

## COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No.: 45/CR/May06**

In the matter between:

<b>The Competition Commission of South Africa</b>	Applicant
<b>And</b>	
<b>Sasol Chemical Industries (Pty) Ltd</b>	First Respondent
<b>Kynoch Fertilizer (Pty) Ltd</b>	Second Respondent
<b>African Explosives and Chemical Industries Ltd</b>	Third Respondent

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Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member), and U Bhoola (Tribunal Member)

Heard on : 14 February 2008

Decided on : 15 February 2008

Reasons Issued : 01 April 2008

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### REASONS AMENDMENT AND STRIKE-OUT APPLICATIONS

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[1] On 11 February 2008, Sasol launched an application to strike out certain portions of the Commission's expert witness statement in a complaint referred to the Tribunal by the Commission against it and Kynoch/AECI (the strike out application). On 13 February 2008, the Commission launched an application to amend its pleadings in this complaint referral. Both applications were heard by the Tribunal on 14 February 2008. The Tribunal dismissed the Commission's application for amendment to its pleadings (the amendment application) and ordered that certain portions of the Commission's expert witness statement not be allowed into evidence. These are the reasons for our decision.

## Background to the applications

[2] These two applications concern a complaint in the fertilizer market that was referred to the Tribunal during August 2004 by the Commission against Sasol Chemical Industries, Kynoch Fertilizer and AECL ("the Profert complaint"). Pleadings in this matter have closed. At more or less the same time the Commission referred a second complaint against Sasol, Omnia Fertilizer Ltd ("Omnia"), Yara South Africa (Pty) Ltd, and African Explosives and Chemical Industries of South Africa Ltd ("AECL"). Nutri Flo CC and Nutri-Fertilizer CC were admitted as interveners in the Nutri-Flo complaint referral in July 2007 ("the Nutri-Flo complaint"). Pleadings in the Nutri-flo complaint have not yet closed.

[3] On 2 August 2007, at a pre-hearing of the Profert complaint, the parties agreed on a timetable in preparation for trial and the matter was set down for hearing from 3-14 March 2008. During August 2006, the Commission had indicated that it may approach the Tribunal for a consolidation of the Profert and Nutri-flo complaints but launched a consolidation application only a year later on 5 October 2007. In the meantime preparations for trial in respect of the Profert complaint continued along the time lines agreed by the parties. Documents and witness statements were exchanged, experts were confirmed, bundles were being prepared and the Tribunal had set aside the dates of 3-14 March 2008 which then became unavailable for other matters.

[4] On 11 February 2008 Sasol sought to strike out certain paragraphs in the expert report of Dr Simon Roberts filed by the Commission ("Robert's Report") on the basis that they constituted inadmissible evidence. Sasol objected to the Commission's attempt to lead evidence in the form of those portions of the Roberts Report that it identified as inadmissible.<sup>1</sup> At the same time, amid the myriad of applications being lodged with the Tribunal, a skirmish was taking place between Sasol and Profert, the complainant in this matter regarding a subpoena *duces tecum*, which required Profert to produce a range of documents. Profert had objected to the subpoena on the basis that it had not been validly issued. Given that the trial was scheduled to start on 3 March 2008, the Tribunal directed that it will hear all of these interlocutory matters on 14 February 2008.

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<sup>1</sup> While we refer to this as a strike out application this was not an application such as a strike out application that is customarily launched by an applicant in the High Court when it seeks to remove certain allegations or statements in a respondent's pleadings. This application was in substance an application asking the Tribunal not to allow some aspects of the Commission's expert's evidence. The disputed evidence is contained in paragraphs 1.1 to 1.6 of the Notice of Motion in the Strike out Application.

[5] On 12 February 2008, the Commission filed a notice of withdrawal of the consolidation application and literally a day before the hearing, on 13 February 2008; it lodged an application to amend its particulars of complaint (pleadings).

[6] We do not deal here with the merits of the consolidation application or Profert's objection to the Tribunal subpoena but refer to them merely for purposes of sketching the context in which these two applications were heard. Nor do we deal with the substance of the amendment application or the strike-out application, save to say that they are related. Both dealt with references to the Import Planning Committee, the Nitrogen Balancing Committee and the Export Club ("the committees"), their functioning and the impact of these committees on the competitive structure of the fertilizer market. These committees are the subject of the Nutri-flo complaint.

[7] The Tribunal is guided by the Uniform Rules of the High Court in matters of procedure not expressly provided for in its rules. When a matter is expressly dealt with in its rules, the Tribunal may also have regard to the practice and jurisprudence of the High Court in interpreting its own rules. In general the approach to applications for amendments in the High Court is a permissive one.<sup>2</sup>

[8] However the Tribunal enjoys a wide discretion to determine the conduct of its proceedings. Rule 18 of the rules of the Tribunal provide that parties can seek to amend their papers. The Tribunal has a discretion to grant such an application such discretion to be exercised in the context of the particular application and with regard to the possible prejudice caused to the parties to the proceedings and the interests of justice.<sup>3</sup>

[9] As noted above this complaint was referred to the Tribunal almost four years ago. Since then its resolution has been hindered by a number of events, not least by the conduct of the respondents themselves.<sup>4</sup> The Commission on the other hand, has dithered about consolidating this complaint with the Nutri-flo complaint since 18 August 2006. The Commission's initial indications, the subsequent late filing of the consolidation application and then the withdrawal of it at the last minute cloaked the adjudication of this matter in

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<sup>2</sup> The court will not easily dismiss an application for amendment which cannot be cured by postponement of the matter or by an order of costs. However where there is inordinate delay in bringing an application for amendment, such delay must be explained. See LTC Harms "Civil Procedure in the Supreme Court: Commentary" page B-189 issue 34.

