COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR212Feb17[1]

In the consolidated *exception, dismissal and joinder* applications

In re: the complaint referral between:

COMPETITION COMMISSION OF SOUTH AFRICA	Applicant

And

BANK OF AMERICA MERRILL LYNCH INTERNATIONAL DESIGNATED ACTIVITY COMPANY	First Respondent
BNP PARIBAS	Second Respondent
JP MORGAN CHASE AND CO.	Third Respondent
JP MORGAN CHASE BANK N.A	Fourth Respondent
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	Fifth Respondent
STANDARD NEW YORK SECURITIES INC.	Sixth Respondent
INVESTEC LIMITED	Seventh Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Eighth Respondent
NOMURA INTERNATIONAL PLC	Ninth Respondent
STANDARD CHARTERED BANK	Tenth Respondent
CREDIT SUISSE GROUP	Eleventh Respondent
COMMERZ BANK AG	Twelfth Respondent
MACQUARIE BANK LIMITED	Thirteenth Respondent

[1] These reasons deal with the various applications under Tribunal case numbers: CR212Feb17/AME051Jun20; CR212Feb17/JOI136Sep20; CR212Feb17/EXC092Aug20; CR212Feb17/EXC055Jun20; CR212Feb17/DSM088Aug20; CR212Feb17/DSM098Aug20; CR212Feb17/DSM090Aug20; CR212Feb17/DSM089Aug20; CR212Feb17/DSM094Aug20; CR212Feb17/EXC110Aug20; CR212Feb17/DSM107Aug20; CR212Feb17/EXC099Aug20; CR212Feb17/EXC109Aug20; CR212Feb17/DSM068Jul20; CR212Feb17/DSM097Aug20; CR212Feb17/EXC093Aug20; CR212Feb17/DSM096Aug20; and CR212Feb17/DSM091Aug20.

HSBC BANK PLC	Fourteenth Respondent
CITIBANK N.A	Fifteenth Respondent
ABSA BANK LIMITED	Sixteenth Respondent
BARCLAYS CAPITAL INC.	Seventeenth Respondent
BARCLAYS BANK PLC	Eighteenth Respondent
HSBC BANK USA, NATIONAL ASSOCIATION INC.	Nineteenth Respondent
MERRILL LYNCH PIERCE FENNER AND SMITH INC.	Twentieth Respondent
BANK OF AMERICA, N.A.	Twenty First Respondent
INVESTEC BANK LIMITED	Twenty Second Respondent
CREDIT SUISSE SECURITIES (USA) LLC	Twenty Third Respondent
NEDBANK GROUP LIMITED	Twenty Fourth Respondent
NEDBANK LIMITED	Twenty Fifth Respondent
FIRSTRAND LIMITED	Twenty Sixth Respondent
FIRSTRAND BANK LIMITED	Twenty Seventh Respondent
STANDARD AMERICAS INC	Twenty Eighth Respondent

Panel:	Ms Y Carrim (Presiding Member) Ms M Mazwai (Tribunal Member) Mr AW Wessels (Tribunal Member)
Heard on:	29, 30 November, 01, 02, 03 and 06 December 2021
Order Issued on:	30 March 2023
Reasons Issued on:	30 March 2023

REASONS FOR DECISION AND ORDER

INTRODUCTION

[1] This matter relates to a second round of exception, objection and dismissal applications brought by the Respondents[2] in response to the Competition Commission's ("Commission") complaint referral ("Referral") alleging collusion by foreign and local firms for allegedly manipulating the rand-dollar exchange rate.

[2] Despite the fact that the named banks are formally applicants in the exception, objection, dismissal and strike out applications, we refer to the banks as Respondents in these reasons.

[2] The Commission alleges that between 2007 and at least 2013, 28 banks[3] from multiple jurisdictions, in Europe, South Africa, Australia and the United States of America conspired to manipulate the South African Rand through information sharing on electronic and other platforms and through various co-ordination strategies when trading in the USD/ZAR currency pair.[4]

[3] The manipulation impacted on the exchange rate of the South African Rand which in turn affected various parts of the South African economy including imports and exports, foreign direct investment, public and private debt, company balance sheets, with the attendant implications for the price of goods and services and financial assets.[5]

[4] The Referral was filed by the Commission pursuant to an order by the Competition Appeal Court ("CAC") in *Competition Commission v Bank of America Merrill Lynch International Limited and Others* ("CAC judgment")[6] in which the CAC ordered the Commission to "*file a new referral affidavit to substitute for and replace all the [previous] referral affidavits*",[7] and to set out details to overcome the Commission's deficiently pleaded case.

[5] In this round the Commission also seeks to join several Respondents in addition to those that it sought to join in the previous round. The joinder applications of the previous round were held over pending the determination of jurisdiction.

[6] The Respondents cited in this matter all raised some form of objection to the Referral (in the form of *inter alia* exceptions, points *in limine* and/or self-styled dismissal applications) and in opposition to the joinder applications.

---

[3] In referring to the Respondents we refer to their respective shortened corporate name and, in brackets, their citation in the Referral as 1R, 3R, 23R etc. (see Annexure A for the list of shorthand names of the 28 banks and their corporate groups).

[4] Referral at para 6.

[5] Referral at para 7.

[6] *Competition Commission v Bank of America Merrill Lynch International Limited and Others (175/CAC/Jul19)* handed down on 28 February 2020 ("**CAC judgment**").

[7] CAC order at para 3.1.

[7] For convenience we have grouped the applications in two broad categories namely the objection applications (which include exceptions, objections, points *in limine,* strike outs and/or self-styled dismissal applications) and the joinder applications.

[8] The joinder applications brought by the Commission and the objection applications were heard on 29, 30 November, 1, 2, 3 and 6 December 2021. These are our composite reasons in respect of all the applications.

[9] Given the convoluted history of the matter and the large number of Respondents and applications in the matter, we have arranged our reasons in the following order. We provide a background to the current proceedings and then deal with our evaluation in two parts. In Part A, we deal with some of the grounds of objection and opposition to joinder on a thematic basis and conclude on these. In Part B, we deal with remedies available to us and deal with outcomes for each application.

BACKGROUND

The First Round

[10] The background to this matter is well recorded in the 2019 decision of the Tribunal[8] and the 2020 decision of the CAC.[9] For ease of convenience the two decisions will be referred to as the **2019 Tribunal decision** and the **CAC judgment** respectively.

[11] On 15 February 2017, the Commission referred its complaint against the first 19 Respondents for alleged price-fixing and market division in contravention of sections 4(1)(b)(i) and (ii) of the Competition Act No 89 of 1998 ("the Act") ("February 2017 Referral") comprised of a notice of motion and affidavit of 26 pages.

---

[8] *Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others* (CR121Feb17) ("**2019 Tribunal decision**").

[9] CAC judgment.

[12] The Commission did not seek a penalty against ABSA Bank (16R), Barclays Capital (17R) and Barclays Bank (18R) as these firms applied for leniency. Citibank NA (15R) and the Commission settled, and the agreement was confirmed as an order on 26 April 2017.[10]

[13] By 3 March 2017 most of the remaining Respondents had either filed exceptions or requests for further particulars, relating to amongst other things, the Tribunal's competency to hear the February 2017 Referral (as supplemented) against peregrini[11] due to the lack of jurisdiction over these firms in the context of extra-territorial application of the Act; and the insufficiency of the Commission's pleadings to make out a cogent answerable case.

[14] The Commission's February 2017 Referral was followed by multiple supplements:

14.1 on 31 March 2017 the Commission filed a supplementary affidavit ("the First Supplementary Affidavit");[12]

14.2 on 7 April 2017 the Commission filed a further supplementary affidavit;[13] and

14.3 on 20 December 2017 the Commission filed a further supplementary affidavit ("the Third Supplementary Affidavit").[14]

[15] In the Third Supplementary Affidavit, the Commission sought the joinder of additional Respondents who were not part of the February 2017 Referral namely, HBUS (19R), MLPFS (20R), BANA (21R), Investec Bank (22R) and CSS (23R) (the "Initial Joinder Respondents"). Four of the five Respondents

[10] CR212Feb17/SA220Feb17.

[11] Distinguished between foreign peregrini and local peregrini who have some presence in the jurisdiction of the Tribunal.

[12] This affidavit was six pages long and addressed only the issue of jurisdiction.

[13] This affidavit rectified an omission contained in the First Supplementary Affidavit.

[14] This affidavit was substantial and, in addition to joinder, sought to provide additional particularity to the initial referral and dispose of a number of the vague and embarrassing exceptions raised by the Respondents.

objected to their joinder on the basis that the Tribunal lacked jurisdiction over the peregrini, and these were accordingly held over to be determined once the issue of jurisdiction had been decided. Investec Bank (22R) did not oppose the application and was ultimately joined as a Respondent.[15]

[16] The Tribunal handed down its decision on the first round of exceptions on 12 June 2019. In doing so, the Tribunal classed the Respondents into various groups relating to the Tribunal's ability to exercise jurisdiction over them; namely:

16.1 Incola: eight local banks[16] in respect of which the Tribunal's jurisdiction was not disputed;

16.2 Banks where jurisdiction was disputed included:

16.2.1 First class local peregrini: five banks[17] which have a local South African branch and are registered as authorised dealers in terms of the Banks Act No. 94 of 1990 ("Banks Act") and SA Exchange Control Regulations;

16.2.2 Second class local peregrini: three banks[18] which have a South African Representative Office and representative officer in terms of the Banks Act; and

16.2.3 Pure[19] peregrini: 12 banks[20] which have no local presence or business activity in South Africa.

[17] In relation to the pure peregrini, the Tribunal held that while it enjoyed subject matter jurisdiction over the conduct of the Respondents as conferred by section 3(1) it lacked personal jurisdiction over them. Notwithstanding this finding, the Tribunal held that it was still entitled to issue a declaratory order if the Commission established its section 4(1)(b) case against all or some of the

---

[15] CAC order at para 4.1.

[16] Investec Ltd (7R); Standard Bank (8R); Absa Bank (16R) (leniency applicant); Investec Bank (22R); Nedbank Group (24R); Nedbank Ltd (25R); FirstRand Ltd (26R); and FirstRand Bank (27R).

[17] BNP (2R); JPMorgan NA (4R); SCB (10R); HBEU (14R); and Citibank NA (15R) (settled).

[18] CSG (11R); CommerzBank (12R); and BANA (21R).

[19] Also referred to as foreign peregrini.

[20] BAMLI DAC (1R); JPMorgan Co (3R); ANZ (5R); SNYS (6R); Nomura (9R); Macquarie (13R); Barclays Capital (17R); Barclays Bank (18R); HBUS (19R); MLPFS (20R); CSS (23R); and Standard Americas (28R).

Respondents. A typical declaratory order would state which firms would have been found to have participated in that conduct which would have civil and penalty consequences. The Tribunal found that while it could not grant a typical declaratory order against the pure peregrini it could still grant an order that would have limited effect which may have reputational consequences.

[18] The Tribunal accordingly dismissed the February 2017 Referral against the pure peregrini being BAMLI (1R),[21] JPMorgan Chase (3R), ANZ (5R), SNYS (6R), Nomura (9R) Macquarie (13R), HBUS (19R). MLPFS (20R) and CSS (23R), with the exception of the declaratory order envisaged in para 3.4.1 of its order.

[19] In relation to the local peregrini, the Tribunal found that additional allegations needed to be made by the Commission for the February 2017 Referral to meet the qualified effects test and for the Commission to confine the administrative penalty sought to turnover within, and exports from, the Republic of South Africa as defined in section 59 of the Act.[22]

[20] In addition, the Tribunal ordered that the Commission provide further particulars in response to the objections raised by Respondents as to deficiency of pleadings. In that process the Tribunal required the Commission to limit its pleading to a single overarching conspiracy ("SOC") due to the confusion created by the Commission by filing several affidavits.

[21] The Tribunal provided the Commission with a final opportunity to file a new referral affidavit to substitute and replace all the referral affidavits filed to date within 40 days of its order containing particularity as set out in the Tribunal's order.

---

[21] Bank of America Merrill Lynch International Limited "BAMLI" was initially cited and later, in the second round, was substituted with Bank of America Merrill Lynch International Designated Activity Company ("BAMLI DAC"). Depending on which party was cited at the time we refer to the entities interchangeably.

[22] Section 59(2) and 59(2A) of the Act.

[22] The pure peregrini Respondents[23] lodged an appeal against the Tribunal's decision that it could issue a declaratory order against them, albeit that the order would be limited in effect. In essence, the pure peregrini Respondents argued that the Tribunal had already determined that it had no jurisdiction over them and therefore did not possess the power to issue the declaratory order if the Commission were successful in its section 4(1)(b) case.

[23] JPMorgan Co (3R), JPMorgan NA (4R), ANZ (5R), CSS (23R), BAMLI (1R) and MLPFS (20R) all filed both an appeal and a review against the decision of the Tribunal. SNYS (6R) only sought to appeal after the Commission filed its cross appeal.

[24] HBUS (19R), MLPFS (20R) and CSG (11R) appealed against the Tribunal's decision to defer the determination of the Commission's joinder application, pending the further particularity so ordered.

[25] The Commission cross appealed regarding the Tribunal findings that (i) it had no personal jurisdiction over the pure peregrini banks; (ii) to establish jurisdiction over a peregrinus, the requirements of both personal jurisdiction and subject matter jurisdiction had to be met; (iii) the common law on personal jurisdiction could not be broadened to apply to section 3(1) of the Act; and (iv) that section 3(1) required the application of the "qualified effects" test for the purposes of subject matter jurisdiction.

[26] On 28 February 2020, the CAC upheld the pure peregrini respondents' appeal against paragraph 3.4.1 of the Tribunal order, read in conjunction with paragraph 1 of the Tribunal's order which dismissed the Commission's referral against them.[24]

---

[23] BAMLI DAC (1R); JPMorgan Co (3R); ANZ (5R); SNYS (6R); Nomura (9R); Macquarie (13R); Barclays Capital (17R) (leniency applicant); Barclays Bank (18R) (leniency applicant); HBUS (19R); MLPFS (20R); CSS (23R); and Standard Americas (28R).

[24] It is recalled that the Tribunal though finding that it has no personal jurisdiction over the pure peregrini but that it was able to issue a declaratory order against any pure peregrini (2019 Tribunal decision at para 65).

[27] The CAC also upheld the Commission's cross appeal against paragraph 1 of the Tribunal's order. In so doing the CAC held that the common law on personal jurisdiction applied to the section 3(1) of the Act and the Tribunal could enjoy both personal and subject matter jurisdiction over the pure peregrini provided there were adequate connecting factors between the foreign peregrini conduct and the suit brought by the Commission to justify the assumption of such jurisdiction.

[28] In setting aside the Tribunal's order, the CAC noted that the Tribunal had already given the Commission a final opportunity to file a new referral affidavit to substitute and replace all the complaint referral affidavits in so far as the local peregrini are concerned. The CAC was of the view that the Commission be granted a similar opportunity in respect of the pure peregrini Respondents, which would provide the Commission with a "*final opportunity to establish adequate connecting factors between the respondent parties and the jurisdiction of the Tribunal to establish personal jurisdiction in addition to proving the requirements of subject matter jurisdiction on facts which may be set out in the fresh referral affidavit"*.[25]

[29] The CAC also directed the Respondents to file their answers within 20 days of the Commission filing its new referral.

[30] The CAC did not vacate the Tribunal's findings regarding the local peregrini Respondents.[26] The CAC restated without disturbing the Tribunal's finding regarding local peregrini that "*the Commission had alleged sufficient facts to establish the Tribunal's personal jurisdiction over all seven local peregrini*".[27] However it was still necessary for the Commission to depose to additional affidavits to sustain its case against the local peregrini.[28]

---

[25] CAC judgment at para 80 and CAC order at para 3.1.1.
[26] CAC judgment at paras 20, 27 and 80.
[27] CAC judgment at para 18.
[28] CAC judgment at para 19.

THE CURRENT PROCEEDINGS

[31] The Commission filed its Referral on 1 June 2020.

[32] On 24 June 2020, the Commission filed a supplementary affidavit to correct an error in the citation of RMB Holdings Limited ("RMB" previously cited as 26R); and in terms of which minor edits were made to the Referral.

[33] On 25 June 2020, the Commission filed an affidavit seeking leave to amend its Notice of Motion and Form CT1 by seeking to add HBUS (19R), MLPFS (20R), BANA (21R), Investec Bank (22R), CSS (23R), Nedbank Group (24R), Nedbank Ltd (25R), RMB (previously cited as 26R), FirstRand Bank (27R) and Standard Americas (28R) on the Referral form; seeking costs against those opposing this application; and amending citations of certain parties.

[34] On 13 July 2020, the Commission filed a second supplementary affidavit, replacing RMB as 26R with FirstRand Ltd (26R).[29] The citation of Investec Ltd (7R) and Investec Bank (22R) were also amended in line with their correct control structures.

[35] On 11 August 2020, the Commission filed a revised Form CT6 and an affidavit supplementing the Commission's Application for Leave to Amend. This affidavit sought to amend the BAMLI DAC's (1R) citation and add HBUS (19R), MLPFS (20R), BANA (21R), Investec Bank (22R), CSS (23R), Nedbank Group (24R), Nedbank Ltd (25R), RMB (previously cited as 26R), FirstRand Bank (27R) and Standard Americas (28R) to the Notice of Motion (of 15 February 2017).

[36] On 30 September 2020, the Commission filed a conditional joinder application in respect of Nedbank Group (24R), Nedbank Ltd (25R), FirstRand Ltd (previously RMB was cited as 26R), FirstRand Bank (27R) and Standard Americas (28R) ("the Conditional Joinder Respondents").

---

[29] On 9 July 2020 the Commission filed a Notice of Withdrawal against RMB (the erstwhile 26R).

[37] Instead of filing their answering affidavits as ordered by the CAC, the Respondents (applicants in these proceedings) filed exceptions, objections, applications for dismissal and strike out of the Referral and the Commission's application to join further Respondents.

[38] The matter was heard over 29, 30 November, 1, 2, 3 and 6 December 2021. The joinder applications were heard first and the objections thereafter. Unlike in the previous round where the hearing was arranged on a thematic basis with a lead counsel per theme agreed amongst the Respondents, in this round each Respondent argued its own case.

[39] We turn to summarise the applications.

Joinder applications

[40] In these proceedings the Commission seeks to join the Initial Joinder Respondents – HBUS (19R); MLPFS (20R) and BANA (21R); CSS (23R) – and the Conditional Joinder Respondents – Nedbank Group (24R); Nedbank Ltd (25R); FirstRand Ltd (26R); FirstRand Bank (27R); and Standard Americas (28R).

[41] As mentioned, the Commission initially simply sought to amend their papers and cited the Initial and Conditional Joinder Respondents (collectively referred to as the "Joinder Respondents") on the basis that the Referral constituted a whole new referral *in toto*, in line with the CAC's order that a "new" referral be filed. After receiving objections, the Commission filed what it termed "conditional joinder applications". We have treated both Initial and Conditional Joinder Respondents as respondents before us in unconditional joinder applications.

[42] The Joinder Respondents oppose the joinder applications on the following grounds, arranged thematically:

42.1 Tribunal lacks personal jurisdiction and subject-matter jurisdiction: HBUS (19R), MLPFS (20R), BANA (21R), CSS (23R) and Standard

Americas (28R).[30]

42.2 No cause of action

42.2.1 MLPFS (20R), BANA (21R) and CSS (23R) oppose the Commission's joinder application on the ground that the Referral does not make out a prima facie case against them.[31]

42.2.2 FirstRand Ltd (26R) opposes its joinder to the Referral and asserts that it and FirstRand Bank (27R) are "two distinct firms" without advancing any principal legal or factual basis for its assertion. FirstRand Bank (27R) does not oppose its joinder.

42.3 No valid initiation

42.3.1 Standard Americas (28R), Nedbank Group (24R) and Nedbank Ltd (25R), oppose the Commission's joinder application on the ground that the Commission did not properly initiate a complaint against them.[32]

42.4 The complaint is time-barred in terms of section 67(1)

42.4.1 Standard Americas (28R), Nedbank Group (24R) and Nedbank Ltd (25R), oppose the Commission's joinder application on the ground that the case is time-barred.[33]

42.5 Prejudice

42.5.1 Nedbank Group (24R) and Nedbank Ltd (25R) point only to prejudice arising from alleged defects in the case against them, and not to the procedural prejudice relevant to the

[30] Joinder bundle, MLPFS's (20R) supplementary answering affidavit at para 52 on p151.

[31] Ibid.

