from purchasing directly from SAB the manufacturer beer at the same price (or at all) that SAB the manufacturer passes on to SAB the wholesaler*."

[34] To return to the first undated letter, generated by the complainants and directed to first respondent, the following passage becomes important:

"*Since our discussion, I have sought legal advice and it is our company's contention that SAB is not entitled to dominate the market to the extent that the supplying of the product to its own distribution division/wholesalers with its concomitant special benefits and then on-selling to other distributors/ wholesalers at the same price that the SAB distributor/wholesaler is selling to retailers. We also contend that SAB is not entitled to favour certain distributors/wholesalers with special prices to enable them to supply at the SAB retail prices but to refuse those same prices to other independent distributors/wholesalers.*"

[35] The key question therefore is whether these specific averments, as set out in the complaint as I have outlined it, bear the weight of the complaints as they were referred to the Tribunal.

[36] To recapitulate: the referred complaint, in terms of s 4 (1) (b) (ii) to the Act, stated that first respondent has concluded wholesale distribution agreements with a number of appointed distributors, that is second to eleventh respondents. It also concluded franchise agreements with twelve and thirteenth respondents. Appellant averred in its referral that both the franchisees and wholesalers perform the same economic function and are remunerated by first respondent in the same way. Second to thirteenth respondents together with fourteenth respondent are not agents of the first respondent but are independent parties who buy products from first respondent and on-sell them in their own right. They take ownership of the product from first respondent and the risk of ownership passes to these respondents once products are delivered by first respondent. They are appointed as the exclusive distributor of the products by first respondent within a defined territory and first respondent grants to this kind of wholesaler the right to warehouse stock, distribute, sell and market the products within the defined territory. The wholesaler is prevented from soliciting any orders for these products from customers situated outside the defined territory nor may it deliver or knowingly sell the products directly or indirectly to customers located outside the territory.

[37] On the basis of these averments, appellant contended that first respondent, was a competitor to the second to fourteenth respondents in the market for the distribution of liquor and further, second to fourteenth respondents were competitors or potential competitors of one another. The agreements between first respondent and second to fourteenth respondents therefore, in the view of appellant, constituted an agreement between firms in a horizontal relationship. Each of the agreements involved a division of the South African market for the distribution of liquor by allocating territories to each of the second to thirteenth respondents which prohibited the competitors from trading outside their defined territories. On this basis, it was contended that each of the agreements fell to be prohibited in terms of s 4 (1) (b) (ii) of the Act.

[38] Do the key complaint documents, being Annexure B and the two undated letters, sustain this complaint? The Tribunal answered in the negative. In upholding the application brought by the respondents, the Tribunal, after examining the initiating documents, concluded thus at para 72:

> "*The initiating document neither expressly not implicitly refers to the contracts SAB has with appointed distributors, not to their exclusive nature, which is the nub of the section 4(1) and 5(1) cases in the referral. Put another way, although the initiating document could be read to describe a vertical foreclosure case, it is not the one the Commission advances.*

Pitsiladi is concerned that the elimination of the wholesale discount will destroy the viability of the wholesale business and arguably, although he does not say this expressly, lead to a reduction of intra-brand competition in the sale of SAB products. The Commission does not focus on the elimination of the discount for its vertical case; it is concerned with the nature of the vertical effects of territorial exclusivity, although it does regard the elimination of the discount as a factor aggravating the weakness of intra-brand competition, but this concern is incidental and not fundamental to its case.

Nor are the appointed distributors mentioned on the CC1 as parties against whom the complaint has been laid, which as we have seen from the case discussion above is a requirement. Although the theory of harm that the Commission wishes to advance in respect of these two claims emerges tangentially from the factual milieu provided in the complaint, it is not founded in the complaint if we apply a ***facta probanda*** *approach nor if we apply an intentional approach.*"

[39] If recourse is had only to annexure B, this conclusion could arguably be justified. For example, in paragraph 10 to annexure B, the complaint focuses on the fact that first respondent, as manufacturer of beer ,is 'passing on' by means of a sale of beer to first respondent as the wholesaler at a cost which allows the

retailer to purchase at the same price as other wholesalers would purchase the beer. However, in the first undated letter the following is clearly stated:

> *"[i]t is our company's contention that SAB is not entitled to dominate the market to the extent of supplying its product to its own distribution divisions/wholesalers with it concomitant special benefits and then on-selling to other distributors/wholesalers at the same price that the SAB distributor/wholesaler is selling to retailers*."