<sup>3</sup> In terms of the Rule 18(1) the person who filed a Complaint Referral may apply to the Tribunal by notice of Motion in Form CT 6 at any time prior to the end of the hearing of that complaint for an order authorizing them to amend their form CT 1(1), CT1 (2) or CT 1(3), as the case may be, as filed. Rule 18(2) provides that if the Tribunal allows the amendment, it must allow any other party affected by the amendment to file additional documents consequential to those amendments within a time period allowed by the Tribunal.

<sup>4</sup> The respondents had taken an earlier decision of the Tribunal in the early days of this matter on review to the Competition Appeal Court. See 51/CAC/Jun05

constant uncertainty. Significantly at no stage between the pre-hearing of 2 August 2007, where the dates for hearing this matter were decided, and at the time when it launched its consolidation application did the Commission suggest that it was not ready to proceed to trial. Indeed it continued to comply with the time-table agreed to by the parties for the exchange of documents and witness statements.

[10] As far as the amendment application is concerned the Commission gave no indication, despite being seized with the complaint over a period of at least four years that it would seek an amendment to its pleadings. Nor did it approach the Tribunal timeously, as one would have expected it to if it was of the view that it was not ready for some or other reason not to proceed with the matter, to remove the matter from the roll. Instead it put the all other parties to great effort and time for trial preparation and precluded the Tribunal from allocating the dates of 3-14 March 2008 to another matter. Moreover it provided no explanation whatsoever for bringing the amendment application at such a late hour. Nor were we persuaded by the Commission's counsel that the amendments sought were of such importance to the Commission's case that it warranted a postponement of the matter at the eleventh hour.<sup>5</sup>

[11] Had we granted the amendment application or refused the strike out application the matter would certainly have been further delayed, with prejudice not only to the respondents, but also to a speedy resolution of the complaint which had been referred to this Tribunal almost four years ago. This of course does not mean that the Tribunal will not permit amendments and postponements brought timeously, or even if these are brought at the last minute or in the course of proceedings, but are properly motivated and in the Tribunal's view will promote the public interest by a fuller ventilation of the issues. Nor is the Tribunal inclined to exclude evidence prior to the commencement of a trial or to make a determination on its probative value before it has heard such evidence.

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<sup>5</sup> The motivation provided by the Commission's counsel, in a somewhat vague manner, ranged from the amendments being important in relation to the impact of the agreement between Sasol and Kynoch/AECI, to being part of an evidential matrix, to providing a contextual background and being relevant to the issue of market power. When pressed by the Chairperson to clarify what he meant by impact, Mr. Brassey was not able to shed any more light on the matter.

*"CHAIRPERSON: I'm still not certain that I get the distinction between those two contentions. You are saying that you are going to prove the existence of a horizontal agreement by a set of facts distinct from those that we are talking about now, the clubs and the like.*

*ADV BRASSEY: We will not independently rely on the clubs and the like, as a basis for ... it is not a count. It is not a charge, but it's a context.*

*CHAIRPERSON: And so it's collateral. I mean, it's...*

*ADV BRASSEY: It's a background circumstance. In other words, if you ask yourself the question what is the impact of this agreement, you see the impact of the agreement by reference to the relationship that exists between these three players and you assess its impact on those grounds and where...*

*CHAIRPERSON: But what do you mean by impact? I mean, I'm sorry. I don't understand what impact means..."*

[12] In this case however, the Tribunal's decision to refuse the Commission's application and grant the respondent's application was motivated solely in order to avoid the Profert matter from being delayed any further. The matter has been plagued by inordinate delays and despite a long passage of time has not yet gotten off the starting blocks. Our primary concern was that the matter should proceed on 3 March 2008.

[13] In the circumstances, after this decision was handed down, the matter was indeed postponed *sine dies* at the request of the respondents.<sup>6</sup> This postponement of course provides all parties concerned with an opportunity to consider their strategies, weigh up their options, to seek any amendments, supplement their witness statements and if the Commission considers this necessary, to seek consolidation of the two complaints timeously.

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Y Carrim

01 April 2008  
Date

Concurring: D Lewis and U Bhoola.

Tribunal Researcher : J Ngobeni

For the applicant : Adv. Brassey S.C and Adv. O Mooki  
(Instructed by Cheadle Thompson & Haysom Inc)

For the first respondent : Adv. D Unterhalter S.C and Adv. A Cockrell  
(Instructed by Webber Wentzel Bowens)

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<sup>6</sup> Sasol attorneys have been attempting to access a variety of documentation relevant to the proceedings from Profert. The documents had initially been sought from the Commission by way of discovery and the Commission had indicated that it was not in possession of those documents. The Chairman of Profert was subpoenaed to produce the documents but Profert challenged the validity of the of the Tribunal summons. This resulted in Sasol launching contempt proceedings against Profert in the Competition Appeal Court. Profert had also brought an application to suspend the Tribunal summons. Profert withdrew the suspension proceedings on 28 February 2008. According to Sasol on 29 February 2008, Profert provided Sasol with limited amount of documentation requested. Sasol further submitted that copies of those documents were not readily available and Sasol attorneys had had to travel to Potchefstroom on 1 March 2008 to collect copies. Therefore Sasol attorneys only had 2 March 2008 to analyze the documents. According to Sasol it appeared to them on 2 March that the documents given to them by Profert were incomplete. In light of the documents provided Sasol also considered whether it should amend its witness statements. Under the circumstances Sasol was not ready to commence with the hearing and they asked for a postponement which we granted.