[32] Joinder Bundle, Nedbank Group's (24R) and Nedbank Ltd's (25R) answering affidavit at paras 15 - 45 on pp332 – 339.

[33] Ibid.

question of whether the joinder should be granted.[34]

42.5.2 Standard Americas (28R), argues it has suffered prejudice as a result of the belated attempt to include it as a Respondent in the Referral.[35]

Exceptions, objections strike out and dismissals

[43] The Respondents' (applicants in these proceedings) objections can be categorised as follows:

43.1 Exceptions on notice are brought by BNP (2R), SCB (10R), Nedbank Group (24R) and Nedbank Ltd (25R);

43.2 Exception and objection applications on affidavit are brought by BAMLI DAC (1R), JPMorgan Co (3R), JPMorgan NA (4R), Nomura (9R), CSG (11R), CSS (23R) in the alternative, CommerzBank (12R), and Macquarie (13R);

43.3 In respect of CSG (11R), the exception application is made in the alternative to CSG's (11R) dismissal application and in respect of CSS, the exception application is made in the alternative to CSS' (23R) opposition to joinder.

43.4 An application to set aside / strike out was brought by ANZ (5R); and

43.5 Self-styled "dismissal applications" are brought by SNYS (6R), Standard Bank (8R), Standard Americas (28R), HBEU (14R), HBUS (19R), FirstRand Bank (27R), and CSG (11R). In substance however we consider these applications as exceptions to the Referral which seek the dismissal of the complaint as a remedy.

[44] Each application raises several grounds of objections to the Commission's Referral as follows[36]:

---

[34] Joinder bundle, Nedbank Group's (24R) and Nedbank Ltd's (25R) answering affidavit at para 75 on pp347 - 348 and FirstRand Bank's (27R) answering affidavit para 34.5 on p301.

[35] Standard Americas' (28R) heads of argument at para 18.

[36] In legal parlance this is called a shot-gun approach to pleadings where parties raise as many objections as they can muster in the hope that some will succeed.

44.1 JPMorgan Co (3R), JPMorgan NA (4R), ANZ (5R), SNYS (6R), Standard Bank (8R), Nomura (9R), CSG (11R) and CSS (23R) objected to the Commission's Referral due to the Tribunal having no subject-matter or personal over them.

44.2 SNYS (6R) and Standard Bank (8R) still persist with the argument the matter has prescribed under s 67(1).

44.3 SNYS (6R), Standard Bank (8R), Nomura (9R),Macquarie (13R), HBEU (14R),HBUS (19R), and Standard Americas (28R) allege that the Referral is not in compliance with the CAC order because no case of a contravention is made out.

44.4 Nomura (9R) and Macquarie (13R), objected to the Referral, alleging that there is an insufficiency of averments as required by the CAC order and Tribunal Rule 15(2).

44.5 BAMLI DAC (1R), MLPFS (20R) and BANA (21R) argue that MLPFS (20R) and BANA (21R) have still not been properly joined. They also raised exceptions seeking a dismissal to the Referral as it relates to BAMLI DAC (1R) due to insufficient facts to support the allegation that BAMLI DAC (1R) participated in the SOC.

44.6 BNP (2R) seeks an order directing the Commission to amend or supplement its Referral.[37] It argues that no cause of action was disclosed, and alternatively, the Referral affidavit was vague and embarrassing due to the Commission not specifying the end date of the SOC or whether each Respondent remained as participants or exited. BNP (2R) argues that if they exited the SOC, there is no indication when they did so.

44.7 JPMorgan Co (3R) and JPMorgan NA (4R) objected to the Referral due to no facts sufficiently pleaded to connect JPMorgan NA's (4R) South African branch. They also argue that the Referral does not comply with Tribunal Rule 15(2) requiring material facts or points of law, the SOC is deficient, and the pleadings are vague and embarrassing. They also argue for a dismissal of the Referral against them.

---

[37] In oral argument it sought a dismissal of the complaint.

44.8 SCB (10R) argued the Referral lacks an averred cause of action and raised grounds of exception based on the Commission's failure to plead a SOC and failure to plead facts to establish personal jurisdiction.

44.9 CSG (11R) and CSS (23R) also raised exceptions on the basis that there are no facts to establish a concerted practice, no global SOC established nor proof that CSG (11R) and CSS (23R) were party to it, no cause of action, vague and embarrassing. In respect of CSG (11R), the exception application is in the alternative to CSG's (11R) dismissal application (filed separately) and thus only needs consideration if the dismissal is refused. For CSS (23R), the exception application is in the alternative to CSS' (23R) opposition to the Commission joinder application of CSS (23R), and thus only needs consideration if the Commission joinder is granted. CSG (11R), in addition to its arguments above, argues for a dismissal of the Referral against them as CSG (11R) never employed the implicated individuals and the Commission fails to substantiate this and CSG (11R) has never traded in foreign currency as it is merely a holding company.

44.10 CommerzBank (12R) argued the Referral be dismissed due to no cause of action having been averred as the facts for an SOC is lacking and their participation and foresight of effects.

44.11 HBEU (14R) and HBUS (19R), also submit that there is no cause of action against them based on a SOC as ordered, and the pleadings are vague & embarrassing with no compliance in terms of Tribunal Rule 15(2)(b).

44.12 FirstRand Bank (27R) argues for the Referral to be dismissed due to no disclosure of a valid complaint against them as the fact of shareholder is insufficient and not enough to establish participation in SOC. In addition, the pleadings are vague and embarrassing and fail to comply with Tribunal Rule 15(2). It argued that alternatively, the Commission should amend its Referral.

44.13 Standard Americas (28R) submit that there is no complaint initiated against them as they have not been validly joined. Further, there is no case of a contravention averred against them, the Tribunal has no jurisdiction over them and the Commission's amendment applications were irregular steps. Therefore, they seek a dismissal of the Referral and the amendment applications.

44.14 SNYS (6R), Standard Bank (8R) and Standard Americas (28R) allege that the amendment applications on 25 June 2020 and 11 August 2020 are irregular steps.

[45] Needless to say, these are voluminous, ranging from a challenge to whether the pleading alleges adequate connecting factors to establish both subject matter and personal jurisdiction, insufficient facts alleged to establish a SOC, to no cause of action or vague and embarrassing and a catch-all category of non-compliance with the CAC order or Tribunal Rule 15(2).[38]

[46] In summary, the Respondents' objections arranged thematically can be categorised in two broad categories (i) special pleas which are more in the nature of legal objections (such as lack of jurisdiction, time bar, no valid initiation) and (ii) objections based on deficiency of pleading (such as vague and embarrassing, no cause of action against a particular Respondent, non-compliance with Tribunal Rule 15(2).

[47] The Commission argued that the Respondents' refusal to plead over contravenes paragraph 3.1.2 of the CAC order which the Commission contends required the Respondents to "answer" the Referral by filing an answering affidavit dealing with the merits of the case.

---

[38] Which reads—

"*Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –*

(a) a concise statement of the grounds of the complaint; and

(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be" (emphasis added).

[48] In the Commission's view[39] the Tribunal should make short shrift of these applications and order the Respondents to plead over in accordance with its own approach to exceptions which is supported by the approach of the High Court.[40]

Our Approach to Exceptions

[49] The Tribunal's approach to exceptions mirrors that of the High Court in some respects and the Tribunal has, depending on the facts of a particular case, granted or dismissed exceptions or ordered parties to plead over.

[50] In *Invensys PLC v Protea Automation Solutions (Pty) Ltd ("Invensys")*[41] the Tribunal, discussing its approach to exceptions, stated that there were three central considerations in its approach, namely that complaint proceedings in the Tribunal are *sui generis* and contain elements of both motion and trial proceedings of the High Court; the subject matter of the Tribunal's proceedings involves the intersection of law and economics, often requiring complex economic analysis of the facts to advance a theory of harm. The Tribunal also enjoys inquisitorial powers and is required to exercise these in its functions while ensuring the proceedings are conducted fairly and informally.

[51] The guiding principle in the Tribunal's approach is that of fairness. Fairness requires that a Respondent must know the case that it has to meet as provided for in terms of the Tribunal Rule 15. Fairness however is not a one-way street, and in particular does not oblige the Commission to make more known of the case at pleadings stage than is required in the Tribunal Rules.

[52] These principles are consistent with the general rules for determining exceptions in civil proceedings which can be summarised as follows:

---

[39] Commission's Dismissal and Objection Heads of Argument at para 12.

[40] *Botswana Ash (Ply) Ltd and Chemserve Technical Products (Ply) Ltd* Case No. 49/CR/Apr00; *Rooibos Ltd v Competition Commission* (129/CR/Dec08); *Invensys PLC and Another v Protea Automation Solutions (Pty) Ltd* (019315); and *Tourvest Holdings (Pty) Ltd and Another v Competition Commission* CR209Feb17/EXC134Aug17, CR209Feb17/EXC132Aug17.

[41] *Invensys PLC v Protea Automation Solutions (Pty) Ltd* [2014] 2 CPLR 505 (CT).

52.1 The test on exception is whether on <u>all</u> possible readings of the pleading no cause of action may be made out.[42]

52.2 Exceptions must be judged on the interpretation of the pleadings most favourable to the plaintiffs.[43]

52.3 The *onus* rests on the excipient.[44]

52.4 A court must take all the allegations at face value. The allegations of fact must be accepted as true and correct.[45]

52.5 An over-technical approach must be avoided.[46] The purpose of the exception is not to scrutinise pleadings for every possible flaw and imperfection.

52.6 An exception that the pleadings are vague and embarrassing will be upheld only if it goes to the root of the plaintiffs' cause of action, and not to a particular paragraph or allegation.[47]

[53] Exceptions must be judged on the interpretation of the pleadings most favourable to the plaintiffs. The excipient must show that, read as a whole, the pleading is excipiable on every possible interpretation that can reasonably be attached to it. It is for the excipient to satisfy the court that the cause of action or conclusion of law, for which the plaintiff contends, cannot be supported on every interpretation that can be put upon the facts.

[54] The CAC in *IMS*[48] confirms this approach:

> *"A trite principle governing the adjudication of an exception is that allegations of fact by a complainant <u>must be accepted as true</u>.*
>
> *…*

---

[42] *Fetal Assessment Centre* at para 10.

[43] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 630.

[44] *Fetal Assessment Centre* at para 10; *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) at paras 6 and 36.

[45] *Stewart v Botha* 2008 (6) SA 310 (SCA) para 4; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) 755.

[46] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para 3.

[47] *Carelsen v Fairbridge, Arderne and Lawton* 1918 TPD 306 309; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) 899B-900C.

[48] *Competition Commission v Interaction Market Services Holdings (Pty) Ltd In re: Interaction Market Services v Competition Commission* CAC Case No: 193/CAC/Jun21 (25 March 2022) ("***IMS***").

> *…[T]he purpose of the exception is not to scrutinise pleadings for every flaw and imperfection. It is not about the granularity of the facts alleged. The affidavit must contain sufficient 'concise statements' of the grounds relied upon and 'material facts or point of law' relied upon".*[49]

[55] In guiding the Tribunal, the CAC thus cautions that in the context of exceptions, the Tribunal ought to properly delineate what the Commission may allege during the complaint referral stage from what the Commission was required to prove at the hearing stage; and the Tribunal should guard "*against inadvertently shoehorning the Commission to a premature election about its case before all the evidence is led and assessed"*.[50]

[56] But the important aspect to bear in mind is that in the exception proceedings, the Tribunal has the discretion to impose a wide range of remedies. In such proceedings, the Tribunal has utilised its discretion to *inter alia* require parties to file supplementary papers, to dismiss the complaint referral, dismiss the exception, or partly grant or partly dismiss the exception and/or regulated the further conduct of the matter in its order.

[57] However, exceptions which are in the nature of special pleas such as those raised in this matter – objection to the Tribunal's jurisdiction over peregrini, time bar or no valid initiation - are matters of such significance that were they to be decided in favour of the Respondents, it could bring matters to an early conclusion thus obviating the need for prolonged and costly proceedings. It would thus serve the interests of justice to decide these types of objections at the outset.

[58] This is indeed the approach we have taken.

[59] In Part A of these reasons, we deal with the common grounds of exception/opposition for both the objection and joinder applications. These include the question of jurisdiction, initiation, time bar, no valid initiation, and

---

[49] *IMS* at para 45 and 47.
[50] *IMS* at para 31.

non-compliance with the CAC order, and any other residual grounds which we have found can be dispensed with at this stage. Given that there are some overlapping grounds of opposition to the joinder applications and those in the objection applications we deal with these thematically for application to both. In Part B, we deal with the issue of remedies and decide each application on its own, separating out the joinder from the others and referring to our rulings in Part A where relevant.

[60] In so doing, and not to cover ground that has already been dealt with previously, we do not traverse the jurisprudence already considered by the Tribunal in its 2019 decision and in the CAC judgment in detail. We deal only with salient aspects thereof for purposes of our findings.

PART A.

JURISDICTION OBJECTION

[61] Recall that in the current round, all the pure peregrini - except for HBUS (19R) - dispute both subject matter and personal jurisdiction.

[62] The local peregrini adopt a range of positions in respect of the Tribunal's jurisdiction. JPMorgan NA (4R) disputes both subject matter and personal jurisdiction. SCB (10R) disputes personal jurisdiction but not subject matter jurisdiction. CSG (11R), CSS (23R) , Commerzbank (12R), and BANA (21R) dispute subject matter jurisdiction but not personal jurisdiction. BNP (2R), and HBEU (14R) do not raise a dispute on jurisdiction at all.

[63] The Commission alleges that the Respondents contravened section 4(1)(b) of the Act in that they reached an agreement and/or coordinated their activities to participate in a SOC to manipulate and distort the normal competitive conditions in the trading of the USD/ZAR currency pair.

[64] The alleged conduct is considered the most egregious in our Act and the probable effects are presumed to be substantial.

[65] It is undisputed that the Tribunal enjoys exclusive jurisdiction over conduct alleged to be in contravention of section 4(1)(b), often referred to as subject matter jurisdiction. However, the exercise of the Tribunal's jurisdiction over extra-territorial conduct is subject to the provisions of the section 3(1).

[66] Section 3(1) of the Act provides that the Act applies to "*all economic activity within, or having an effect within, the Republic*".

[67] In *American Soda Ash Corporation CHC Global (Pty) Ltd v Competition Commission of South Africa and Others* ("*ANSAC")*[51] the CAC found, after a review of international jurisprudence, that section 3(1) does confer subject-matter jurisdiction over extra-territorial firm conduct on the competition authorities.[52]

Subject Matter Jurisdiction and the Qualified Effects Test

[68] In *ANSAC,* the CAC held that the effects contemplated in section 3(1) were "*'direct and foreseeable' substantial consequences within the regulating country".*[53] This is referred to as the qualified effects test.

[69] The qualifications made to the effects test were incorporated by the CAC in *ANSAC* with reference to principles of international law and the specific use of the qualifiers "direct", "immediate", or "substantial" utilised in multiple international law sources.[54]

[70] The *nature* of direct, foreseeable or substantial effects was also dealt with by the CAC in *ANSAC*:

> *"The question is not whether the consequences of the conduct is criminal or, for that matter anti-competitive, but whether the conduct complained of has 'direct and foreseeable' substantial consequences within the regulating country. In other words 'the effects' in the present case must be such that they fall within the regulatory framework of the Act whether they are uncompetitive or not."*[55]

---

[51] *American Soda Ash Corporation CHC Global (Pty) Ltd v Competition Commission of South Africa and Others* (12/CAC/Dec01) [2003] ZACAC 6 (30 October 2003) ("*ANSAC CAC")*.

[52] This was done with reference to international prescripts and the 1945 US antitrust case of *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

[53] *ANSAC CAC* at para 18.

[54] *ANSAC CAC* at para 17 citing *Barcelona Traction, Light and Power Company Limited* Case 1970 ICJ 3 (February 5, 1970) where it was said in § 70; *ANSAC CAC* at para 18 citing R*estatement (Third) of the Foreign Relations Law of the United States* (1987) and citing *Hartford Fire Insurance Company v California* 509 US 764 (1993).

[55] *ANSAC CAC* at para 18.

[71] On appeal in *ANSAC*, the Supreme Court of Appeal ("SCA")[56] concurred with the CAC's reasoning on how to understand "*effect*" as embodied in section 3(1) and added the following:

> "'*Effect' is not only neutral, but extremely wide. Standing without qualification, it necessarily embraces both the benign and the malign. It is hard to avoid the conclusion that this is deliberate"*[57]
>
> *"We agree with the CAC, for the reasons fully set out in its judgment, that the 'effect' the Act contemplates must be such that it falls within the regulatory framework created by the statute, whether anti-competitive or not. This inquiry, … 'does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences. … The question is … one relating to the ambit of the legislation: the Act in the matter under consideration, its regulatory 'net', concerns not only anti-competitive conduct but also conduct the import of which still has to be determined*."[58]

[72] In the CAC judgment of 2020, the court reinforced the extra-territorial application of section 3(1) and the qualified effects test. It is now settled law that "*the issue of subject matter jurisdiction is addressed in s 3 which clearly envisaged that the Act applied to all economic activity that was located outside of South Africa but where the conduct complained of had 'direct and foreseeable' substantial consequences in South Africa*".[59]

[73] What might be considered direct (sometimes interchanged with 'immediate'), foreseeable and substantial effects can be gleaned from some European

---

[56] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* [2005] 1 CPLR 1 (SCA) ("*ANSAC SCA"*).

[57] *ANSAC SCA* at para 26.

[58] *ANSAC SCA* at para 29 quoting *ANSAC CAC* at para 18 (citations omitted).

[59] CAC judgment at paras 54 and 58.

Community and United States ("US") jurisprudence, where those terms are expressly incorporated into their jurisdictional effects test.

[74] In the *Intel*[60] case, which involved an abuse of dominance, the General Court had found in favour of the European Commission ("EC") that it enjoyed jurisdiction over an agreement between Intel (a US based company) and Lenovo (a Chinese based company), which led to indirect sales in the European Economic Area ("EEA").[61]

[75] In evaluating the jurisdictional question, the General Court clarified that, for the purposes of establishing jurisdiction, the effects test may be employed. Thus, even where the implementation of the prohibited conduct happens outside of the EEA – this is not dispositive of the matter because there may still be effects within the EEA.

[76] As to the requirement of substantiality, the General Court in *Intel* held -

> "*In order to examine whether the effects are substantial, the various instances of the conduct forming part of a single and continuous infringement must not be considered in isolation. It is on the contrary sufficient that the single infringement as a whole be capable of substantial effects*."[62]

---

[60] *Intel v Commission* (T-286/09, EU:T:2014:547) handed down on 12 June 2014. The General Court judgement was appealed to the Court of Justice ("CJEU") in case *Intel v Commission* (C-413/14 P, ECLI:EU:C:2017:632) handed down on 6 September 2017. (The CJEU quoted with approval the General Court's reasoning on jurisdiction and referred the matter back to the General Court. The General Court judgment was handed down in 2022 on the merits, issues of jurisdiction having been disposed of by the CJEU, we quote the test as enunciated by the General Court's first judgment.)

[61] For background, on 26 July 2007, the EC sent Intel a statement of objections concerning its conduct vis-à-vis 5 major original equipment manufacturers (OEMs). The EC was leading an abuse of dominance case against Intel in respect of two types of conduct: (i) the grant of rebates to four OEMs, namely Dell, Lenovo, HP and NEC, which were conditioned on these OEMs purchasing all or almost all of their x86 CPUs from Intel; and (ii) the making of payments to OEMs so that they would delay, cancel or restrict the marketing of certain products equipped with Advanced Micro Devices Inc.'s (AMD) CPUs. This conduct (conditional rebates and so-called "naked restrictions"), the EC found, was implemented to exclude a competitor, AMD, from the market for x86 CPUs.

[62] *Intel* para 268.

[77] The matter was taken on appeal to the CJEU.[63] As a starting point, the CJEU pointed out that when determining jurisdiction, it is important that Intel's conduct be viewed as a whole.

[78] Under the foreseeability criteria the CJEU stated that it "*is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied*".

[79] The CJEU disagreed with Intel's assertion that because the agreements were negligible there was no substantial effect and found that Intel's conduct in relation to Lenovo was clearly part of an overall strategy to ensure that no Lenovo product would contain Advanced Micro Devices Inc.'s ("AMD") Computer Processing Units (CPUs) in the market, including the EEA and that this was part of an overall strategy to foreclose AMD's access to the most important sales channels.

[80] Without discussing the immediacy criterion, the CJEU proceeded to refer to the holistic nature of the contravention of which Intel's conduct vis-à-vis Lenovo was a part, and it emphasised that to "*do otherwise would lead to a fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the [EU's] jurisdiction*".