Mr Pitsiladi is expressly concerned in this letter with the elimination of the wholesale discount which, in his view, will lead to a reduction of intra brand competition and the sale of the products of first respondent. Hence, there is no mention of territorial exclusivity in the initial complaint, although in the first of the undated letters it is clear that the words 'own distribution division/wholesalers' could reasonably be read to encompass both the appointed distributors and first respondents own distribution depots.

[40] However, reading the complaint as a whole, it becomes clear that Mr Pitsiladi has complained about a change in the pattern of distribution of first respondent's beer products and, further, that first respondent had entered into new arrangements, whereby its distributors were being treated differently from independent wholesalers. It was against this policy, as implemented by first

respondent's, that Mr Pitsiladi complained. It follows that the complaint focussed upon the conduct of first respondent, which in turn, required appellant to initiate an investigation. By contrast, the Tribunal considered that a case could not be brought by appellant in terms of s 4 (1) and 5 (1) of the Act because, whereas Mr Pitsiladi was concerned with the elimination of the wholesale discount, appellant had focussed on the nature of the vertical effects of territorial exclusivity.

[41] That then reduces the inquiry into the following consideration: When the complainants, particularly in the first undated letter, refer to the supplying of products and concomitant special benefits, was this complaint against these arrangements sufficient to justify appellant, after its investigation, to formulate the complaint as it so did, being a breach of s 4 (1) (b)?

[42] This question necessitates a return to the decision of this Court in **Yara**, *supra,* but now viewed within the prism of the broader jurisprudence of this Court. As indicated earlier in this judgment, the **Yara** case requires a careful and specific examination in terms of its specific facts. As observed in **Yara,** a complaint of some 113 pages was generated. Only three paragraphs were devoted to a possible cartel arrangement. However, these paragraphs clearly did not encompass the complaint as it was carefully and painstakingly set out by the

complainant. The complaint said so in clear terms. Thus, the latter made it clear that the complaint that was lodged was exclusively based upon certain prohibited practices, being exclusionary pricing practices, excessive pricing practices and discriminatory pricing practices.

[43] Nothing in the judgment suggests that this Court overruled its earlier decision in **Glaxo Welcome (Pty) Ltd and other v National Associated of Pharmaceutical Wholesalers** (Case No: 50/CAC/Feb02) in which, at paragraph 16, the following was stated:

> "*Clearly it is intended that once the complaint is initiated the Commission will investigate the matter and it is the Commission which is enjoined to find that the conduct complained of amounts to prohibited conduct in terms of one or more sections of the Act. While the complaint need not be drafted with precision or even a reference to the Act, the allegations or the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices. <u>There must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions in the Act,</u> otherwise it will not be possible to say what the complaint is about and what should be investigated. Note that section 49 B provides that, once a complaint is initiated, the Commission must investigate the complaint*." (my emphasis)

The key principle in this *dictum* is that there must be a rational or recognisable link between the conduct referred to in a complaint and the prohibitions set out in the Act, 'otherwise it will not be possible to say what the complaint is about and what should be investigated'. That important principle was not overturned in the judgment of this Court in **Yara,** *supra*.

[44] Unfortunately, it appears that the Tribunal read the judgment in **Yara** in isolation and therefore, with respect, dealt with this judgment as constituting a rupture from this Court's earlier jurisprudence. This resulted in the Tribunal formulating its view of binding precedent in the worst possible light; that is as a mechanistic test embracing the most egregious excesses of a type of legal formalism of a bygone era. Whereas the jurisprudence of this Court has sought to balance the legitimate interests of those against whom a complaint has been lodged with the public mandate of the appellant to investigate anti-competitive activity, the Tribunal represented its jurisprudence in a fashion which would make it almost impossible for the appellant to prosecute complaints lodged by third parties, particularly those not well versed in the intricacies of competition law. That the balancing exercise might give rise to different approaches is one issue; an interpretation that requires a precise description of every detail of the complaint is an entirely different and far more problematic issue.

[45] It must be emphasised that the Tribunal's approach to **Yara** is not the manner in which the applicable precedent of this Court should have been read. See, for example, R Cross and JW Harris Precedent in English Law (4ed) at 72 ff To repeat, with particular reference to this case, the applicable test from the Court's jurisprudence is the following: is there a rational or recognisable link between the conduct which was referred to in the complaint and the prohibitions in the Act? To again cite **Glaxo**:

> "*While the complaint need not be drafted with precision or even a reference to the Act, the allegations of the conduct in the complaint must be cognisably linked to particular prohibited conduct or practices*." See also Mailula JA in **Sappi-Fine Paper (Pty) Ltd v The Competition Commission and another** (Case No 23/CAC/Sep02 at para 42).