[81] In the *LCD*[64] case the EC established jurisdiction by looking at: (i) where the implementation of the cartel arrangement took place; (ii) the immediacy of the effect of the conduct on the EEA; (iii) the foreseeability of the effect of the cartel arrangement within the EEA; and (iv) the substantiality of the effect in the EEA. It reasoned:

> *"First, the infringement immediately affected the EEA market since the agreements and concerted practices directly influenced the setting of price for LCD panels delivered directly or through transformed products*

[63] *Intel v Commission* (C-413/14 P, ECLI:EU:C:2017:632) handed down on 6 September 2017.
[64] *InnoLux Corp., formerly Chimei InnoLux Corp., v European Commission* (Case C-231/14 P).

to European customers. In this case the effects on the market of the price fixing agreements have been even more immediate as the monthly fixing of prices were prone to result in effects within a month or, at the latest, with the selling out of existing customer stocks."

"Secondly, the effect on the European market was foreseeable as the price rise or the maintenance of higher prices and the reduction of output were to have evident consequences on the conditions of competition at the downstream level for all IT and TV applications. Since the undertakings participated in a global cartel with which they intended to cover customers in Europe and which was implemented through direct sales of LCD panels and transformed products in the EEA, it is irrelevant whether the suppliers knew of the destination of specific orders." In addition, "… even if the higher price resulting from a cartel is not always or not in its entirety passed on to intra-group customers, the competitive advantage deriving from this positive discrimination does foreseeably influence competition on the market". Further, the immediacy and foreseeability of the effects are more easily established in the case of the vertically integrated Samsung.

"Finally, the effect of the agreement [was] substantial due to the seriousness of the infringement, its long duration and the role of the parties on the European market for final and intermediate products."

[82] In the US jurisprudence, an effect on commerce is "direct" if there is a reasonably proximate causal nexus, that is, if the effect is proximately caused by the alleged anticompetitive conduct.[65]

[83] Thus, the guidance from international jurisprudence is that the requirement of "direct effects" would be satisfied by taking into account both direct and indirect effects, and/or "direct effects" can also be assumed if there is a proximate causal nexus with the alleged conduct. The substantiality criterion may be satisfied by the seriousness of the conduct and its duration. In this assessment,

---

[65] *Minn-Chem*, 683 F.3d at 857; *Lotes Co. v. Hon Hai Precision Indus. Co*., 753 F.3d 395, 409-13 (2d Cir. 2014) as cited in 'Antitrust Guidelines for International Enforcement and Cooperation' issued by the US Department of Justice and Federal Trade Commission (13 January 2017) on p21 (accessed at: https://www.justice.gov/opa/press-release/file/926481/download).

the holistic nature of the conduct and the overall strategy of the Respondent to foreclose its competitors was taken into account. In order for the foreseeability criterion to be satisfied it is sufficient to take into account the probable effects of the conduct on competition or that there is a reasonable proximate causal nexus to the conduct.

[84] Several Respondents have argued that the Commission's Referral falls short of meeting the qualified effects test because it fails to show effects such as harm to consumers (traditional competition effects). However, this is not a requirement for purposes of the jurisdictional enquiry under section 3(1). The CAC and the SCA in *ANSAC* have made it abundantly clear as discussed above that the inquiry on effects for purposes of section 3(1) "*does not involve a consideration of the positive or negative effects on competition in the regulating country, but merely whether there are sufficient jurisdictional links between the conduct and the consequences*."[66]

[85] It is important to bear in mind that unlike the *Intel* and *LCD* cases, the issue of jurisdiction in this matter is to be evaluated at pleading stage and not at the merits (hearing of evidence) stage.

[86] Equally important to bear in mind is that the enquiry is whether the Commission has pleaded adequate allegations to satisfy the *prima facie* requirements of the test, and not about the merits of these allegations.

[87] In other words, we are concerned here with whether the Commission's Referral *prima facie* shows the alleged conduct to satisfy subject-matter jurisdiction i.e. a contravention of section 4(1)(b) of the Act, and whether the Referral *prima facie* shows that the likely effects of such conduct are direct, substantial and foreseeable.

---

[66] *ANSAC SCA* at para 29 quoting *ANSAC CAC* at para 18 (citations omitted and emphasis added).

Congruency between the common law on personal jurisdiction and section 3(1)

[88] In the 2019 Tribunal case,[67] the Tribunal acknowledged that in the modern global economy section 3(1) of the Act clearly contemplated that extra-territorial economic activity by firms not domiciled in the country could have an effect on the South African economy. The Tribunal found that it enjoyed subject-matter jurisdiction over the alleged conduct of the Respondents namely price fixing in contravention of section 4(1)(b)(i) and that the standard applicable to this was the qualified effects test. The Tribunal was acutely aware of the need to develop the common law on jurisdiction in the context of section 3(1) of the Act. After reviewing the prevailing case law, the Tribunal found that the common law had not developed to such an extent as to permit it to exercise personal jurisdiction in the context of section 3(1) over the pure peregrini who had no presence/did not carry on business in South Africa.

[89] On appeal, in the CAC judgment, the court assessed whether the common law on personal jurisdiction can be rendered congruent with the objective of section 3(1) of the Act and more generally with the overall purposes of the Act including the promotion of efficiency, adaptability and development of the economy.[68]

[90] The CAC recognised that there was an impetus for it to develop the common law on personal jurisdiction –

> *A failure to develop the common law so as to refuse to consider the presence of adequate connecting factors between the complaint brought by the Competition Commission and the jurisdiction of the Tribunal and thus the issues of appropriateness and convenience as sufficient to found personal jurisdiction would mean that a central objective of the Act, namely the protection of the South African economy from egregious anti-competitive conduct would be stymied.*[69]

---

[67] *Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others (*CR121Feb17).

[69] CAC judgment at para 56.

[91] The CAC endorsed the approach in *Strang* and *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and another v Blue Label Telecoms Limited and others ("Multi-Links")*[70] and held that personal jurisdiction would be established over foreign peregrini if there were adequate connecting factors between the conduct of the Respondents and the jurisdiction of the Tribunal. The task of founding personal jurisdiction is to assess whether there are adequate connecting factors between the complaint brought by the Commission and the jurisdiction of the Tribunal, and thus issues of appropriateness and convenience.[71]

[92] The CAC has developed the common law of personal jurisdiction to section 3(1) of the Act, to ensure that extra-territorial egregious conduct which might have anti-competitive effects on the South African economy does not escape the reach of the Act.

[93] It is important to emphasise at this stage that the enquiry into jurisdiction requires the Tribunal to decide whether its forum is appropriate and convenient to adjudicate on the alleged conduct of the foreign Respondents.

[94] In other words, the Tribunal is required to ask *itself* whether there are adequate factors that connect the *complaint* and *it* as a forum of appropriateness and convenience to warrant the exercise of its jurisdiction.

[95] In this assessment the emphasis is on the alleged conduct as a whole and other factors which may be relevant to whether the Tribunal is the most appropriate and convenient forum. In this enquiry the emphasis is not on whether the Commission has pleaded sufficient facts against a particular Respondent but whether the Tribunal is the appropriate and convenient forum.

[96] In *Multi-Links,* the court in discussing what was meant by the words "*causes arising*" in section 19(1)(a) of the Supreme Court Act of 1959 referred to *Strang:*

---

[70] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and another v Blue Label Telecoms Limited and others* [2013] 4 All SA 346 (GNP).

[71] CAC judgment at para 56.

"*In the context of section 19(1)(a) of the Supreme Court Act Howie P said that jurisdiction would fall within its terms if the matter could be said to involve a "cause arising" or be a matter of which the court "may according to law may take cognisance". A "cause arising" is not to be confused with a cause of action, and to determine what a "cause arising" is, is also to determine of what court may take cognisance, if one is driven back to the common law jurisdictional principles...Appropriateness and convenience are lists of concepts which can be developed case by case. Obviously, the strongest connection would be provided by the cause of action arising within that jurisdiction."*[72]

[97] In the CAC judgment the court held that –

> *"Expressed differently, on the assumption that the Competition Commission could make an adequate showing that there was an overarching conspiracy between the respondent banks to fix the rand / dollar exchange rate in contravention of ss 4 (1)(b)(i) and (ii) of the Act, this would mean that the case brought by the Competition Commission would involve the participation of all of the banks, that is local, local peregrini and pure peregrini in an activity which would contravene a central provision of the Act, namely the prevention of cartel activity. Assuming that the Competition Commission could make such a showing, this itself could indicate that there were adequate connecting factors between each of the parties and the practice sought to be adjudicated upon by the Tribunal."*[73]

[98] But the assessment of whether there are adequate connecting factors is not limited to only the pleadings. Of course, the pleadings are a logical starting point to assess what this matter is about, and its relative gravity or importance. However, the decision maker can also be informed by other considerations that may stand outside the pleadings.

---

[72] *Multi-Links* at para 11 referring to *Strang at* para 56.

[73] CAC judgment at para 56.

[99] For example, in *Multi-Links* which involved a private commercial dispute, the court had regard to clauses in an agreement that ASPN, a peregrinus to the jurisdiction of the court, had concluded. In that case the court held that: "*The appropriate or natural forum is that with which the action has the most real and substantial connection. In that context then, the Court would look at all the connecting factors including the background facts, convenience, experts, the law governing the relevant transactional action, the place where the parties reside or carry on business etc.*[74]

[100] Obviously, a key consideration in this enquiry would be whether there were other proceedings in the domicile of the Respondents (to avoid a multiplicity of proceedings) or another forum would be appropriate and convenient.

[101] Hence, in a case involving the enforcement of the Act, the Tribunal could take into account factors such as whether any other jurisdiction has or is likely to embark on enforcement action in respect of the alleged conduct, whether the Respondent has some presence in the jurisdiction of the Tribunal, whether the exercise of its jurisdiction would be unduly resource intensive in comparison with the gravity of the contravention or whether its decision would have some effect and that it has exclusive jurisdiction in respect of the alleged conduct.[75]

[102] In other words, the Tribunal has to consider <u>all</u> connecting factors and not only those contained in the Commission's pleadings.[76]

---

[74] *Multi-Links* at para 23.

[75] *Multi-Links; Holloway and Another v Padi Emea Limited* 2020 (5) SA 172 (GJ); *Standard Chartered Bank, Johannesburg Branch and Others v Mapula Solutions (Pty) Limited In Re: Mapula Solutions (Pty) Limited v African Banking Corporation of Zambia Limited and Others (*2016/33936) [2017] ZAGPJHC 247 (11 August 2017).

[76] This is the stance adopted by Australian competition authorities in applying the provisions of its Competition and Consumer Act. In *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224 (22 December 2017) the court held that "the territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business." (Valve para 149) In that case, even a place of business within the court's jurisdiction was considered to be over and above the requirement of "carrying on business" within the territorial jurisdiction.

[103] Ultimately, in line with the guidance provided by the CAC, this assessment is a matter of the Tribunal's discretion in which it has to balance several factors.[77] These factors do not constitute a closed list.[78]

[104] But as indicated by the CAC, the Tribunal cannot allow the extra territorial powers conferred by section 3(1) to be rendered nugatory in the face of egregious conduct such as collusive conduct in contravention of section 4(1)(b).

[105] We turn to consider the pleadings (the Referral) and the nature of the alleged contravention.

Pleadings and nature of the alleged offence

The approach to pleadings

[106] It is important to highlight that this matter is not an ordinary civil dispute between private parties but a matter of public importance in which the Commission seeks to enforce the provisions of the Act against firms whose conduct is alleged to have major effects on the South African economy.

[107] The Respondents are accused of engaging in conduct considered the most egregious in competition law. Furthermore, the alleged conduct relates to fixing and manipulating the rand/dollar exchange rate, which has a central and crucial role in the South African economy.

[108] Equally important to highlight is that the assessment is done on the face of the pleadings and on exception that is without any versions put up by the Respondents in answer or with the insights gained from the leading of any evidence.

[109] The Tribunal in recognising its *sui generis* nature has developed a particular approach to pleadings.

---

[77] CAC judgment at para 81.
[78] *Multi-Links* at para 23.

[110] The Tribunal's approach has been confirmed by the Constitutional Court ("ConCourt") in *Senwes*.[79] It is trite that the Tribunal is required by the Act to conduct its matters expeditiously and informally, provided that it does so in accordance with the Constitution. Froneman J, writing for the minority, in *Senwes* noted that the Tribunal is mandated to "*cut to the heart of the matter before it with expedition, informality and Tribunal-led intervention".*[80]

[111] The reason for this is obvious. The Tribunal is a specialist body that regulates market conduct and conduct of firms that may impact adversely on competition and consumers in a market. Its mandate is to act with a degree of agility so as to limit any adverse consequences. At the same time competition matters involve complex intersections of law and economics and might require the exercise of the Tribunal's inquisitorial powers, to fully ventilate the issues in a particular case.

[112] The Tribunal thus enjoys a wide discretion to conduct its proceedings. Hence, the approach taken by the Tribunal is not an overly technical one and each case is decided on its own merits and circumstances.[81]

Nature of the alleged conduct

[113] The second aspect that guides our enquiry is the grave and peculiar nature of the alleged conduct. Cartels operate in secret and are difficult to detect. Anti-trust agencies the world over have developed strategies to detect and prosecute cartel conduct. In the modern global economy cartels have the additional benefit of secrecy and immediacy of encrypted communications which makes the detection of collusive conduct even more challenging. One of the most effective ways in which cartels are prosecuted is through direct evidence obtained from whistle blowers. This is why the Commission, like many agencies across the globe, has implemented a Corporate Leniency Policy ("CLP") to encourage cartel members to *'fess up'* and co-operate with

---

[79] *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC).
[80] *Senwes* at para 78.
[81] *Invesys at* para 16.

the Commission in prosecuting the other members in exchange for leniency.[82] However, cartel conduct can also be detected from indirect evidence such as pricing conduct.

[114] How cartels are formed and expanded to achieve both scale and scope is the subject of many legal and economic publications.[83] But a sample of our own case law serves well to elucidate how conspiracies are hatched and, when needed, expanded to include regional loops to cover both geographic and product markets.

[115] Typically, a cartel consists of a core group of industry players who may set out to establish the cartel from inception or continue one on the basis that is how "*things were always done*". This latter conduct is usually found in industries that have long standing cartels[84] or those that have come out of a regulated into a deregulated environment.[85] At times, a cartel may break down and be re-established after a period of fierce competition or punishment.

[116] In some cases, while cartels exist at the national level, different players are brought in at local arrangements because they only operate at a regional or provincial level.[86]

[117] Very often there is a key driver or leader of the cartel whose role is to corral or persuade the other players into agreement.[87] In implementing the conspiracy, especially to achieve wider consensus, members who consider themselves bound to the objectives of the cartel do not all have to be in the same room at

---

[82] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08). Massimo Motta, "On Cartel Deterrence and Fines in the European Union", *European Competition Law Review*, 29(4), 2008: 209-220. International Competition Network Anti-Cartel Enforcement Manual (2014), Chapter 2.

[83] Niels et al, *Economics for Competition Lawyers* (2 ed, Oxford University Press, 2016) Simon Bishop and Mike Walker *Economics of EC Competition Law* (2000) 85. Ayers 'How cartels punish: a structural theory of self-enforcing collusion' 1987 *Colorado Law Review* 295.

[84] *Competition Commission v Esorfranki Ltd Rodio Geotechnics (Pty) Ltd; Dura Soltanche Bachy (Pty) Ltd; Geomechanics CC; Diabor (Pty) Ltd; And Grinaker Lta (An Operating Group Of Aveng (Africa) Limited)* CR107Mar11.

[85] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08).

[86] *The Competition Commission v Southern Pipeline Contractors and Conrite Walls (Pty) Ltd* 23/CR/Feb09.

[87] *Competition Commission v DPI Plastics (PTY) Ltd and Others (15/CR/Feb09).*

the same time. It is often the case that a core group would decide on a price/allocation and then pass the message along to non-attendees. Some of the more complex cartel structures consist of a series of multiple contact points but arranged along the lines of a typical fixed line telephone network with a core and then regional outposts and then local outposts which all feed into contact points to relay the message up or down the lines. This 'telephone network' type structure, is often difficult to detect precisely because all the players do not meet in one room at the same. At times the players in the local arrangement might not know the extent of the cartel and the details of each of the players but will be informed of other participants by the contact point. All the players in the network consider themselves to be bound by the common message relayed to them. In some complex cartel structures, the collusion could extend to more than one product and include price fixing and customer and market allocations.[88] In some cases cartels may utilise a legitimate industry association for collusive purposes and in those cases the industry association might serve as a facilitator of such collusion.[89]

[118] Whatever the *modus operandi* employed, and the structure of the cartel, the hallmark of a cartel is that the objective of the members of the conspiracy is anti-competitive and consists of an arrangement to which they consider themselves bound.[90]

[119] Thus, an SOC does not necessarily require that all members of the conspiracy meet at the same time in the same room or for that matter that each member must have met with every other member of that conspiracy.[91] What it does require is contact between firms, either directly or through an intermediary, and a common objective to which the participants consider themselves to be bound.

[120] All the Respondents have suggested – in keeping with the microscopic view of the pleadings – that an SOC means that they must <u>all</u> have been in contact with

---

[88] *The Competition Commission v Southern Pipeline Contractors and Conrite Walls (Pty) Ltd* 23/CR/Feb09.

[89] *Netstar v Competition Commission* 2011 (3) SA 171 (CAC).

[90] Whish and Bailey "Competition Law" 8th Ed (OUP, 2015) on pp107-110.

[91] Ibid.

each other at some point in time between 2007 and 2013. In other words, they should all have been in the same room – figuratively speaking – at the same time.

[121] But conspiracies – especially those on a global scale which involve different time zones - are not built in that way. As we have discussed here, it is more often the case in modern day cartels that there is a core group in the same room and that the cartel gains both scale and scope through a series of other contact points.

[122] We tun now to consider the Commission's pleadings in detail.

The alleged SOC

[123] The Commission pleads that the Respondent's contravened section 4(1)(b) in the following way:

> *With effect from September 2007 and until at least September 2013, the respondents reached an agreement and/or coordinated their activities to participate in a single overarching conspiracy ("the conspiracy").*
> *The participants of the conspiracy pursued a single anti-competitive economic objective, namely the manipulation and distortion of normal competitive conditions in the trading of the USD/ZAR currency pair through: (1.) the direct or indirect fixing of prices in respect of the trade in the USD/ZAR currency pair, … (2.) the division of markets through the allocation of customers in the USD/ZAR currency pair.*[92]
> *The general and consistent terms of the conspiracy were:*
> *60.1. The respondents' traders would participate, actively and passively, in frequent and regular communication and contact with one or more traders employed by or representing competing banks ("competing traders") when engaged in trading the USD/ZAR currency pair.*

[92] Referral at paras 56-57.

60.2. The purpose of the communication and contact between the competing traders was to:

60.2.1. offer and provide assistance to competing traders through the co-ordination of trading activities;

60.2.2. request and accept assistance from competing traders through the co-ordination of trading activities;

60.2.3. offer and provide information to competing traders;

60.2.4. request and accept information from competing traders; and

60.2.5. reach understandings on trading strategies and the coordination of trading activity in order to assist and be assisted by competing traders.[93]

CONDUCT IMPLEMENTING THE CONSPIRACY

85.1. Sharing information and reaching arrangements on bid-offer spreads;

85.2. Sharing information, reaching arrangements on the order of trading and giving effect to those arrangements;

85.3. Sharing information, reaching arrangements to consolidate and off-set trades at FIX, and giving effect to those arrangements;

85.4. Sharing information, reaching arrangements to manipulate bid-offer prices on the Reuters trading platform, and giving effect to those arrangements;

85.5. Sharing information, reaching arrangements to manipulate the level of the spot rate; and

85.6. Sharing competitively sensitive information including information on customer inquiries and orders, for the purposes of concluding the arrangements set out above.[94]

[124] It is important to note the distinction made by the Commission between the conduct alleged and the elements of the alleged SOC which is described as "*The participants of the conspiracy pursued a single anti-competitive economic*

[93] Referral at para 60.

[94] Referral at para 85.

objective, namely the manipulation and distortion of normal competitive conditions in the trading of the USD/ZAR currency pair through: (1.) the direct or indirect fixing of prices in respect of the trade in the USD/ZAR currency pair, … (2.) the division of markets through the allocation of customers in the USD/ZAR currency pair"[95]

[125] Hence, the Commission does not plead that the SOC consisted of only one species of conduct for example the agreement on bid-offer spreads for UDS/ZAR but rather that the common objective of the participants was the *manipulation and distortion of normal competitive conditions in the trading of the USD/ZAR currency pair* through the various conduct(s) which are in contravention of the Act. So it might be that one trader in the complex web may not have agreed to a bid-offer spread at a given point in time, but he/she might have agreed to facilitate this by passing on the request, another might have only engaged in the manipulation of the USD/ZAR FX rate.

[126] The alleged conduct can be broadly categorised in two classes. The first includes communication of competitively sensitive information relating to various steps of the value chain of setting foreign exchange process. These communications are grouped into the sharing of (i) information and understandings on bid offer spreads; (ii) information and arrangements to coordinate trading; (iii) information and arrangements to consolidate and off-set trades at the FIX; as well as (iv) the sharing of competitively sensitive information, broadly. Allegations under this class includes direct mention of individuals/natural persons (alleged to be employed by/representing one or more of the Respondent banks) sharing information in any of the listed chat rooms on specified dates and times.

[127] The second class includes allegations of the manipulation of the USD/ZAR FX rate. This class of evidence does not detail conduct of specific individuals/natural persons but rather details patterns of behaviour by certain

[95] Referral at para 57.

(incola) Respondent banks, which is said to be correlated to later observations of trends up and down in the FX rate.

[128] The Commission then sets out in detail examples of how the employees of the Respondents ("the traders") engaged with each other in chatrooms on digital platforms and personally (over drinks). There were two core chatrooms, (i) the Old Gits chatroom and (ii) the ZAR chatroom.

[129] A group of traders in the Old Gits chatroom namely Sweeney, Cummins, Hatton, Cook, Mullaney, Katz, McInerney, Barisic and Williams participated in the Old Gits chatroom. Some of these traders also participated in the ZAR chatroom with other traders such as Aiyer, Surana. They were not all present on every occasion but they all at some point or the other alleged to have engaged in collusive arrangements to fix the rand/dollar rate. They also shared though copying and pasting information from traders who were not present in that chat. In a series of implicated chatrooms traders such as Taylor and Browning, Dempey, Howes, Aiyer and O'Shea participated – again not all with each other at the same time but in subsets of the group – that discussed what would be the appropriate bid-offer spread for USD/ZAR. Another group of traders which included Chia, Kunene, Murray, Atkins, Harkins, Donnelly, Fryday, Bhana and Naidoo were present. They are alleged to have discussed bid-offer spread for USD/ZAR. The further details of these allegations can be found in the Referral itself.

[130] Of importance to our assessment is the pattern that emerges from these alleged facts, and which is best captured by the diagrams of contact points and trading information illustrated by the Commission and reproduced here as Annexures B, C and D.

[131] Diagram 1 of the Commission (Annexure B) is a visual representation of the contact between the Respondent banks in the chats pleaded which we discussed earlier. The pattern shows a complex web of contact points between the traders, who are named, and the links to the South African traders. In some instances, there are multiple contact points (eg ABSA Bank (16R) with several

traders) in others only one (eg Investec Bank (22R) and ABSA Bank (16R)). In some instances, there are direct contact points between the local foreign traders (eg Howes from ABSA Bank (16R) with Katz and Dempsey from Nomura (9R) with Howes). In others there is the suggestion that there are indirect contacts between traders through a common contact (eg Howes-Katz and Katz–Brownrigg from Standard Bank (8R)).

[132] Diagram 2 (Annexure C) is a visual representation of trading data pleaded by the Commission connecting the Respondent banks. Here we see again the contact points between the Respondent banks which include both local and foreign Respondents.

[133] Diagram 3 (Annexure D) combines diagram 1 and diagram 2 and contains the visual representation of the totality of the Commission's pleading. The picture that emerges is that of multiple contact points between these traders in which the appropriate bid-offer spread for USD/ZAR and trading data was agreed or discussed.

[134] One of the key criticisms of the Commission's claim that there is an overall SOC between foreign and local banks (as depicted in these diagrams) is that it is fanciful and far removed from reality. SCB (10R) argued that what the pleading shows is several different SOCs rather than one SOC. On this reading of the pleading there is an SOC in the northern hemisphere consisting of the Old Gits and ZAR chatrooms participants, then possibly another in the southern hemisphere in South Africa and maybe another one further south in Australasia ("mini-SOC theory").

[135] Before turning to examine whether the pleading supports a picture of three separate, unlinked mini-SOCs one might ask why and how such a situation would prevail in the world – as if by some act of spontaneous combustion traders in three parts of the globe decided to engage in mini-conspiracies to manipulate the USD/ZAR rate over a similar time period? If we are to assume that these mini-SOCs stood independently of each other with no common participant or contact point, and that the objectives of all these mini-SOCs was the same namely that USD/ZAR rate should be manipulated to their advantage,

how would they be able to achieve this in a context where the ZAR is one of the most traded currencies in the world and international trading occurs on electronic platforms across the world?

[136] It stands to reason that if a trader or customer could still turn to traders outside of the cartel to obtain a better deal a small, localised cartel would achieve little scale to make it worth the risk for its members.

[137] Hence, in order to achieve the intended objective of manipulating the USD/ZAR in the international market of currency trading, the mini-SOCs would necessarily have to be linked through common contact persons or points, lest the one defeat the overall objective of all three.

[138] A more realistic scenario in a global economy where trades in currency pairs such as USD/ZAR occur daily across international boundaries by currency traders, is that traders who wish to manipulate the USD/ZAR rate would necessarily have to bring in traders from other parts of the globe to ensure that the objectives of the conspiracy are achieved. Traders in the northern hemisphere such as the Old Gits members would not be able to achieve their objective of manipulation of the USD/ZAR currency pair without persuading their counterparts in other major trading centres to co-operate with them.

[139] In the context where the ZAR is one of the most traded currencies in the world, ultimately, it stands to reason that many significant players across the major trading centres of USD/ZAR would have to be brought into the conspiracy for it to work and for it to be worthwhile for the traders to embark on such risky conduct.

[140] In any event the several mini -SOC theory is not supported by the alleged facts of one of the players in this complex web, namely Duncan Howes from ABSA Bank (16R) which is set out in the Referral. Recall that the ABSA Respondents are the CLP applicants in the matter and the allegations in the Referral that can be attributed to Howes' (employed by ABSA Bank (16R)) participation supports the Commission's formulation of the theory of harm. A sample of the allegations attributed to Howes in the Referral shows that Howes colluded with

foreign traders, assisted and was assisted by others to manipulate spreads and trading, was referred to other traders at other banks who he could approach and so forth:

140.1 In 2012, twice on 10 April[96]and in October,[97] Howes discussed competitively sensitive information with Citibank NA (15R) and JPMorgan Respondent's (3R) (4R) representatives.

140.2 Howes had a particularly open relationship with Fenton of Investec Ltd (7R) and/or Investec Bank (22R):

140.2.1 On 6 May 2008, Howes and Fenton shared information on bid-offer spreads quoted to customers which include the South African Reserve Bank, AngloGold and Sasol. Howes told Fenton that he had a new boss and so it would be difficult to chat about trades. He said that he may not be able to respond to a message from Fenton but that they would make a plan.

140.2.2 On 30 June 2008, Howes requested Fenton to share an offer price which appeared on the third-party platform to which Investec had access. Fenton responded with a bid-offer price and Howes requested Fenton to buy a quantity of USD, which Fenton did. In addition, Fenton and Howes coordinated by posting offers on Reuters platform in order to impact pricing on the third-party platform to which Investec had access.

140.2.3 On 8 January 2009, Howes asked what the price was on the third-party platform. He then proceeded to post a low fake offer on the Reuters platform to try and drive the price down on the third-party platform to which only Fenton had

---

[96] Howes provides information on his proposed bid spread in response to the question posed to him and O'Shea of Citibank NA (15R) by JPMorgan Co (3R) and JPMorgan NA's (4R) representative Aiyer who asked for their views on the bid spread on USD/ZAR. Howes and Aiyer also discussed bid-offer spreads and exchanged commercially sensitive information.

[97] On the 18th, Howes and a Nomura (9R) representative, Dempsey, discussed bid-offer spread for USD/ZAR.

access. Fenton provided Howes with live feedback of what was happening to the price on the third-party platform until a desired offer was reached. Howes then instructed Fenton to buy USD.

140.2.4 On 2 November 2011, Howes agreed not to touch the market until Fenton was finished trading. Howes offered to skew his Barx machine in order to attract offers which he could then pass on to Fenton to improve Fenton's position.

140.3 Howes on three separate occasions communicated with Katz of the Old Gits chatroom:

140.3.1 On 7 May 2009, Katz and Howes were participants in an implicated chatroom in which the following communication took place: Katz and Howes coordinated with each other to elicit a response from the automated trader machines to prompt a downward or upward movement in bids or offers.

140.3.2 On 13 April 2011, Katz and Howes were participants in an implicated chatroom in which the following communication took place: Katz told Howes about how his contacts at Citibank NA (15R), SCB (10R) and Standard Americas (28R) pulled their offers in order to allow him to go first and put his offer. Howes understands that the contacts of Katz at SNYS (6R) alternatively Standard Americas (28R) included Silverman, De Roos[98] and Friedman.

140.3.3 On 10 April 2012, Katz and Howes were participants in an implicated chatroom in which the following communication took place: Katz offered to skew his ecom platform to assist Howes. Katz suggests to Howes that he call John Wood.[99]

---

[98] Seemingly clarified that they are from SNYS (6R).

[99] Referral at para 221.

[141] This kind of contact between the local banks and foreign banks is also found elsewhere in the Referral, for example -

141.1 On 19 September 2012, Standard Bank (8R) represented by Brownrigg provides an unusually high spread in the market in line with a conversation he had with Taylor from Barclays Bank (18R) on the Bloomberg platform.[100] ABSA Bank (16R) and Standard Bank (8R) then post the same bid and ask price of 8.2097 and 8.3097.[101]

141.2 On 27 May 2010, Standard Bank (8R), ABSA Bank (16R) together with Barclays Bank (18R), Nomura (9R) and other banks held the USD/ZAR around the focal point of 7.5760. Standard Bank (8R) and ABSA Bank (16R) together with HBEU (14R) or HBUS (19R) and other banks pushed the exchange rate to 7.5600.[102]

[142] While we accept that these are allegations in the Referral, yet to be tested at trial, the picture that emerges is one in which the traders were comfortable approaching each other to manipulate the USD/ZAR rate. But for their common understanding and/or agreement, Howes would not have been comfortable enough to approach Katz, nor would Katz have easily referred him to John Wood, neither would Katz feel comfortable enough to share the information about SCB (10R) and SNYS (6R) pulling their offers, nor would Fenton agree to provide Howes with live feeds or Howes offering to skew his Barx machine to improve Fenton's position.

[143] In our view the Commission's Referral, read holistically, sets out sufficient alleged facts to make out a *prima facie* case of an SOC between foreign and local banks, which suffices to establish adequate connecting factors to establish personal jurisdiction over all peregrini Respondents.

---

[100] Referral at para 192.11.
[101] Referral at para 192.12.
[102] Referral at para 194.

[144] Furthermore, the nature of the alleged conduct is so egregious that, as suggested by the CAC: *"there can be cases where an agreement between or a concerted practice involving peregrini and which consist, for example, of direct or indirect fixing of a purchase or selling price or any other trading condition, reveal that adequate connecting factors are established to justify a finding of both subject matter and personal jurisdiction*."[103]

[145] While we are satisfied, following the guidance of the CAC, that the showing of an alleged SOC as discussed above establishes both subject matter and personal jurisdiction, we nevertheless deal with the allegations made by the Commission against each Respondent in Part B when we consider each of the applications.

[146] Moreover, given that some of the Respondents persisted with the objection that the Commission has not pleaded sufficient facts to satisfy the qualified effects test, we turn to consider the allegations in the Referral.

[147] As to direct effects, the Commission pleads as follows:

> *The common manner in which the effects of the impugned conduct are felt is that buyers of ZAR pay artificially inflated prices for buying the currency and sell at artificially reduced prices when selling the currency.*[104]
>
> *The conspiracy's conduct had a direct impact on the exchange rate of USD/ZAR. The exchange rate in turn impacts on various parts of the South African economy – including imports and exports, foreign direct investment, public and private debt, and companies balance sheets, with the attendant implications for the pricing of goods, services and financial assets.*[105]

---

[103] CAC judgment at para 81.
[104] Referral at para 260.
[105] Referral at para 266.

[148] We see that the Commission has specifically pleaded the probable direct and immediate effects of the alleged conduct in the Referral.[106] To avoid reproducing the entire pleading in these reasons, we deal only with the most obvious effects alleged in the Referral.

[149] The price at which currency is bought and sold, would clearly have direct pricing effects on the USD/ZAR exchange rate as alleged by the Commission. It is axiomatic that this would have consequences on any transaction that involves the exchange rate.

[150] Thousands of commercial transactions are impacted by the exchange rate. Any government, business, investor, or individual which transacts with parties from other countries will have to exchange amounts of local currency.

[151] The exchange rate would have an impact on various parts of the South African economy including imports and exports, travel and tourism, foreign direct investment, public and private debt, and company balance sheets.[107]

[152] As to substantiality the Commission alleges that -

> *The effect of the conduct was cumulatively substantial: The conspiracy took place consistently throughout the day or covered a substantial period of the day. It took place over a number of years. The manipulation of the exchange rate took place largely through variations in at least the last three digits of the price, after the point (the pips). The large amounts traded translate into significant profits and losses to customers collectively. Furthermore, the conspiracy included at least five incola South African banks and four authorised dealers. This accounts for 9 out of the 25 authorised dealers in South Africa. The influence of the global conspiracy therefore also had the potential to effect (sic.) competition within the local inter-bank market.*[108]

---

[106] Referral at paras 268 – 279.
[107] Referral at paras 259 - 267.
[108] Referral at paras 271 - 274.

[153] The Commission has pleaded an overall conspiracy, a cartel with the objective of manipulating the USD/ZAR exchange rate in order to increase the trader's profits at the expense of direct and indirect customers and its likely effects on competition within the local inter-bank market. Furthermore, the gravity of the alleged conduct satisfies the substantiality requirement set out in *Intel* and *LCD*. As discussed in *Intel*, such conduct should be considered in a holistic manner so as not to allow such conduct to escape competition enforcement.

[154] As to foreseeability the Commission has pleaded:

> *It was foreseeable to the cartelists that the conduct would have a direct or immediate and substantial effect: It is sufficiently probable that the conspiracy was capable of having a more than insignificant influence in South Africa. The ZAR is an internationally traded currency. As of 2019, the volume traded on the South African local forex markets was 16% of the global turnover. Regardless of where it is quoted, the posting of the quote contributes to the time-series that market participants use to make economic decisions worldwide. The quotes form part of the information that traders use to take a view of where the market goes. The banks' quotes become the real-time global market price of the currency. The valuation of imports and exports depends on the exchange rate. The traders were aware of all of this.*[109]

[155] Given that the very objective of the cartelists was to manipulate the USD/ZAR exchange rate so that they could make a higher profit, common sense and logic tell us that it would be foreseeable that customers would suffer as a result, either directly as investors in a given transaction or in the prices of goods and services for export and import purposes.

---

[109] Referral at paras 275 - 279.

[156] In conclusion we find that the Commission has alleged sufficient facts in its pleading taken as a whole, to satisfy the qualified effects test for purposes of establishing subject matter jurisdiction over all peregrini Respondents.

Other Relevant Factors

[157] As discussed above, the showing of the SOC is not the only basis upon which we have decided that there are adequate connecting factors between the conduct of the peregrini Respondents and our jurisdiction.

[158] The peregrini and local Respondents are accused of colluding to manipulate the USD/ZAR rate in contravention of section 4(1)(b) of the Act.

[159] The Tribunal enjoys exclusive jurisdiction over the alleged conduct involving a contravention of section 4(1)(b) of the Act.

[160] No other forum in the domiciles of the peregrini Respondents has indicated that it will embark in enforcement action for the alleged contravention in relation to the ZAR.

Conclusion on jurisdiction

[161] In our view the Commission has made out a *prima facie* case of an SOC, between peregrini banks and local banks, in contravention of section 4(1)(b) in its Referral, in respect of which the Tribunal enjoys exclusive jurisdiction.

[162] The Commission has alleged sufficient facts in the Referral to satisfy the qualified effects test of direct, substantial, and foreseeable effects for purposes of section 3(1).

[163] Thus, the requirements of both subject-matter and personal jurisdiction have been met in respect of the peregrini Respondents.

[164] The Tribunal enjoys exclusive jurisdiction over the alleged conduct.

[165] No other jurisdiction has indicated that it will embark on enforcement action against the peregrini Respondents in relation to the ZAR.

[166] In conclusion we find that there are adequate connecting factors between the alleged conduct of the peregrini Respondents and this Tribunal as the forum that is most appropriate and convenient to adjudicate on the alleged conduct.

TIME BARRED (67(1))

[167] Prior to the amendment in 2019,[110] section 67(1) read as follows:

> "*A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased*".

[168] The word prescription or time bar is not used in the section. However, over the years Respondents have persistently argued that section 67(1) presents a guillotine on the ability of the Commission to initiate a complaint more than three years after the practice has ceased.

[169] The recent decision of the ConCourt in *Competition Commission v Pickfords Removals SA ("Pickfords")*[111] has laid this debate to rest. In that decision, the ConCourt held that the Commission's work as a public body acting on behalf of the public interest would be undermined if section 67(1) were to be interpreted as imposing an absolute time bar and would drastically undermine the right of access to courts. A purposive constitutionally compliant interpretation was thus required. The court found that section 67(1) is merely a procedural time bar and should not be interpreted as a substantive and permanent bar to investigation by the Commission. The Commission could on good cause shown request the Tribunal to condone its non-compliance with section 67(1).

[170] Obviously, it will have to be shown that the conduct has ceased three years before the date of initiation before an application for condonation could be

---

[110] Section 37 of Act 18 of 2018, effective on 12 July 2019.

[111] *Competition Commission v Pickfords Removals SA (Pty) Ltd* (CCT 123/19).

launched by the Commission. In *Paramount Mills v Competition Commission*[112] the CAC found that a party raising prescription (or cessation of conduct as contemplated in section 67(1)) must properly plead it in its papers. In other words, material facts must be provided in support of the allegation that the conduct has ceased.[113] Furthermore prescription challenges under section 67(1) can only be determined after evidence has been heard and the facts are fully ventilated. In *Competition Commission v Pioneer Foods (Pty) Ltd*[114] the Tribunal was of the view that the party who raises prescription as a defence must prove that the conduct has ceased as contemplated in section 67(1).

[171] Thus, whether the Referral is time barred in terms of section 67(1) (as it was then) cannot be determined without recourse to a factual enquiry.

[172] It is therefore no surprise that most of the Respondents have elected not to persist with this objection and only SNYS (6R), Standard Bank (8R) and Standard Americas (28R) persist with it at this stage.

[173] It may be of course that some Respondents persist with this because the CAC in its order of 28 February 2020 and the Tribunal in its order of 12 June 2019 have required the Commission to plead when the conduct ceased. The Commission has indicated that it cannot plead this because the date of cessation is within the knowledge of the Respondents. We return later to the issue of non-compliance with the CAC order raised as a separate ground, and in which some Respondents have included this objection, but we find that the time bar issue, raised as special plea of prescription in these proceedings, whether by the Joinder Respondents or the Objection Respondents, cannot be decided at the pleading stage without recourse to a factual enquiry.

---

[112] *Paramount Mills v Competition Commission* 112/CAC/Sep11.

[113] *Paramount Mills v Competition Commission* 112/CAC/Sep11 at para 32.

[114] *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08).

NO VALID INITIATION

[174] We now deal here with the objection based on no valid initiation. This ground has two streams. First it is argued that a complaint referral against a Respondent is not valid unless an investigation was initiated against them specifically. In other words, initiation is a jurisdictional requirement to bring a complaint referral against a particular Respondent. If there has been no initiation against that particular firm, then there can be no valid complaint against that Respondent. For this the Respondents rely on the SCA case of *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* ("*Woodlands")*[115] and jurisprudence of the CAC.

[175] The second stream in this argument is that if the complaint had not been initiated against a particular firm, then that firm could not be joined as a respondent in a complaint that had already been referred to the Tribunal.[116] For this the Respondents rely on the CAC decision of *Woodlands* and *Competition Commission v Loungefoam (Pty) Ltd* ("*Loungefoam").*[117]

[176] In our view the SCA case of *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* ("*Yara"*)[118] and the recent *Pickfords* case are complete answers to both these objections.