[46] The test was formulated in the light of a system of an initiation of complaints in terms of s 49 B of the Act, where any person (other than the Commissioner who himself may initiate a complaint) may submit a complaint against an alleged prohibited practice to the Competition Commission in the prescribed form. This provision envisages that lay people have a right to lodge a complaint which will trigger off a process of investigation and possibly referral. To demand that a lay person is required to draft the complaint with the precision of pleadings and with accurate references to the Act is to subvert the very

purpose of s 49 B, in its ambition to accord the citizenry of this country the right to complain against an anti-competitive practice or conduct. Lack of precision is thus no bar if the complaint meets the test as set out above. The implications of precision in the form of a clearly circumscribed complaint, as was the case in **Yara,** is an entirely different matter which is not relevant to this particular complaint.

[47] Viewed within this reading of the Act, in paragraph 10 of annexure B, read with the first undated letter, the complaint was directed against an agreement, arrangement or a practice in which prices were being fixed. In turn, this meant that the complaint had a cognisable link to a prohibited section, meaning s 4 (1) (b). When this complaint was investigated by appellant, it was clear that, in addition to the specific manifestation highlighted by the complaint, the appellant found that the impugned arrangements also involved territorial exclusivity which fell within the very same provisions of the Act.

[48] Significantly, within this context, this Court in **Loungefoam (Pty) Ltd and others v Competition Commission and others; In Re: Feltex Holdings (Pty) Ltd v Competition Commission and others** [2011] 1 CPLR 19 (CAC) interrogated a *dictum* in the judgment in **Woodlands Diary v Competition**

Commission 2010 (6) SA 108 (SCA) at para 35, namely that a complaint could be subject to 'possible amendment or fleshing out after its initiation. On behalf of this Court, Wallis AJA (as he then was) said at para 55:

> *"In referring to the possibility of both an amendment and an initiation of another complaint, the learned judge contemplated two possibilities. The first is that the information obtained in the course of investigation may relate to and fortify the existing complaint and justify an amendment to the particulars of that complaint as initiated without altering its fundamental nature. The second is where the information discloses a quite different transgression or participation by a party not hitherto the subject of a complaint. In those circumstances either the original initiation must be amended to encompass the additional complaint or party or a fresh initiation of a complaint is required.*"

In the present case, after the initial complaint had been lodged, the complainants provided further information, which amplified or 'fleshed out' the complaint lodged in terms of s 4 (1) (b). This is shown in the following passage from a letter cited above:

> "*The real issue however is the question as to the price of beer particularly 750 ml. The so-called independent distributors of SA Breweries such as Southern Cape Beer Distributors (Pty) Ltd operate in specific and non-variable areas*."

Furthermore it was alleged that "*SAB are selling to their distributors at a fixed price with the agreement that such distributors sell at the same fixed price*." This correspondence should have been taken into account because it sought to clarify and amplify the complaint which had been initiated on 25 November 2004 and which had been supplemented by the two undated letters.

[49] To the extent that the complaint lodged did not fall to be heard in terms of s 4 (1) (b) (ii) because the parties were not in a horizontal relationship, the same complaint, as set out and amplified in the subsequent correspondence, to which I have made reference, clearly fell within the scope of a restricted vertical practice in terms of s 5 (1) and s 5 (2) of the Act. After the **Loungefoam** decision, there could be no justification for the Tribunal to have rejected, without explanation, all or any recourse to the subsequent correspondence in determining whether this correspondence amplified or clarified the complaint as initiated.

[50] To the extent that there was any difficulty in negotiating the jurisprudence of this Court and, in particular the **Yara** decision with regard to the complaints lodged in terms of s 4 and s 5 of the Act, there was even less justification for the finding that there had been no complaint lodged in terms of s 9. Here the

formulation of the complaint was clear. In the first undated letter the following appears:

> *"We also contend that SAB is not entitled to favour certain distributors/wholesalers with special prices to enable them to supply the SAB retail price list but to refuse those same prices to other independent distributors/wholesalers."*

There could, possibly, still have been some residual doubt that the complaint in this regard was based on s 9, given the absence of an express reference to the section in the first undated letter. That doubt was completely removed in the second undated letter when first respondent replied thus:

> "*We too have sought legal advice in relation to your complaints. We certainly denied that SAB engages in a form of price discrimination in contravention of the Competition Act*."