[177] In *Yara* the court held that the act of initiation by the Commission does not require any special formalities and that the Commission could tacitly initiate a complaint against a respondent. While the notion of 'tacit initiation' still required the Commission to lead some evidence on when this was done, the Commission was not barred from referring a complaint against a respondent not specifically mentioned in an initiation statement at inception. A tacit initiation could take place at any time, presumably even after a complaint was referred to Tribunal. (However, prior to the decision of the ConCourt in *Pickfords* (on time bar) and the subsequent amendment of section 67(1) the

---

[115] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA).
[116] Standard Americas (28R).
[117] *Competition Commission v Loungefoam (Pty) Ltd* 102/CAC/Jun10.
[118] *Competition Commission v Yara (South Africa) (Pty) Ltd and Others* 2013 (6) SA 404 (SCA).

Commission still ran the risk of facing an absolute bar challenge in initiating against a respondent after the lapse of time).

[178] In *Pickfords,*[119] the ConCourt discussed the *Woodlands* case and held —

> *"Much reliance was placed during Pickfords' argument in this Court on Woodlands Dairy, in particular the statement that '[a] suspicion against some cannot be used as a springboard to investigate all and sundry'.*[120] *Understood in its proper context, that statement has no bearing on the facts in this case, as Woodlands Dairy is entirely distinguishable on the facts. That case concerned a full investigation into the milk industry. That investigation was undertaken by the Commission in the absence of an initiation of a complaint against an alleged prohibited practice, which would have resulted in a direction to an inspector to investigate. The investigation into the milk industry followed upon information submitted to the Commission by a dairy farmer, alleging price fixing by three milk distributors. Instead of following the inspectors' recommendation, pursuant to his/her investigations, that a complaint be initiated against two of the three milk distributors, the Commissioner ordered the investigation into the entire industry."*

[179] The ConCourt makes it clear that the court in *Woodland*s was concerned that the Commission had not initiated a complaint in an *alleged prohibited practice* in relation to identified respondents (albeit the Commission might not know all the members to the prohibited practice at the time of initiation). Instead, the Commissioner initiated a complaint into an entire industry and there was no material evidence to support his belief that there was anti-competitive behaviour in the milk industry as a whole.[121]

[180] In other words, the ConCourt in *Pickfords* has confirmed the approach taken by the CAC in the seminal case of *Glaxo Wellcome (Pty) Ltd & Others and*

---

[119] *Pickfords* at paras 28 and 29.
[120] Ibid.
[121] *Woodlands* at para 26.

National Association of Pharmaceutical Wholesalers & Others ("*Glaxo")*[122] where it held that section 49B(1) requires the Commissioner to initiate a complaint against an alleged prohibited *practice* i.e. against the *conduct*.

[181] In that case the CAC held that in a case where a complaint has been submitted to the Commission in terms of section 49B(2)(b), the Commission need not go back and initiate particulars it wishes to add to a complainant's particulars.

[182] In the arguments presented by the Respondents it was suggested that *Woodlands* was relied upon by the CAC in the subsequent case of *Loungefoam* to overturn an amendment application to a complaint referral granted by the Tribunal in which additional respondents were joined to an existing referral.

[183] However, a closer reading of the court's dicta in *Loungefoam* shows that the court essentially took a different view from the Tribunal in relation to the alleged conduct. The court, relying on *Glaxo* and *Woodlands*, was essentially concerned about whether the alleged conduct of the respondents to be joined through the amendment, constituted *new* prohibited conduct which had not previously been investigated.

[184] Nevertheless, the outcomes in *Woodlands* and *Loungefoam* have presented opportunistic respondents with a basis to object to a complaint referral on the basis of no valid initiation, or to resist joinder on the basis that they were not mentioned in the Commission's initiation statement.

[185] In *Competition Commission v Power Construction (West Cape) (Pty)* ("*Power")*[123]*,* the CAC has made it abundantly clear that the provisions of the Act cannot be interpreted to allow potential members of a cartel to get away with it. In *Power* although the CAC eventually found the initiation date to be 23 November 2011 it did so in the alternative. Its earlier finding was that the evidence clearly indicates that the appellants were made the subject of a referral in April 2011 and not 23 November 2011–

[122] *Glaxo Wellcome (Pty) Ltd & Others and National Association of Pharmaceutical Wholesalers & Others* 15/CAC/Feb02.

[123] *Competition Commission v Power Construction (West Cape) (Pty) Ltd* [2016] ZACT 87.

> *In summary, the dispute which confronts this Court is whether, having received information from the appellants pursuant to its February invitation, which in itself flowed from the initiation of a complaint against 19 specified entities together with others that could be added, the respondent included the appellants as part of the entities specified in the complaint of September 2009. Given that the judgment in Woodlands accepts that it is permissible to add a firm to an existing complaint subsequent to an investigation and that the judgment in Yara recognises that the initiation does not require any level of formality, the evidence clearly indicates that the appellants were made the subject of a referral in April 2011. Even if this is not correct, at best for the appellants this addition then took place pursuant to the letter of the respondent to the appellants dated 23 November 2011.*[124]

[186] In conclusion, *Pickfords,* read with the existing jurisprudence of the CAC in *Glaxo* and *Power* and the SCA in *Yara*, confirms that the Commission is required under s49B to initiate a complaint in a prohibited practice, i.e. it must investigate the conduct, that there are no formalities associated with the act of initiation, that at inception it cannot know all of the possible players in that conduct and this is precisely the purpose of an investigation.[125] Where further information may come to light especially in a cartel case, the Commission is entitled to tacitly initiate against a respondent at any time without fearing the spectre of prescription under section 67(1) because it can always seek condonation for such late initiation. There is nothing in the Act that precludes the Commission from tacitly initiating against a respondent after it has referred the complaint to the Tribunal.

[187] In light of this jurisprudence, the application by the Commission for joinder of a respondent subsequent to a referral to the Tribunal, where the alleged conduct has been initiated and investigated, may in itself be viewed as a tacit initiation. If the respondent to be joined wishes to persist with a section 67(1) objection it

---

[124] *Power* at para 40.

[125] Tribunal's decision in *Power* at para 39 cited with approval by the ConCourt in *Pickfords* at para 30.

could do so in the main hearing but would then have to put up evidence to support its claim. If its evidence reveals that the conduct had ceased three years prior to the initiation, then the Commission may still seek condonation from the Tribunal for such late initiation.

[188] To interpret the jurisprudence in the way that the Respondents urge upon us, both the objection and joinder Respondents - namely that the Commission is *absolutely* barred from referring against respondents or joining respondents, after it has referred the complaint to the Tribunal, if they were not specifically mentioned at a particular point in time in the course of the Commission's investigation - would lead to the absurd outcome that the Commission would be precluded from joining a potential, or for that matter even a self-confessed member of a cartel, after it has referred a complaint, an outcome that is not available even to accused in criminal proceedings.

[189] In this case, in the event that the Joinder Respondents are joined to the matter, they would not be prejudiced in any way because the matter has not progressed beyond the pleading stage and no other Respondent has put in an answer to date. The Joinder Respondents, if joined, will be placed in the same position as the other Respondents and will be entitled to defend themselves.

NON-COMPLIANCE WITH THE CAC ORDER

[190] We turn now to consider the other ground of objection raised by the Respondents namely non-compliance with the CAC order, which seems, on the face of it, to be an objection of a legal nature but is in reality, a catch-all ground of objection.

[191] There was a suggestion by one of the Respondents (Standard Bank (8R)) that the Referral was non-compliant with the CAC order because it did not relate to all the "named respondents". It was not clear what this objection sought to achieve in light of the fact that the CAC unambiguously stated that because the Tribunal had given the Commission a final opportunity to file a new referral affidavit, the Commission should also do this in relation to the pure peregrini.

This is why the CAC order incorporates the details of the Tribunal order. In other words, the Commission was required to file a consolidated referral for all the Respondents, not only in relation to the pure peregrini. It would be bizarre to interpret the CAC order as applying only to pure peregrini when the allegations are that they colluded with local banks in order to manipulate the USD/ZAR exchange rate. Hence the Referral can only be assumed to address both the Tribunal and CAC order.

[192] Most of the Respondents argued that if there was any non-compliance with any one single order of the CAC the Referral should be dismissed. It appears that the basis of this argument was the fact that both the Tribunal and the CAC stated that they were providing the Commission with a "*last opportunity"* to file a referral. It was not suggested that the non-compliance was of such a nature as to amount to some form of contempt of court, or that it could not be remedied in any other way by the Tribunal.

[193] In considering this matter we look to the ConCourt dicta in *S.O.S*[126] on how a court order should be interpreted:

> *Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order. The well-established principles governing the interpretation of a court order were expounded in Firestone and more recently endorsed in Eke:*
>
> > *"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."*

[126] *S.O.S Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others* (CCT121/17) [2018] ZACC 37; 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC) (28 September 2018) ("*SOS*").

…

[Orders] must be interpreted in line with Firestone and Eke to ascertain the Competition Appeal Court's intention from the reasons for the judgment and the order as a whole. A determination of the legal context within which the words in an order are used is also required.[127]

[194] The issue to bear uppermost in our minds is that the context of the CAC and the Tribunal orders pertained to a matter of pleading. The context in which those orders were handed down is that the Commission's pleadings required more detail. We are not required to interpret the CAC and Tribunal orders in minutiae as if these were a legislative checklist.

[195] It suffices that the allegations pleaded by the Commission demonstrate what its case is about and for the Respondents to be able to answer thereto or sufficient for the Tribunal to find adequate connecting factors for purposes of establishing jurisdiction over pure peregrini. The Commission of course is not required to prove any of this at this stage.

[196] When regard is had to the pleading as a whole, the requirements of those orders have been substantially dealt with. For example, the Tribunal order required the Commission to plead the SOC, which has been complied with. The CAC order required the Commission to plead adequate connecting factors to show the SOC between foreign banks and local banks. We have found that the Commission has complied with that.

[197] As to when the Respondents joined the conspiracy, the Commission has pleaded that they did so through attending or participating in the chatrooms.[128] In respect of some Respondents the Commission alleges that they joined the conspiracy through a concerted practice.[129]

[198] For obvious reasons, a lot of emphasis was placed by the Respondents on the requirement in the CAC order that the Commission plead whether the conduct

---

[127] *SOS* at paras 52 and 54.

[128] Referral at paras 68 and 69.

[129] Commission's exceptions heads of argument at para 46.

continued and if not when it had ceased.[130] The Commission has indicated that while it holds the view that the conduct is ongoing, it is not able to plead when the conduct ceased because the knowledge lies solely with the Respondents. If the Respondents wish to claim that the conduct has ceased, they are best placed to bring evidence that supports such claim.

[199] Nevertheless, the core issue for us to consider is whether non-compliance with the CAC orders amounts to a fettering of our discretion to order appropriate remedies in these proceedings. Put differently, assuming that the Commission has not in its Referral set out all the details required by the CAC order, are we to take it that this Tribunal panel is compelled to dismiss the Referral and that we enjoy no discretion whatsoever as to remedy in the context of exception/preliminary proceedings?

[200] In *S.O.S*[131] the ConCourt made it abundantly clear that an order of the CAC could not limit the Commission's investigative mandate and powers granted to it by legislation.[132]

[201] In the same vein, it would seem that an order of the CAC cannot be interpreted to fetter the discretion of another Tribunal panel granted to it by the provisions of the Act.

[202] Hence, the previous Tribunal's order and the CAC order cannot be interpreted to fetter this Tribunal's discretion - granted to it by sections 55 and 59, read with Tribunal Rule 55 of the Act - to decide on appropriate remedies in any context, let alone preliminary proceedings.

[203] Moreover, to interpret the words "*last opportunity*" used by both the Tribunal and the CAC in their judgments – which when read in context suggest frustration at the manner in which the Commission had handled the matter at that time – as imposing a guillotine on any further amendments of the Referral through supplementary affidavits would be tantamount to interfering with the

---

[130] CAC Order at paras 3.2.7 and 3.2.8.

[131] *S.O.S.*

[132] *Competition Commission v Pioneer Hi-Bred International Inc. and Others* CCT58/13.

Commission's independence and discretion to refer a case to the Tribunal if further information came to light. Consider a scenario where a Respondent in these proceedings elects to settle the matter with the Commission in this interlude between argument and decision, and in that settlement provides information to the Commission that it would like to include in the Referral by way of a supplementary affidavit. The Respondents would have it that this Tribunal limit the Commission's legislative obligation to enforce the Act by requiring a dismissal of the Referral for minor non-compliance with the CAC order.

[204] Accordingly, we find that the objection based on non-compliance with the CAC order is not a discrete ground of objection and cannot be relied upon by the Respondents to have a second bite at the cherry. Nor can the CAC order be interpreted to fetter this Tribunal's discretion or interfere with the Commission's independence and discretion to refer additional details or amendments to its Referral.

TRIBUNAL RULE 15(2)

[205] Turning now to the requirements of Tribunal Rule 15(2), the rule reads as follows:

> *"Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs –*
> *(a) a concise statement of the grounds of the complaint; and*
> *(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be*"

[206] The rule requires nothing more than a concise statement of the grounds of the complaint, the material facts or the points of law relevant to the complaint and relied upon by the Commission.

[207] In *Glaxo* the CAC held that in a case involving a complaint submitted by a third party all that must be demonstrated is that "*the complaint must be cognizably*

linked to the particular prohibited conduct or practices and that there must be a rational or recognizable link between the conduct referred to in a complaint and the relevant prohibition in the Act".[133]

[208] The Commission's Referral runs into 107 pages (excluding annexures) and contains adequate details that have enabled us to conclude that the Referral, as a whole, *prima facie,* shows that there was an SOC between the foreign and local banks to manipulate trading in the USD/ZAR currency pair.

[209] The Referral thus complies with Tribunal Rule 15(2).

MULTIPLE ENTITIES IN A GROUP/ /MISTAKEN IDENTITY

[210] This leads us to discuss the objection raised by various Respondents (pure and local peregrini) that the Referral lacks specific factual allegations linking a particular entity in the group to the conduct of the traders or that the traders were employed and/or authorised by them.

[211] One of the features of this case is that the Commission has cited multiple entities in a bank group as Respondents. The Commission's explanation for this is that it has been unable to ascertain the correct entity in a particular group because traders only utilised the umbrella brand name of the bank they were representing at the time and traders moved from bank to bank. So, for example in the case of Christopher Hatton the Commission alleges that he was employed by or represented HBUS (19R) from 1 September 2005 to 30 October 2010 and authorised by HBUS (19R) alternatively HBEU (14R) to trade in the USD/ZAR currency pair. However the Commission was unable to ascertain the entity that employed Hatton after October 2010 because the Bloomberg Instant Messaging platform recorded his details from 1 December 2010 as "*CHRISTOPHER HATTON/ CREDIT SUISSE SECURI/Christopher.hatton@creditsuissse.com*". A similar issue arose in the case of Gavin Cook whose details on the Bloomberg Instant Messaging during 2007 were recorded as "*GAVIN COOK MERRILL*

[133] *Glaxo* at paras 15 and 16.

LYNCH/gavin.cook@baml.com" and then during 2010 as *"GAVIN COOK MERRIL LYNCH/NY, WFC/gavin.cook@ml.com*".

[212] Some of the Respondents have made efforts to investigate the matter and have put up an explanation in correspondence or in their exception/opposition affidavits. For example, SNYS (6R) has brought the attention of the Commission that Katz and Friedman were not employed by it but in fact were employed by Standard Americas (28R). The Commission's response to this has been to retain SNYS (6R) and seek to join Standard Americas (28R) who in turn admits that these traders were employed by it but still opposes the joinder.

[213] The Commission is then caught on the horns of a dilemma. It is being asked to withdraw the Referral against SNYS (6R) on the one hand but is not certain that it will succeed in joining Standard Americas (26R). A similar conundrum is faced by the Commission in the case of Cook and the Bank of America Respondents (1R), (20R) and (21R). The Commission's reluctance in such circumstances is understandable given that it is being asked to withdraw the Referral against one Respondent while facing countless other objections and opposition to the Referral. If it elected to withdraw the Referral against one, it has no certainty that it will succeed in the other.

[214] The Tribunal itself would be cautious about dismissing an alleged cartel case against a particular Respondent at this early stage of the proceedings without the hearing and cross-examination of *viva voce* evidence from witnesses. Collusive conduct at its core requires co-operation amongst colluders. Hence the evidence of a particular trader may implicate a range of other traders, a fact which may not be apparent on the papers or which the employer might not be aware of at this stage of the proceedings.

[215] In this case the alleged conduct is particularly egregious. Not only does it involve the most serious of offences in competition law, namely collusion, but it also relates to the currency of South Africa, a matter of sovereignty. The likelihood of the alleged conduct's substantial effects on South African

consumers and the economy at large have been discussed above. To dismiss a case against one particular Respondent at this stage of proceedings might have unforeseen consequences and could lead to the outcome we are mindful to avoid namely allowing an alleged member of a cartel to get away with it.

[216] The Commission has also sought to cite the holding or sister companies in a group for purposes of section 59(3A) which it is entitled to do under the Act.

[217] Another feature of this matter is that several Respondents have put up a 'defence' at exception stage. For example, Standard Bank (8R) has put up a defence in their papers along the lines that the relationship between it and Barclays Capital (17R) is a vertical one. Nomura (9R) has argued that the Referral only cites one meeting, arguing that no trade occurred in that engagement.[134]

[218] Respondents who have put up explanations or defences confirm that they understand the case brought against them by the Commission. However, because these defences or explanations are raised in objection/exception/dismissal applications and not in answering affidavits, the matter cannot progress further in accordance with the rules of the Tribunal until the preliminary issues have been decided.

[219] In light of the fact that we have decided on some of the preliminary objections as discussed above, we deal with both these matters when considering the individual applications in Part B.

CONCLUSION ON PART A

[220] In conclusion, we have found that the Referral *prima facie* alleges an SOC between the peregrini and incola (local) respondents.

[134] Nomura's (9R) objection application at para 13.

[221] Accordingly, we have found that the Referral establishes adequate connecting factors to enable us to exercise both subject-matter and personal jurisdiction over all peregrini Respondents.

[222] In relation to the time bar, we have found this objection to have little merit in light of the ConCourt's decision in *Pickfords*. In any event the issue of whether the complaint has been time barred cannot be decided without recourse to a factual enquiry.

[223] In relation to the no valid initiation objection, we have shown that a proper reading of the prevailing jurisprudence does not support the Respondents' interpretation and that not allowing a Respondent to be cited or joined after the Commission has referred the complaint to the Tribunal could result in allowing alleged cartel members to get away with it. It would also lead to the absurd outcome that Respondents in these proceedings would enjoy greater rights than accused in criminal proceedings.

[224] As far as the non-compliance with the CAC order ground is concerned, we have shown that the CAC's order cannot be interpreted as if it were a legislative checklist and that read in context it relates to the issue of pleadings. The CAC and previous Tribunal orders cannot fetter this Tribunal's discretion, nor infringe on the Commission's independent discretion to supplement a referral.

[225] The Referral complies with the requirement of Tribunal Rule 15(2).

[226] Hence any objection, whether exception/dismissal/strike out, based on any of the above grounds cannot succeed. Likewise, any opposition to joinder based on any of the above grounds cannot succeed.

[227] Finally, we have found that notwithstanding some of the objections about incorrect entity or lack of particularity, on the whole, the Respondents understand what the Commission's alleged case is. Whether or not the Commission will succeed in proving its case at trial is another matter and not a consideration at this stage of the proceedings.

PART B

DECISIONS – EACH APPLICATION

[228] In this section we deal with each application and provide our orders in respect thereof.

Tribunal's discretion in remedies

[229] In terms of section 55 read with section 52, the Tribunal enjoys a wide discretion to determine its own rules of procedure provided that these are in accordance with the principles of natural justice,[135] expedition, transparency and section 35 of the Constitution. Tribunal Rule 55 provides that if there is any uncertainty as to the practice and procedure to be followed, a member presiding over a matter may give directions on how to proceed and for this purpose, may have regard to the High Court rules.[136] Section 55, read with Tribunal Rule 55(3) further provides that the Tribunal may condone any technical irregularities arising in its proceedings.

[230] Indeed, this has been the approach adopted by the Tribunal, where in many instances it has had regard to the rules of the High Court and in others had given directions to facilitate a speedier resolution of matters especially in interlocutory matters while ensuring fairness to all sides.

[231] In the context of exceptions, the Tribunal does not take an overly technical approach. At times it has granted exceptions brought on special pleas or where there is no reasonable prospect of success[137] but the usual remedy for exceptions brought on grounds of deficiency of pleading, failure to disclose a cause of action and the like is to provide the offending party an opportunity to file a supplementary affidavit to the pleading.[138] The Tribunal approach has

---

[135] Section 52(2).

[136] Tribunal Rule 55(1).

[137] *FFS Refiners (Pty) Ltd and Eskom & others (64/CR/Sep02); BMW South Africa (Pty) Ltd at* para 31; and *Casalinga Investments CC t/a Waste Rite* (CR133Sep15/Exc152Oct15).

[138] *Invensys.*

also followed, the approach of the High Court, at times requiring objecting parties to plead over so that matters are not unduly delayed.

[232] The approach we have taken to exceptions (including dismissals and strike outs) in this matter is to decide on some of the preliminary objections and have required the Respondents to plead over should they wish to persist with others that we may have not decided on.

[233] To our mind the allegations against the Respondents are of a serious nature. The Respondents, as banks, rely on the trust and confidence of governments, investment firms, business, and members of the public, for their livelihood. It would be in their own interest for the matter to progress where they are required to file answers and provide an explanation, as it in the interests of the Commission to pursue the matter. Once *answers* have been filed, the Commission – and the Tribunal – will be better placed to assess the strengths or weaknesses of the Commission's case against the Respondents.

[234] In the context of Joinder applications, the Tribunal's powers under Tribunal Rule 45(1) are discretionary in nature and are exercised on a case-by-case basis. In this case we would be disinclined to dismiss these in the context of an alleged cartel case, where dismissals at an early stage of the proceedings may result in the unintended consequence of letting an alleged cartelist get away with it while its erstwhile members are left *holding the can*, so to speak.

[235] Before turning to consider each application, we note that these were brought in different ways – some in the form of notices and others on Notice of Motion with supporting affidavits. In order not to delay proceedings any further and to avoid elevating form over substance we have accepted all of these as applications in the normal course in accordance with our discretion in terms of section 55 read with Tribunal Rule 55 and condone any irregularity that might attach to form.

[236] In relation to the self-styled dismissal applications and ANZ's (5R) strike out application at the substantive level we have treated these as exceptions to the Referral in accordance with our aforesaid discretion.

[237] As far as the allegations by SNYS (6R), Standard Bank (8R) and Standard Americas (28R) that the Commission's amendment applications on 25 June 2020 and 11 August 2020 are irregular we find no proper case has been made out in support of this but if found to be wrong hereby condone any such irregularity.

JOINDER APPLICATIONS

[238] We deal now with each Joinder application.

238.1 The Initial Joinder Respondents are: HBUS (19R); MLPFS (20R) and BANA (21R); CSS (23R) and

238.2 The Conditional Joinder Respondents are: Nedbank Group (24R) and Nedbank Ltd (25R); FirstRand Ltd (26R) and FirstRand Bank (27R); and Standard Americas (28R).

[239] As discussed earlier the Commission had filed "conditional" joinder applications in these proceedings seeking to join Respondents that we refer to as "the Conditional Joinder Respondents". The Commission had initially simply cited these Respondents to the Referral on the basis that this was a "new" referral (as required by the CAC) and it was entitled to simply cite Respondents without seeking to join them formally. After receiving objections to this approach, the Commission filed joinder applications "on condition that the Tribunal required them to do so". In our view, the Referral cannot be considered to be "new" in the sense that the Commission had treated it. While the CAC used the word "new" it was clear that the CAC was providing the Commission an opportunity to consolidate all the affidavits filed to date (as the Tribunal had done in its order) and to supplement this with additional allegations to enable the Tribunal to establish adequate connecting factors for purposes of jurisdiction. Hence the Commission's joinder applications cannot be treated as conditional, and we have accordingly treated them as unconditional applications.

[240] Some Respondents raised objections to the form in which the Commission had brought its joinder applications, arguing that the Commission should first seek leave from the Tribunal to bring such an application. In our view this would be

elevating form over substance and would cause unnecessary delays. In any event the Tribunal as a matter of practice does not require applicants to first file a notice (as required in the High Court) to seek leave to join or amend with the leave of the Tribunal, unless they are specifically directed to do so.

[241] The applications are therefore properly before us and any technical irregularity as to the form thereof which might exist is hereby condoned in accordance with our discretion in section 55 and Tribunal Rule 55.

Initial Joinder Respondents

HBUS (19R)

[242] The Commission seeks to join HBUS (19R) on the basis that HBUS (19R) forms part of the same corporate group as HBEU (14R), and that HBUS(19R) had employed Hatton and Mirkovic.[139] Hatton was a member of the Old Gitz chatroom.[140] The Commission alleges that Hatton's 2010 conduct related to the sharing of information on bid-basket spreads, trading positions and a reference to drinks had in real life ("irl"). Hatton's conduct coincided with HBUS (19R) holding the focal point. Hatton also co-ordinated with Cummins of Citibank NA (15R) to withhold trades.[141] The Commission seeks to join HBUS (19R) to the averments applicable to HBEU (14R) (and all Respondents), from at least 2007.

[243] HBUS (19R) opposes the application on several grounds including that the Commission has not established subject or personal jurisdiction over HBUS (19R) as a foreign peregrini, the complaint had not been initiated validly; the complaint has been time barred and discloses no cause of action.

---

[139] Referral at paras 65.9 and 304.
[140] Joinder Bundle, Commission's Supplementary Affidavit at paras 9-14 on p5-6.
[141] Referral at para 130.

[244] The opposition grounds of jurisdiction, time bar and no valid initiation have been dealt with in part A and are accordingly dismissed.

[245] HBUS' (19R) argues that the Referral discloses no cause of action because the only conduct attributed to HBUS (19R) by the Commission is conduct on the part of Hatton, after 2010, which was after he had left HBUS' (19R) employ on 31 October 2010.

[246] Thus, HBUS (19R) admits that Hatton was indeed employed by it at least until 31 October 2010. But this argument is also more in the nature of a defence to the allegation that it was involved in the SOC since 2007.

[247] But the fact that the Commission's pleading does not allege conduct on the part of Hatton prior to 2010 does not mean that he was not, as a matter of fact, involved in such conduct. Recall that the nature of the alleged conduct is that it is collusive. In other words, it requires co-operation between participants to achieve the collusive outcome. The Tribunal would be hesitant to accept - without the hearing of evidence from other participants - that a Respondent, who has already been implicated in some of the alleged conduct in the period 2007 to 2013, has no case to answer.

[248] In our view the Commission has established that HBUS (19R) has a case to answer and HBUS (19R) has conceded as much by admitting that Hatton was employed by it albeit suggesting that his conduct could not be attributed to it after 2010.

[249] HBUS (19R) is hereby joined to case number CR212Feb17 as the Nineteenth Respondent. HBUS (19R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that HBUS (19R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of HBUS's (19R) answer.

MLPFS (20R) and BANA (21R)

[250] The Commission alleges that MLPFS (20R) and BANA (21R) are companies related to BAMLI. BANA (21R) is the holding company for BAMLI and MLPFS (20R) is a sister company to BANA (21R). The Commission seeks to join MLPFS (20R) and BANA (21R) to the averments applicable to BAMLI (and all Respondents), from at least 2007. The factual basis for the joinder is that Cook and Sheppard[142] who were members of the Old Gits chatroom were employed by MLPFS (20R).[143] The Referral alleges that there was a South African presence in Old Gits and Cook had direct involvement with the ZAR chatroom. Cook also has additional allegations against him regarding a Bloomberg username. Cook's conduct from 2007 to 2011 related to Cook's coordination on the USD/ZAR price[144] and requests for information from Johannesburg where Cook asks Katz (working at Standard Americas at the time) about the current trading position of the Johannesburg office. Cook had knowledge of Hatton talking to others and sharing of information. There is also a reference to Cook "meeting for drinks" in person with other bankers.[145]

[251] MLPFS (20R) and BANA (21R) raise objections including that the Commission has not established subject matter jurisdiction over the conduct, MLPFS (20R) also argues that the Commission has not established personal jurisdiction over it. They both argue that the Commission has not made out a coherent or consistent case for joinder; and, finally, that their joinder would result in prejudice.

[252] The arguments on jurisdiction are all dismissed for the reasons provided in part A. As to prejudice, MLPFS (20R) and BANA (21R) could not point to any prejudice that they might suffer from being required to answer a case, when on their own version Cook was employed by MLPFS (20R). Moreover, their legal

---

[142] Referral at para 307.1 and 307.2, Joinder record on p151. Sheppard mentioned in Referral at paras 65.6 and 307.2.

[143] Commission's Supplementary Affidavit at paras 15-21, Joinder Bundle on p6-7.

[144] Referral at para 99.

[145] Referral at paras 97 and 101.

team has been involved in these proceedings from inception and are fully aware the developments in the matter.

[253] MLPFS (20R) is hereby joined to case number CR212Feb17 as the Twentieth Respondent.

[254] BANA (21R) is the holding company for MLPFS (20R). BANA (21R) is therefore not irrelevant to the proceedings. The Commission is entitled to join a holding company when there is an element of uncertainty about who the true employer is. Joining BANA (21R), a holding company, might be relevant for purposes of section 59(3A) in the event that the Commission seeks to hold it jointly and severally liable for the actions of its subsidiary. The Tribunal would also have similar concerns about *not* joining a Respondent in an alleged cartel case, where an employee of the Respondent's subsidiary has been implicated, without the hearing of evidence.

[255] Accordingly, BANA (21R) is hereby joined to case number CR212Feb17 as the Twenty First Respondent.

[256] MLPFS (20R) and BANA (21R) are directed to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that they persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of their answering affidavit(s).

CSS (23R)

[257] The Commission, in seeking to join CSS (23R), alleges that CSS (23R) is an indirect subsidiary to CSG (11R). The Commission seeks to join CSS to the averments applicable to CSG (11R) (and all Respondents), from at least 2007. The factual basis for CSS' (23R) joinder is the employment of Hatton and Putter[146] who were Old Gits members. In the Referral the Commission alleges

[146] Referral at paras 65.8 and 307.7.

that Hatton had direct communication with Katz, and which included information sharing and understandings on bid-offer spreads.[147]

[258] CSS (23R) raised multiple objections alleging that no cause of action has been made out, disputing subject matter and personal jurisdiction and a valid initiation.[148] CSS (23R) alleges that the Commission has not established whether it or CSG (11R) or, in the case of Hatton, HBUS (19R) are Hatton and Putter' employers.

[259] The opposition on the basis of jurisdiction and no valid initiation are dismissed for the reasons set out in Part A. The Commission has already explained why it has difficulty in identifying precisely which entity in the Credit Suisse stable employed Hatton for the reasons discussed in Part A.[149] In our view only CSS (23R) or CSG (11R) can clarify this.

[260] CSS (23R) is hereby joined to case number CR212Feb17 as the Twenty Third Respondent. CSS (23R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that it persists in raising objections or exceptions which have not been dealt with in these reasons, it may do so in its answering affidavit and plead over. The Commission may file a replying affidavit if it so wishes within 20 days of the answering affidavit.

---

[147] Referral at para 105.

[148] No initiation against CSS: The Commission thought this argument had been abandoned however, Respondents had chosen not to advance the time-bar objection at this stage they distinguish *Power Construction* in that it had been added informally on the basis of specified conduct; and say *Pickfords* is not authority to say that the Commission can refer a complaint against a respondent that has not been subject to complaint initiation at all

[149] Referral at para 101.

Conditional Joinder Respondents[150]

Nedbank Respondents (24R) and (25R)

[261] The Commission seeks to join[151] Nedbank Group (24R) and Nedbank Ltd (25R) on the basis of their alleged involvement in the conspiracy from, at least, 1 January 2008.[152] The factual behaviour underlying this assertion relates to the market conduct of the entities which includes matching bid-ask quotes;[153] same ask and bid prices as Standard Americas (28R), ABSA Bank (16R), Standard Bank (8R)[154] and same conduct in chatrooms.

[262] Both Nedbank Respondents (24R) and (25R) object to their joinder on the basis of no valid initiation[155] and that the Referral fails to make out a cause of action against them. These arguments are all dismissed for the reasons provided in Part A.

[263] Nedbank Ltd (25R) is hereby joined to case number CR212Feb17 as the Twenty Fifth Respondent.

[264] In relation to Nedbank Group (24R) joinder is resisted on an additional ground that this entity is a holding company and not a registered or authorised bank, it does not trade in foreign currency. As noted earlier, liability for contravention is not the only basis for joinder of a holding company, it may also be on the basis of seeking an administrative penalty in terms of section 59(3A).

---

[150] Referral Bundle on p177 for detail of when each from Nedbank Group (24R) was alerted to this case against them.

[151] Referral at paras 34 - 35.

[152] Referral at para 69.13.

[153] Referral at para 191 and 197.

[154] Referral at para 192.4

[155] The stance adopted by the Commission is not supported by the *Pickfords* judgment. The issue in *Pickfords* centred around the amendment of an initial complaint initiation in order to add new respondents to that complaint initiation (i.e. at the initiation-stage or Step 1 of the three-step process). *Pickfords* did not, unlike the circumstances of this case, deal with the scenario in which new respondents were added at the referral-stage (Step 3) and in respect of which no initiation had ever taken place against those respondents.

[265] Nedbank Group (24R) is hereby joined to case number CR212Feb17 as the Twenty Fourth Respondent.

[266] Nedbank Ld (25R) and Nedbank Group (24R) are directed, to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that they persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of their answering affidavit(s).

FirstRand Respondents (26R) and (27R)

[267] The Commission seeks to join[156] FirstRand Ltd (26R) and FirstRand Bank (27R) on the basis of their alleged involvement in the conspiracy from, at least, 28 May 2010.[157] The Commission alleges the market conduct included: pairing bid-ask prices;[158] withholding in the ZAR chatroom;[159] and producing matching bids in the Old Gits chatroom.[160]

[268] FirstRand Bank (27R) does not oppose its joinder.[161] Any irregularities arising out of the timing of the filing of the Commission's withdrawal notice against RMB prior to the formal joinder of the FirstRand Respondents (26R) and (27R) are condoned.

[269] FirstRand Ltd (26R) however does oppose the joinder as the Twenty-Sixth Respondent. Initially the party cited as the Twenty Sixth Respondent was RMB. The Commission then filed another supplementary affidavit in which it stated that it sought to "*amend the citation of the 26th respondent*" by substituting FirstRand Ltd (26R) as the 26th Respondent instead of RMB. FirstRand Ltd

---

[156] Referral at paras 36 – 38.

[157] Referral at para 69.14 RMB Holdings is the entity referred to.

[158] Referral at para 234.

[159] Referral at paras 144 and 145.

[160] Referral at para 197.

[161] Exception Bundle, FirstRand Bank's (27R) Founding Affidavit in Application to Dismiss the Complaint at para 19 on p887 and Joinder Bundle, Commission's Founding Affidavit in Conditional Joinder Application at para 12.5 on p278.

(26R) objected to the filing of the supplementary affidavit. However, the Commission has since withdrawn the Referral against RMB and asks that all the allegations in the Referral that were made against RMB be read to apply to FirstRand Ltd (26R) and FirstRand Bank (27R). While this is somewhat unusual, it is not entirely impermissible for the Commission to substitute one party for another where it is of the view that the previous citation was incorrect.

[270] FirstRand Ltd (26R) resisted this on the basis that this was not a mere correction but amounted to the substantive exchanging of one party for another. It also resists substantive joinder on account of the fact that FirstRand Ltd (26R) is not authorised to deal in foreign exchange currency and is only connected by virtue of the fact that it wholly owns FirstRand Ltd (26R).

[271] However, the Referral clearly alleges conduct on the part of traders which advantaged FirstRand (cited as RMB). In para 230 it is alleged that FirstRand cited as RMB was allowed to dominate the market with its quotes while the other traders withheld bids and offers.[162] In para 270.9 it is alleged that FirstRand cited as RMB together with ABSA Bank (16R), HBEU (14R) or HBUS (19R), HSBC London alternated in posting quotations in a manner that enables them to set the exchange rate at various levels for nearly eight minutes. FirstRand (cited as RMB) is also alleged to have engaged in pairing bid-ask prices with other banks such as HBEU (14R) or HBUS (19R), CommerzBank (12R), Barclays GFX, Investec JHB and Nedbank Group (24R) and Nedbank Ltd (25R).[163]

[272] The Commission does not know whether FirstRand Bank (27R) or FirstRand Ltd (26R) employed the (unnamed) traders that the Commission alleges participated in the conspiracy. While the traders may be unnamed there are sufficient details alleged in the Referral to enable FirstRand Ltd (26R) or FirstRand Bank (27R) to conduct an internal investigation to enable them to address the allegations.

---

[162] Referral at para 270.6.

[163] Referral at para 234.

[273] Given the details set out in para 230 and 270.9 we are of the view that FirstRand Bank (27R) has a case to answer or at least provide an explanation. FirstRand Ltd (26R) as the holding company may also be relevant for purposes of section 59(3A).

[274] FirstRand Bank (27R) and FirstRand Ltd (26R) are hereby joined to case number CR212Feb17 as the Twenty Sixth and Twenty Seventh Respondent.

[275] FirstRand Ltd (26R) and FirstRand Bank (27R) are directed to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that they persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of their answering affidavit(s).

Standard Americas (28R)

[276] The Commission seeks to join[164] Standard Americas (28R) on the basis of the allegation that Standard Americas (28R) is an affiliate of Standard Bank (8R)[165] and employed Katz[166] and Friedman.[167] These traders both participated in the Old Gits, ZAR chatrooms, and multiple others.

[277] Standard Americas (28R) confirms that it employed Katz[168] but resists the Commission's joinder on the basis of a lack of personal jurisdiction, no valid initiation and time bar. All of these grounds have been decided in Part A and are accordingly dismissed.

[278] In light of the fact that it employed Katz (until June 2010) and Friedman (until October 2014) it clearly has a case to answer or at least provide an explanation.

---

[164] Referral at para 39.
[165] Referral at para 39.2.
[166] Referral at para 65.4.1.
[167] Referral at para 65.11.
[168] Exceptions Bundle at para 6 on p1009. See email sent by SNYS (6R) Attorney (who also came to represent Standard Americas (28R)) confirming this point.

[279] Standard Americas (28R) is hereby joined to case number CR212Feb17 as the Twenty Eighth Respondent.

[280] Standard Americas (28R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that it persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of the answering affidavit.

EXCEPTIONS, OBJECTIONS, DISMISSALS AND STRIKE OUT APPLICATIONS

BAMLI DAC (1R)

[281] BAMLI DAC (1R)[169] excepted to the Referral on affidavit, seeking the dismissal of the Commission's Referral against it on the basis that the Commission has not established subject or personal jurisdiction over BAMLI DAC (1R) as a foreign peregrini, and that the complaint discloses no cause of action and is vague and embarrassing.

[282] BAMLI DAC's (1R) grounds of exception on personal and subject-matter jurisdiction have been dealt with in Part A and are accordingly dismissed.

[283] BAMLI DAC (1R) argues "*it is common cause that Cook was not employed by BAMLI. Cook was, at all material times, employed by MLPFS"* and that the Commission seems to accept this, which is why it seeks to join MLPFS (20R), on this basis BAMLI DAC (1R) says the case against it should be dismissed.

[284] The Commission, on the other hand argued that the case against BAMLI DAC (1R) relates to its membership to the Bank of America group in that it is a direct-wholly owned subsidiary of BANA (21R), which company has as a subsidiary MLPFS (20R), Cook's alleged employer. BAMLI DAC (1R) is unarguably linked to the conspiracy through its employees, Cook and Sheppard, who were

[169] BAMLI which name was changed to BAMLI DAC.

members of the Old Gits Chatroom and engaged in multiple instances of price fixing and market division.

[285] The Commission did not abandon its case against BAMLI DAC (1R) on the basis of its attorney attesting to the fact that Cook was employed by MLPFS, arguing that the "*Referral contains factual allegations from which a reasonable possible inference may be drawn that BAMLI or one of the BoA entities participated in the single over-arching conspiracy and that they did so with the necessary knowledge*".[170]

[286] As discussed in Part A, the Commission cited BAMLI DAC (1R) because Cook at one time was identified as "*GAVIN COOK MERRILL LYNCH/gavin.cook@baml.com".* We would be reluctant to dismiss the Referral against BAMLI DAC (1R) for this reason and without hearing evidence from witnesses, whether from the Commission or BAMLI DAC (1R), who Cook was representing at the time.

[287] Accordingly, the BAMLI DAC (1R) exception brought under case number CR212Feb17 / EXC092Aug20 is dismissed. BAMLI DAC (1R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that BAMLI DAC (1R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of BAMLI DAC's (1R) answer.

BNP (2R)

[288] BNP (2R) has filed an exception, on notice, seeking dismissal of the Referral on the grounds that the Referral fails to disclose a cause of action and is vague and embarrassing because it does not include sufficient allegations dealing with the cessation of the SOC and the individual Respondents continued participation in, or exit from, the SOC.