The point is not whether first respondent denied breaching s 9 of the Act. The merits of the complaints are not in issue at this stage of proceedings. The key question was whether the complaint was lodged in a form which gave rise to recognisable link between the conduct and a particular prohibited practice, in this case s 9 of the Act. Once it was accepted that the undated letters formed part of the complaint, there was no basis by which the Tribunal could arrive at its decision to conclude that there had not been a complaint initiated in terms of s 9 of the Act.

Conclusion

[51] Much was made in this case about whether the judgment in **Yara** introduced an 'intention test' into the determination of the ambit of a complaint. To emphasise, in the **Glaxo** judgment at para 69 this Court said:

> "*The proper approach is to determine first what conduct is alleged between the complaint and what prohibited practices such conduct may be said to invoke or be rationally connected to. Then consideration is given to the referral to see whether the conduct they alleged to substantially the same.*"

In **Yara** a careful reading of the specific complaint in that case lead to the conclusion that the conduct alleged turned on a series of prohibited practices carefully described in that complaint. Cartel activity was not the subject of that complaint and that was made clear by the complainant when it generated the complaint. To the extent that the complaint in **Yara** contained three paragraphs which referred to the appellants, Dambuza JA found that this constituted the submission of information to the Commission. That much is clear from the following passage of her judgment:

> "*There is no statement of conduct by Yara or Omnia in the CC1 Form that can be linked to a section 4 (1) (b) (i) prohibited practice. There is no such statement of conduct in the Form even as against Sasol. I can find no complaint therefore on the CC1 Form relating to collusion by the same respondents over the prices of fertilizers as set out in paragraph 8 of the*

> *referral. The non appearance of the names of Yara and Omnia from the CC 1 Form is, in my view, indicative of Nutri-Flo's intention not to submit a complaint against them. The complaint is set out in the CC1 Form as "concerning Sas*ol." para 25

[52] By contrast, in the present dispute, the complaint focussed clearly on certain agreements or arrangements between first respondent and the balance of respondents. The complainant was concerned with a practice which gave rise to certain arrangements with respect to pricing between specified parties as well as price discrimination. That was the ambit of the complaint. There was no room in this particular case to conclude that there was no intention to lodge a complaint against different forms of conduct and different parties as had been the case in **Yara**, *supra*.

[53] In this case, the complainant complained about certain forms of conduct. Agreed the complaint, as drafted, did not accurately refer to all of the relevant sections of the Act which were later invoked by appellant, but the conduct, against which the complaint was lodged, gave rise to an investigation. During that process, the complaint was amplified and/or "fleshed out". The upshot was that the conduct against which the complainant brought its complaint gave rise to a series of allegations of breaches of the Act which were cognisably linked to the conduct against which the complainant had initially complained; that is the

complainants had targeted a process of disintermediation of wholesaling of beer, by first respondent and a consequent change in the distribution system of first respondents manufactured product which directly involved second to fourteenth respondents. Read as a whole, that averment was the foundational basis of the complainant's initiation of a complaint.

[54] Unfortunately, the uncritical invocation of the **Yara** judgment was the root of the problem which then gave rise to an incorrect decision. As is apparent from this judgment, the present dispute can and should have been resolved by an examination and analysis of the specific facts. It is not dependent on a reconstruction of any of the existing legal principles, notwithstanding the nuanced arguments based upon various cases cited by counsel. However, it is important to mention the approach adopted by the Constitutional Court in **Competition Commission of South Africa v Senwes Ltd** 2012 (7) BCLR 667 (CC) in which the Court warned against an interpretation of the procedural provisions of the Act which would limit the Tribunal's jurisdiction to consider prohibited practices that were brought before it. It also eschewed the uncritical use of formalism in proceedings before the Tribunal which had given rise to that appeal to the Court in favour of an approach which asked the question as to whether the defendant was aware of the complaint against it (see para 51). That principle is also applicable to the present dispute.

[55] For these reasons therefore, the appeal is upheld. The order of the Tribunal is set aside and replaced with an order dismissing the applications brought by first respondent and second to fourteenth respondents. Although appellant asked for the costs of three counsel, there was no justification placed before the Court for such an award. The respondents are thus ordered jointly and severally to pay the costs of the appellant in this Court, which includes the costs of two counsel.

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DAVIS JP

Mailula and Zondi JJA concurred.