---

[170] Commission's Heads of Argument at para 76.

[289] The Commission alleges that BNP (2R) employed Jason Katz and he represented, and was authorised to trade by, BNP (2R) from September 2011 to 2013. .[171]

[290] As discussed in Part A, the Commission has explained why it was unable to plead as required by the CAC regarding cessation of the SOC. We have dealt with the issue of non-compliance with the CAC order in Part A and accordingly dismiss BNP's (2R) exceptions on these grounds.

[291] BNP's (2R) notice of exception filed under case number CR212Feb17 / EXC055Jun20 is dismissed. BNP (2R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that BNP (2R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of BNP's (2R) answer.

JPMorgan Respondents (3R) and (4R)

[292] The JPMorgan Respondents (3R) and (4R) filed an objection application on affidavit, praying for the dismissal of the Commission's complaint on the basis that the Commission has not established subject or personal jurisdiction over JPMorgan Co (3R) as a foreign peregrini, and JPMorgan NA (4R) as a local peregrini; that the Referral is in violation of Tribunal Rule 15(2) requiring material facts or points of law, and for being vague and embarrassing.

[293] The JPMorgan Respondents (3R) and (4R) argue that the Commission has not made out case for JPMorgan's participation in a conspiracy. The Commission was required to have shown that the impugned conduct took place pursuant to JPMorgan NA's (4R) authorised dealer licence and no attempt is made to connect JPMorgan NA (4R) to a South African branch.

---

[171] Referral at paras 295 and 296.

[294] The Commission's case against the JPMorgan Respondents (3R) and (4R) is that they both are linked to the conspiracy through its employees, Aiyer[172] and Simister, who were participants in implicated chatrooms and engaged in multiple instances of conduct furthering the conspiracy; including walking prices lower.[173]

[295] We have dealt with the jurisdiction and Tribunal Rule 15(2) objections in Part A and these grounds of objection are accordingly dismissed.

[296] As to which specific allegations the Commission is required to plead – for example that the Commission was required to have shown that the impugned conduct took place pursuant to JPMorgan NA's (4R) authorised dealer licence – we have set out our approach to pleadings in Part A and do not accept that a failure by the Commission to allege the specific facts required by the JPMorgan Respondents (3R) and (4R) is a basis for dismissing the Referral. All that is required is for the JPMorgan Respondents (3R) and (4R) to understand the case against them.

[297] Accordingly, the JPMorgan Respondents' (3R) and (4R) application brought under case number CR212Feb17 / DSM088Aug20 is dismissed. The JPMorgan Respondents (3R) and (4R) are directed to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that the JPMorgan Respondents (3R) and (4R) persist in raising other preliminary objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of the JPMorgan Respondents' (3R) and (4R) answer(s).

---

[172] In November 2019, Aiyer was found guilty in the New York Southern District Court of the charge of knowingly entering into and participating in a combination and conspiracy to suppress and eliminate competition by fixing prices of and rigging bids and offers for Central and Eastern European, Middle Eastern and African emerging market currencies.

[173] Referral at para 210.

ANZ (5R)

[298] ANZ (5R) has filed, on affidavit, an application seeking to set aside or strike out the Referral insofar as it relates to ANZ (5R). ANZ's (5R) application is based on the grounds that the Commission has not established subject or personal jurisdiction over ANZ (5R) as a foreign peregrini and the Referral fails to disclose a cause of action, is vague and embarrassing, does not comply with the CAC order or Tribunal Rule15(2); insufficiently pleaded when it joined or furthered an SOC.

[299] ANZ (5R) argues that there are no facts disclosing that ANZ (5R) joined and participated in alleged conspiracy because every instance of participation in the impugned conduct alleged on the part of Katz predates 2013 (when he was employed by ANZ (5R) before 2013) and no instance of active or passive participation in impugned conduct is alleged on the part of Tezel.

[300] The Commission's case against ANZ (5R) is that it is unarguably linked to the conspiracy through its employees, Tezel and Katz. ANZ (5R) is alleged to have joined the conspiracy by at least October 2012 when Tezel was a participant in an implicated chatroom alternatively early 2013 when Katz was a participant in implicated chatrooms including the Old Gits chatroom. An example of the market conduct is when Aiyer copies and pastes a communication between Tezel and Madaras from a chatroom that Aiyer, Tezel and Madaras would all have had access to.[174]

[301] As to the issue of jurisdiction, non-compliance with the CAC order and requirements of Tribunal Rule 15(2) we have decided these in Part A and the application on these grounds is dismissed.

[302] As to the issue of no conduct after 2013 or active or passive participation this is more in the nature of a defence and if ANZ (5R) wishes to persist with it, it may do so in its answering affidavit.

---

[174] Referral at para 184.

[303] The ANZ application to set aside or strike out brought under case number CR212Feb17 / DSM098Aug20 is accordingly dismissed. ANZ (5R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that ANZ (5R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of ANZ's (5R) answer.

SNYS (6R)

[304] SNYS (6R) filed an affidavit objecting to the Referral and praying for the dismissal of the Referral on the basis that the Commission had not established personal jurisdiction over SNYS (6R) as a foreign peregrini and that the complaint is time-barred. It is alleged that the complaint discloses no cause of action and has not complied with the CAC order due to failure to plead a SOC by failing to properly plead the date on which SNYS (6R) allegedly joined the conspiracy, and failure to properly plead the duration of the conspiracy. SNYS (6R) argues that it should not be a Respondent Referral on the basis of a false understanding that SNYS (6R) employed certain traders whose conduct the Commission relied on in referring the complaint.

[305] SNYS' (6R) objections based on a lack of personal jurisdiction time bar and non-compliance with the CAC order have been dealt with in Part A and are accordingly dismissed.

[306] As discussed in Part A, the Commission's case against SNYS (6R) relates to the employment of Jason Katz, Richard de Roos, Robert Silverman and Louis Friedman. Friedman and Katz are alleged to have been members of a permanent chatroom known as the Old Gits chatroom and the ZAR chatroom, and a participant in the conspiracy from as early as 1 October 2007.

[307] To its credit SNYS (6R) has made efforts to bring to the attention of the Commission that Standard Americas (28R), and not SNYS (6R), had employed

Katz, Friedman and authorised them to trade in the USD/ZAR currency pair. SNYS (6R) also denounced De Roos who it had never employed.

[308] However as discussed earlier the Commission finds itself on the horns of a dilemma. In the context of an alleged cartel and in the absence of *viva voce* evidence, we would be reluctant at this early stage of the proceedings to dismiss the Referral against a particular Respondent.

[309] SNYS (6R) has put up a defence in these preliminary proceedings namely that it was not it but Standard Americas (28R) that employed Katz and the other implicated traders, and it is entitled to pursue this in its answering affidavit.

[310] Accordingly, SNYS' (6R) objection brought under case number CR212Feb17 / DSM090Aug20 is dismissed. SNYS (6R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that SNYS (6R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of SNYS' (6R)answer.

Standard Bank (8R)

[311] Standard Bank (8R) filed an affidavit objecting to the Referral and praying for the dismissal of the Referral on the basis that the Commission had not complied with the CAC order, in that (i) the allegations in the affidavit are not confined to allegations in respect of the "named respondents";[175] (ii) the Commission has not confined itself to a SOC;[176] (iii) no proper inference of a SOC can be drawn from the facts pleaded by the Commission;[177] and (iv) the Commission has not satisfied the requirement that it inform the Respondents whether its case is that

[175] As contemplated in paragraph 3.2.1 of the CAC Order.
[176] As required by paragraph 3.2.2 of the CAC Order.
[177] As required by paragraph 3.2.4 of the CAC Order.

the SOC has ceased or is continuing and to provide particularity for each Respondent based on its election.[178]

[312] The Commission alleges that Standard Bank (8R) employed De Roos, Silverman, Friedman, Brownrigg and Wood. The Commission alleges that Standard Bank (8R) engaged in, among others, the following market conduct: posting quotes in succession in the Old Gits and ZAR chatrooms which had the effect of reducing volatility in the exchange rate and maintain a spot exchange rate;[179] and withholding in chatrooms.[180]

[313] Standard Bank (8R) alleges that the only communications or contacts by an employee of Standard Bank (8R), Brownrigg, with another person regarding currency trades were the two communications engaged in by Brownrigg and Taylor (allegedly employed by Barclays Capital (17R)). By law, Barclays Capital (17R) could only have engaged with Standard Bank (8R) in a vertical relationship, not a horizontal relationship as required by section 4(1)(b) of the Act. Thus, when engaging in this context (if indeed Standard Bank (8R) engaged with Barclays Capital (17R) at all), to the knowledge of the Commission, Standard Bank (8R) and the counterparty were not "competitors", as required by section 1(xiii) of the Act. This is more in the nature of a defence and cannot be determined without recourse to a factual enquiry.

[314] As to the objections on jurisdiction, non-compliance with the CAC, no proper inference of an SOC and failure to plead whether the SOC has ceased or is continuing (or time bar), these have all been dealt with in Part A and are accordingly dismissed.

[315] Standard Bank's (8R) objection filed under case number CR212Feb17 / DSM089Aug20 is accordingly dismissed. Standard Bank (8R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that Standard Bank (8R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering

---

[178] As required by paragraphs 3.2.7 and 3.2.8 of the CAC Order.
[179] Referral at paras 194, 195 and 235.
[180] Referral at paras 152, 153, 150.

affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of Standard Bank's (8R) answer.

Nomura (9R)

[316] Nomura (9R) objected to the Referral on affidavit, on the basis that the Commission has not established subject-matter or personal jurisdiction over it as a foreign peregrini, and that the Referral does not contain sufficient particularity, by omitting to allege averments as per the CAC order and Tribunal Rule 15(2).

[317] It argues that Nomura (9R) is unable to ascertain when it is alleged to have joined; the Commission fails to allege which Respondent banks joined the alleged conspiracy in September 2007. It was argued further that due to the Commission's lack of precision on the date on which each Respondent is alleged to have joined the SOC, the case against Nomura (9R) has strange timeline anomalies that the Commission should be compelled to rectify.

[318] The Commission alleges that Nomura (9R) is represented by Arlan and Dempsey. Two of the three pleaded factual examples of Nomura's participation in the SOC involve Nomura actively communicating with, or trading conduct with, local banks. Nomura's (9R) presence in a discussion in a chatroom between at least two members of the Old Gits chatroom (Katz and Cummins and Aiyer[181]) further links Nomura to the SOC. Dempsey has direct chats with Howes from ABSA on bid-offer spreads.[182] Arlan has direct chats with members of ZAR chatroom (Katz, Williams, Cummins, Aiyer) and shares customer information.[183]

[319] We have dealt with the issue of jurisdiction, non-compliance with the CAC order and Tribunal Rule 15(2) in Part A and Nomura's (9R) objections on these grounds are accordingly dismissed.

---

[181] Referral at para 215.
[182] Referral at para 114.
[183] Referral at para 254.

[320] The Commission has alleged facts of Nomura's participation in at least three instances, two of which are with incola (local) banks. At the very least this requires an explanation from Nomura (9R).

[321] Nomura's (9R) objection seeking the dismissal of the Commission's Referral brought under case number CR212Feb17 / DSM094Aug20 is dismissed. Nomura (9R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that Nomura (9R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of Nomura's (9R) answer.

Standard Chartered (10R)

[322] SCB (10R) has filed an exception on notice praying that the Tribunal uphold the exception and direct the Commission to amend or supplement the Referral to comply with the CAC order. The exception was on the grounds of a failure to comply with the CAC order and failure to disclose a cause of action while having not established personal jurisdiction over SCB (10R) as a local peregrini.

[323] The Commission's case against SCB (10R) is that its employees - representing and or authorised to trade on its behalf: Shreyans Surana, Bernard Barisic, James Mullaney, Matthew Sweeney and Patrick McInerney - were members of Old Gits chatroom. On two occasions in 2012, the communications in the ZAR chatroom show that Katz and Williams are frequently communicating with traders employed by SCB (10R) and that together they are engaging in conduct that furthers the objectives of the conspiracy.[184]

[324] As to the issue of personal jurisdiction over local peregrini, recall that this aspect of the Tribunal's decision had not been overturned by the CAC.

---

[184] Referral at para 109.

[325] The Commission has alleged at least two instances where Katz and Williams, members of the Old Gits chatroom were actively communicating with SCB's traders, and these traders were involved in furthering the alleged conduct.

[326] Accordingly, SCB's (10R) exception notice filed under case number CR212Feb17 / EXC110Aug20 is dismissed. SCB (10R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that SCB (10R) persists in raising other preliminary objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of SCB's (10R) answer.

Credit Suisse Respondents (11R) and (23R)

[327] CSG (11R) filed on affidavit a dismissal application.[185] The CSG (11R) and CSS (23R) also jointly filed an exception application[186] on the same grounds, which application is in the alternative to the CSG's (11R) dismissal application and the CSS' opposition to joinder.

[328] We incorporate by reference the discussion under joinder regarding the alleged conduct. We have already granted the Commission's application to join CSS (23R). Although these applications were filed in the alternative we deal with both of them.

[329] The main thrust of CSG's (11R) argument in its dismissal application is that there is no factual basis advanced for the contention that CSG (11R) employed or was represented by either Hatton or Putter, and accordingly no case for CSG (11R) to answer.

[330] The exception filed by the Credit Suisse Respondents (11R) and (23R) argued that the Commission had alleged insufficient facts to establish personal and subject-matter jurisdiction over CSG (11R) and personal jurisdiction over CSS (23R); establish common objective, an SOC and the Credit Suisse

[185] CR212Feb17 / DSM107Aug20.
[186] CR212Feb17 / EXC099Aug20.

Respondents' (11R) and (23R) participation in the SOC; and cessation of the conspiracy. Further, in particular the Referral does not comply with the CAC order in that a concerted practice was not alleged.

[331] The Credit Suisse Respondents (11R) and (23R) also argue that reference to historical practices should be struck out on the same basis that similar allegations were struck out of the previous referral affidavit: that they amount to impermissible similar fact evidence.[187]

[332] The issue of no personal and subject-matter jurisdiction and non-compliance with the CAC order have been dealt with in Part A. Accordingly, the Credit Suisse Respondents' (11R) and (23R) exception and dismissal applications on these grounds are dismissed.

[333] The argument that the Commission has not established whether it or CSG (11R) or, in the case of Hatton, HBUS are Hatton and Putter' employers is also dismissed, for the reasons discussed under the joinder applications.

[334] In relation to the CSS strike out of historical practices the Commission has only made references to Katz' settlement with the DOJ. Unlike in the previous round where the Commission had included extensive details of Katz' conduct, in this Referral references are made at a general level to the settlement. The fact of the settlement is a matter of public record and cannot prejudice the Respondents in any way.

[335] Accordingly, the CSG (11R) dismissal application brought under case number CR212Feb17 / DSM107Aug20 and the joint exception application brought by CSG and CSS under case number CR212Feb17 / EXC099Aug20 are dismissed. The Credit Suisse Respondents (11R) and (23R) are directed to

---

[187] CSG's and CSS' heads of argument at para 41:

"*The Commission does not implicate Credit Suisse in the historical practices, and the cases which are referenced take the matter no further. The allegations should be struck out on the same basis that similar allegations were struck out of the previous referral affidavit: that they amount to impermissible similar fact evidence and that "reliance on a settlement agreement with one of the respondents in another jurisdiction is, at this stage of the proceedings, prejudicial to the third and fourth respondents and indeed to other respondents in this case given that they are alleged to be part of the same conspiracy*."

file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that the Credit Suisse Respondents (11R) and (23R) persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of the Credit Suisse Respondents (11R) and (23R) answer(s).

CommerzBank (12R)

[336] CommerzBank (12R) excepted to the Referral on affidavit, seeking the dismissal of the Commission's Referral against it on the basis that the Commission has not established subject matter jurisdiction over CommerzBank (12R) as a second class local peregrini and has pleaded insufficiently to the SOC.

[337] The Commission's case against CommerzBank (12R) is that Dousie and Wilson were employed by and/or represented Commerzbank (12R) and Dousie was a participant in an implicated chatroom.

[338] The issue of subject- matter jurisdiction and the SOC have been dealt with in Part A and CommerzBank's (12R) exception is accordingly dismissed for the reasons set out there.

[339] Accordingly, CommerzBank's (12R) exception brought under case number CR212Feb17 / EXC109Aug20 is dismissed. CommerzBank (12R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that CommerzBank (12R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of CommerzBank's (12R) answer.

Macquarie (13R)

[340] Macquarie (13R) objected to the Referral on affidavit, seeking the dismissal of the Referral against it on the basis that the Commission has not established subject or personal jurisdiction over it as a foreign peregrini, and that the Referral does not contain sufficient particularity on the SOC and is insufficiently pleaded in relation to individual firms in that there is only one named case against Macquarie (13R). The Commission also, omitted to allege averments required in terms of the CAC Order and CT Rule 15(2). Similarly vague and contradictory allegations are made by the Commission in respect of the dates that each of the other Respondents allegedly joined and exited the SOC and the Commission has refused to commit itself, unequivocally, to a particular formulation of the case, as it was ordered to do.

[341] The Commission's case against Macquarie (13R) is that it is unarguably linked to the conspiracy through its employees, Chia, Harkins, Atkins, Murray, Fryday and Donnelly. Atkins, Fryday, Murray and Chia are alleged to have been participants in an implicated chatroom and participants in the conspiracy from at least 11 September 2013. Chia, is alleged to have communicated with a trader employed by a South African bank, ABSA Bank (16R), in furtherance of the conspiracy. Chia is alleged to discussed bid-offer spread for USD/ZAR with Kunene a trader employed by ABSA Bank (16R). Murray is alleged to have spread competitively sensitive information in an implicated chatroom.

[342] The issue of personal and subject-matter jurisdiction, SOC, non-compliance with the CAC order and Tribunal Rule 15(2) have been dealt with in Part A and Macquarie's (13R) exception on these grounds is dismissed for the reasons set out there.

[343] The arguments regarding that there is only one named case against Macquarie (13R) is more in the nature of a de minimis defence and Macquarie may persist with it in its answering affidavit, if it so wishes.

[344] Accordingly, Macquarie's (13R) objection brought under case number CR212Feb17 / DSM068Jul20 is dismissed. Macquarie (13R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that Macquarie (13R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of Macquarie's (13R) answer.

HSBC Respondents (14R) and (19R)

[345] The HSBC Respondents (14R) and (19R) filed, on affidavit, a joint dismissal application, seeking the dismissal of the Commission's Referral against it on the basis that it did not allege necessary averments ordered by the CAC - "other conduct", inferences drawn, ongoing nature of conduct – and Tribunal Rule 15(2)(b), failing to disclose a cause of action and making the pleadings vague & embarrassing.

[346] The Commission's case against the HSBC Respondents (14R) and (19R) is dealt with in the joinder section. For the reasons set out therein and our decisions on non-compliance with the CAC order or Tribunal Rule 15 (2) in Part A, the HSBC Respondents' (14R) and (19R) grounds are dismissed.

[347] The HSBC Respondents' (14R) and (19R) dismissal application filed under case number CR212Feb17 / DSM097Aug20 is dismissed. HBEU (14R) and HBUS (19R) are directed to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that HBEU (14R) and HBUS (19R) persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of The HSBC Respondents' (14R) and (19R) answer(s).

Nedbank Respondents (24R) and (25R)

[348] The Nedbank Respondents (24R) and (25R) jointly filed an exception notice and a joint dismissal application, seeking the dismissal of the Commission's Referral against them on the basis that the Referral fails to make out a cause of action against them, there had been insufficient pleading of an SOC in line with the CAC order; alternatively the allegations made in the Referral regarding the Nedbank Respondents (24R) and (25R) are vague & embarrassing.

[349] The Commission's case against the Nedbank Respondents (24R) and (25R) is dealt with in detail in the joinder section and for the reasons canvassed therein and in Part A, the Nedbank Respondents' (24R) and (25R) grounds are dismissed.

[350] The Nedbank Respondents' (24R) and (25R) dismissal application filed under case number CR212Feb17 / EXC093Aug20 is dismissed. Nedbank Limited (24R) and Nedbank Group (25R) are directed, to file their answering affidavit(s) to the Referral within 40 days of date of this order. In the event that Nedbank Limited (24R) and Nedbank Group (25R) persist in raising objections or exceptions which have not been decided in these reasons, they may do so in their answering affidavit(s) and must plead over. The Commission may file a replying affidavit(s) if it so wishes within 20 days of the Nedbank Respondents' (24R) and (25R) answer(s).

FirstRand Bank (27R)

[351] FirstRand Bank (27R) did not oppose the joinder application but filed a dismissal application, seeking the dismissal of the Referral, or in the alternative grant the Commission leave to further amend its Referral. The basis for dismissal was that the Referral is impermissibly vague and contradictory in that it sets out facts that if proved would not suffice to sustain a complaint and do not comply with Tribunal Rule 15(2).

[352] The Commission's case against the FirstRand Bank (27R) is as canvassed above in the joinder section and for the reasons canvassed therein and those in Part A, the FirstRand Bank (27R) grounds are dismissed.

[353] FirstRand Bank's (27R) dismissal application filed under case number CR212Feb17 / DSM096Aug20 is dismissed. FirstRand Bank (27R) is directed to file their answering affidavit to the Referral within 40 days of date of this order. In the event that FirstRand Bank (27R) persists in raising objections or exceptions which have not been decided in these reasons, it may do so in their answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of FirstRand Bank (27R) answer.

Standard Americas (28R)

[354] Standard Americas (28R) filed, an affidavit objecting to the Referral and praying for the dismissal of the Referral on the basis that the Commission had not established personal jurisdiction over Standard Americas (28R) as a foreign peregrini, the complaint had not been initiated, and the Referral did not comply with the CAC order.

[355] The Commission's case against the Standard Americas (28R) is as canvassed above in the joinder section and for the reasons canvassed therein and in Part A, the Standard Americas' (28R) grounds are dismissed.

[356] The Standard Americas' (28R) dismissal application filed under case number CR212Feb17 / DSM091Aug20 is dismissed. Standard Americas' (28R) is directed to file its answering affidavit to the Referral within 40 days of date of this order. In the event that Standard Americas persists in raising objections or exceptions which have not been decided in these reasons, it may do so in its answering affidavit and must plead over. The Commission may file a replying affidavit if it so wishes within 20 days of Standard Americas' (28R) answer.

COSTS

[357] Some Respondents requested that we award costs against the Commission. It is trite that section 57 of the Act does not empower the Tribunal to order costs against the Commission.[188] In the circumstances no costs order will be made in this matter.

[188] *Competition Commission v Pioneer Hi-Bred International Inc. and Others* CCT58/13. See further *Omnia Fertilizer (77/CAC/Jul08)*.

ORDER

Accordingly, we make the following orders:

A. Commission's Joinder Applications

[1] The Commission's applications[189] seeking joinder of HBUS (19R); MLPFS (20R) and BANA (21R); CSS (23R); Nedbank Group (24R); Nedbank Ltd (25R); FirstRand Ltd (26R) FirstRand Bank (27R); and Standard Americas (28R) (the Joinder Respondents) are granted.

[2] The Joinder Respondents must file their answering affidavits to the Referral within 40 days[190] of this order. In the event that they persist in raising objections or exceptions which have not been dealt with in these reasons, they may do so in their answering affidavits and must plead over.

[3] The Commission may file replying affidavits if it so wishes within 20 days of the Joinder Respondents' answering affidavits.

[4] Any irregularities arising out of the filing of the Commission's withdrawal notice against RMB prior to the joinder of the FirstRand Respondents are condoned.

[5] Any irregularity in the form of the Commission's applications to join the Initial and Conditional Joinder Respondents is hereby condoned.

---

[189] In the Commission's Third Supplementary Affidavit dated 20 December 2017 and the Conditional Joinder Application filed under case number CR212Feb17 / JOI136Sep20.

[190] In this order "days" means business days.

B. Commission's Amendment Application and Supplementary Affidavits

[1] The Commission's application for leave to amend Form CT1 filed on 25 June 2020 and supplemented on 11 August 2020 under case number CR212Feb17 / AME051Jun20 is granted.

[2] The Commission's supplementary affidavit, to its amendment application, filed on 11 August 2020 is found not to be an irregular step and is admitted.

[3] The Commission's supplementary affidavits, to its Referral, filed on 24 June 2020 and 13 July 2020 are found not to be irregular steps and are admitted.

C. Objection Applications

[1] The following applications are hereby dismissed:

1.1 BAMLI DAC's (1R) exception brought under case number CR212Feb17 / EXC092Aug20;

1.2 BNP's (2R) notice of exception filed under case number CR212Feb17 / EXC055Jun20;

1.3 JPMorgan Respondents' (3R) and (4R) application brought under case number CR212Feb17 / DSM088Aug20;

1.4 ANZ's (5R) application to set aside or strike out brought under case number CR212Feb17 / DSM098Aug20;

1.5 SNYS' (6R) objections brought under case number CR212Feb17 / DSM090Aug20;

1.6 Standard Bank's (8R) objection filed under case number CR212Feb17 / DSM089Aug20;

1.7 Nomura's (9R) objection brought under case number CR212Feb17 / DSM094Aug20;

1.8 SCB's (10R) exception notice filed under case number CR212Feb17 / EXC110Aug20;

1.9 CSG's (11R) dismissal application brought under case number CR212Feb17 / EXC099Aug20 and the joint exception application brought by CSG (11R) and CSS (23R) under case number CR212Feb17 / DSM107Aug20;

1.10 CommerzBank's (12R) exception brought under case number CR212Feb17 / EXC109Aug20;

1.11 Macquarie's (13R) objection brought under case number CR212Feb17 / DSM068Jul20;

1.12 HSBC Respondents' (14R) and (19R) dismissal application filed under case number CR212Feb17 / DSM097Aug20;

1.13 Nedbank Respondents' (24R) and (25R) dismissal application filed under case number CR212Feb17 / EXC093Aug20;

1.14 FirstRand Bank's (27R) dismissal application under case number CR212Feb17 / DSM096Aug20; and

1.15 Standard Americas' (28R) dismissal application under case number CR212Feb17 / DSM091Aug20.

[2] The Applicants (Respondents in the main matter) must file their answering affidavits to the Referral within 40 days of date of this order. In the event that they persist in raising objections or exceptions which have not been dealt with in these reasons, they may do so in their answering affidavits and must plead over.

[3] The Commission may file replying affidavits if it so wishes within 20 days of the answering affidavits.

[4] Any non-compliance by the Applicants with the rules of the Tribunal in the form of the applications is hereby condoned.

Yasmin Tayob Carrim

30 March 2023

Ms Yasmin Carrim **Date**

Ms Mondo Mazwai and Mr Andreas Wessels concurring.

Case Managers:	Mpumelelo Tshabalala and Juliana Munyembate
For the Commission:	Advocate Tembeka Ngcukaitobi SC assisted by Advocates Frances Hobden, Lerato Zikalala, Cingashe Tabata, Isabella Kentridge, Hannine Drake and Mehluli Nxumalo Instructed by Ndzabandzaba Attorneys Inc.
For the Respondents	See Annexure A

Annexure A

Respondent Number	**Name of Bank**	**Abbreviation**		**Counsel** **Law firm** **Lead attorney(s)**
First Respondent	**BANK OF AMERICA MERRILL LYNCH INTERNATIONAL DESIGNATED ACTIVITY COMPANY**[191]	BAMLI DAC	1R	Advocate Paul Farlam SC assisted by Advocates Phumlani Ngcongo and Michael Mbikiwa Instructed by Daryl Dingley and Shawn van der Meulen of Webber Wentzel
Twentieth Respondent	**MERRILL LYNCH PIERCE FENNER AND SMITH INC.**	MLPFS	20R	
Twenty First Respondent	**BANK OF AMERICA, N.A.**	BANA (collectively referred to as "Bank of America Respondents")	21R	
Second Respondent	**BNP PARIBAS**	BNP	2R	Advocate John Campbell SC Instructed by Robert Legh, Rudolph Labuschagne and Tamara Dini of Bowmans

[191] Bank of America Merrill Lynch International Limited was substituted with BAMLI DAC.

Respondent Number	**Name of Bank**	**Abbreviation**		**Counsel** **Law firm** **Lead attorney(s)**
Third Respondent	**JP MORGAN CHASE AND CO.**	JPMorgan Co	3R	Advocate Mike van der Nest SC assisted by Advocate Duncan Turner Instructed by Martin Versfeld and Clare-Alice Vertue of Webber Wentzel
Fourth Respondent	**JP MORGAN CHASE BANK N.A**	JPMorgan NA	4R	
Fifth Respondent	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**	ANZ	5R	Advocate Chris Loxton SC assisted by Advocates Robin Pearse SC and Pranisha Maharaj-Pillay Instructed by Chris Charter and Lara Granville of Cliffe Dekker Hofmeyr
Sixth Respondent	**STANDARD NEW YORK SECURITIES INC.**	SNYS	6R	Advocates Arnold Subel SC and Greta Engelbrecht SC
Eighth Respondent	**STANDARD BANK OF SOUTH AFRICA LIMITED**	Standard Bank	8R	

Respondent Number	**Name of Bank**	**Abbreviation**		**Counsel** **Law firm** **Lead attorney(s)**
Twenty Eighth Respondent	**STANDARD AMERICAS INC**	Standard Americas	28R	Instructed by Jean Meijer, Sandhya Foster and Stewart Payne of Herbert Smith Freehills
Seventh Respondent	**INVESTEC LIMITED**	Investec Ltd	7R	Did not participate in proceedings
Twenty Second Respondent	**INVESTEC BANK LIMITED**	Investec Bank	22R	
Ninth Respondent	**NOMURA INTERNATIONAL PLC**	Nomura	9R	Ms Deanne Wood Instructed by Neil Mackenzie of Faskens
Tenth Respondent	**STANDARD CHARTERED BANK**	SCB	10R	Advocate Frank Snyckers SC assisted by Advocate Ayanda Msimang Instructed by Robert Wilson of Webber Wentzel
Eleventh Respondent	**CREDIT SUISSE GROUP**	CSG	11R	Advocate Michelle Norton SC assisted by Advocate Gavin

Respondent Number	**Name of Bank**	**Abbreviation**		**Counsel** **Law firm** **Lead attorney(s)**
Twenty Third Respondent	**CREDIT SUISSE SECURITIES (USA) LLC**	CSS (collectively referred to as Credit Suisse Respondents)	23R	Marriott Instructed by Paul Coetser & Paul Cleland of Werksmans
Twelfth Respondent	**COMMERZ BANK AG**	CommerzBank	12R	Advocate Rafik Bhana SC assisted by Advocate Kerry Williams Instructed by Desmond Rudman of Webber Wentzel
Thirteenth Respondent	**MACQUARIE BANK LIMITED**	Macquarie	13R	Advocate Jerome Wilson SC assisted by Advocate Penny Bosman Instructed by Heather Irvine of Bowmans
Fourteenth Respondent	**HSBC BANK PLC**	HBEU	14R	Advocate Alfred Cockrel SC assisted by Advocate Claire Avidon
Nineteenth Respondent	**HSBC BANK USA, NATIONAL ASSOCIATION INC.**	HBUS	19R	

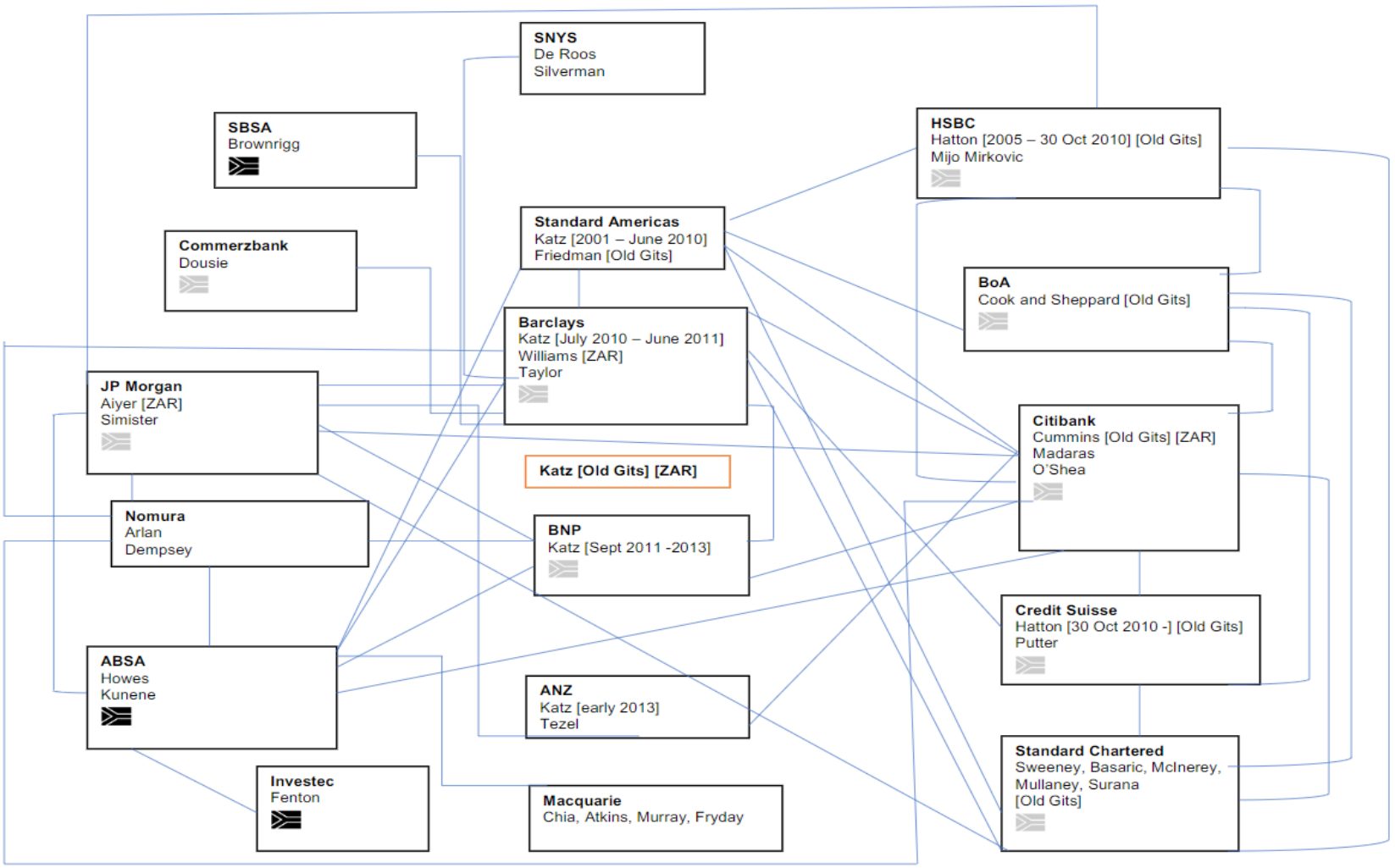
Respondent Number	Name of Bank	Abbreviation		Counsel Law firm Lead attorney(s)
		(collectively referred to as the HSBC Respondents)		Instructed by Nick Altini of Herbert Smith Freehills
Fifteenth Respondent	**CITIBANK N.A**	Citibank NA	15R	Did not participate in proceedings
Sixteenth Respondent	**ABSA BANK LIMITED**	Absa Bank	16R	Did not participate in proceedings
Seventeenth Respondent	**BARCLAYS CAPITAL INC.**	Barclays Capital	17R	
Eighteenth Respondent	**BARCLAYS BANK PLC**	Barclays Bank (Absa Bank, Barclays Capital and Barclays Bank are collectively, referred to as the ABSA Respondent)	18R	
Twenty Fourth Respondent	**NEDBANK GROUP LIMITED**	Nedbank Group	24R	Advocate Anthony Gotz SC assisted by Advocate Tsakane Marolen Instructed by Gomolemo Kekesi and Phuti Rashalane of Lawtons
Twenty Fifth Respondent	**NEDBANK LIMITED**	Nedbank Ltd (collectively referred to as the Nedbank Respondents)	25R	

Respondent Number	Name of Bank	Abbreviation		Counsel Law firm Lead attorney(s)
Twenty Sixth Respondent	**FIRSTRAND LIMITED**	FirstRand Ltd	26R	Advocate Mark Wesley assisted by Advocate Nyoko Muvangua Instructed by Albert Aukema and Craig Thomas of Cliffe Dekker Hofmeyr
Twenty Seventh Respondent	**FIRSTRAND BANK LIMITED**[192]	FirstRand Bank (collectively referred to as the First Rand Respondents)	27R	

[192] On 13 July 2020, the Commission filed a second supplementary affidavit, replacing RMB as 26R and substituting it for FirstRand Ltd (26R).

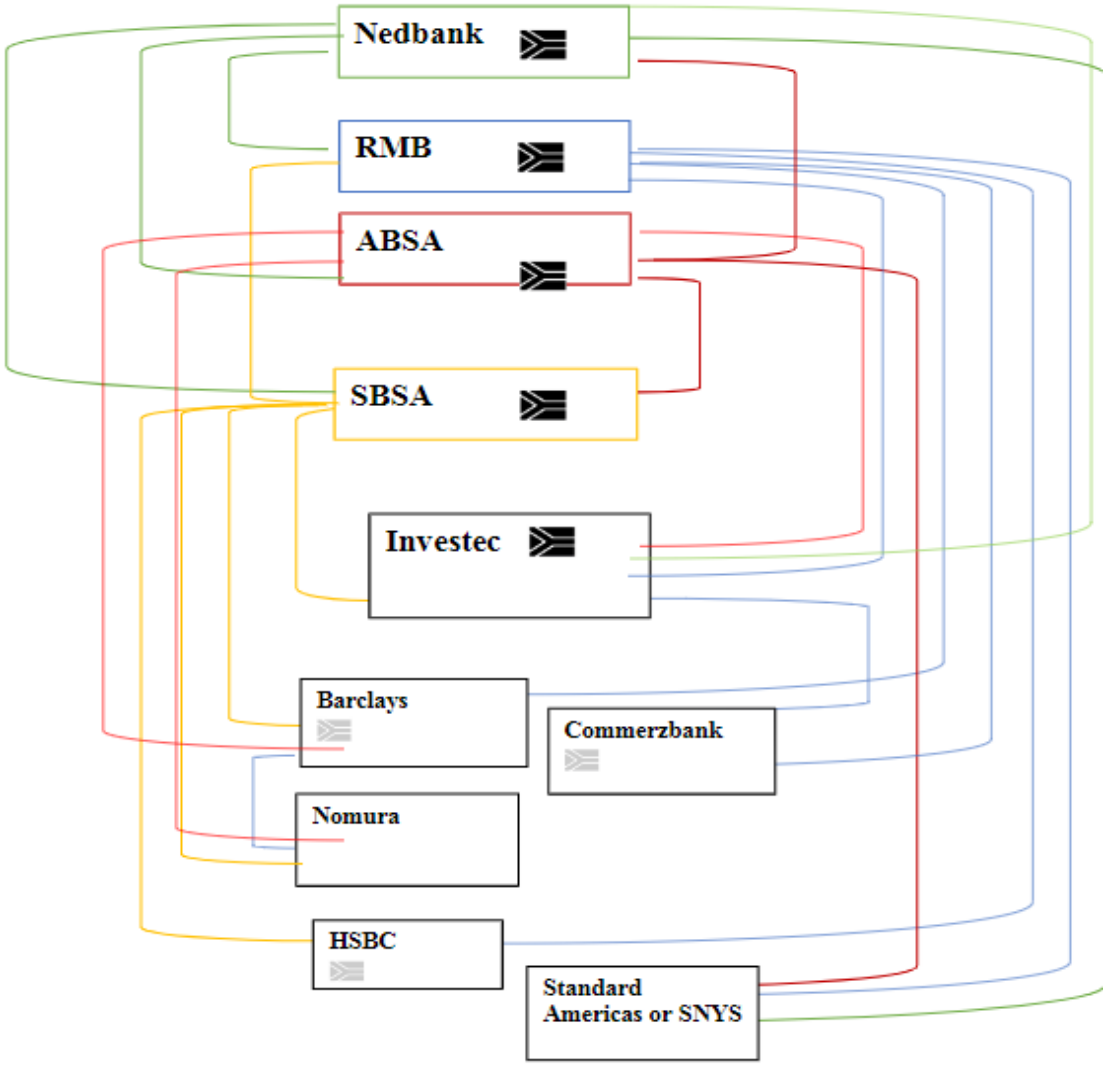
Annexure B

Diagram 1: Is a visual representation of the contact between respondent banks in the chats pleaded by the Commission.



Annexure C

Diagram 2: Is a visual representation of trading data pleaded by the Commission connecting respondent banks.



Annexure D

Diagram 3: Combines Diagram 1 and Diagram 2. Please note that the contacts from Diagram 1 have been highlighted in blue and the trading data from Diagram 2 have been highlighted in red.