COMPETITION TRIBUNAL OF SOUTH AFRICA

CaseNo.:CR174Feb22/STR159Feb25

STR161Feb25

In the application between:

CR174Feb22/STR159Feb25

FIRSTRAND BANK LTD	Applicant
WESBANK, A DIVISION OF FIRSTRAND BANK LTD	Second Applicant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA	Respondent

And

In the application between:

CR174Feb22/STR159Feb25

TOYOTA FINANCIAL SERVICES SOUTH AFRICA LIMITED	First Applicant
TOYOTA MOTOR CORPORATION	Second Applicant

TOYOTA FINANCIAL SERVICES (UK) PLC	Third Applicant
TOYOTA SOUTH AFRICA LIMITED	Fourth Applicant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA	Respondent

In *re* the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant

and

FIRSTRAND BANK LTD	First Respondent
WESBANK, A DIVISION OF FIRSTRAND BANK LTD	Second Respondent
TOYOTA FINANCIAL SERVICES SOUTH AFRICA LIMITED	Third Respondent
TOYOTA MOTOR CORPORATION	Fourth Respondent
TOYOTA FINANCIAL SERVICES (UK) PLC	Fifth Respondent
TOYOTA SOUTH AFRICA LIMITED	Sixth Respondent

Panel	:	Geoff Budlender (Presiding Member)
	:	Thando Vilakazi (Tribunal Member)
	:	Andiswa Ndoni (Tribunal Member)

Heard on	:	03 March 2025
Reasons and Order issued on	:	02 May 2025

REASONS FOR DECISION AND ORDER

INTRODUCTION

1. After the Competition Commission ("Commission") filed its witness statements in preparation for the hearing of the main complaint under case number **CR174Feb22,** FirstRand and WesBank a division of FirstRand ("WesBank Applicants"), as well as Toyota Financial Services South Africa Limited, Toyota Motor Corporation, Toyota Financial Services and Toyota South Africa ("Toyota Applicants") filed applications to strike out. In those applications they seek the striking out of a witness statement and parts of another witness statement filed by the Commission. The Commission opposes these applications.

BRIEF BACKGROUND

2. This matter arises from a complaint against WesBank a division of FirstRand, Toyota Financial Services ("TFS") and [redacted] for allegedly dividing the market by allocating customers in the market for the provision of vehicle finance in contravention of section 4(1)(b)(ii) of the Act.

3. The Complainant alleged that all vehicle finance applications made directly to WesBank by customers seeking to purchase vehicles from Toyota dealerships are referred to TFS for processing.

4. The Commission alleges that from at least April 2000 to date, WesBank and TFS, being competitors in the market for the provision of vehicle finance, entered into an agreement and/or engaged in a concerted practice to divide the market by allocating customers and/or suppliers in contravention of the provisions of section 4(1)(b)(ii) of the Act. In terms of the agreement, WesBank

is prohibited from offering vehicle finance to customers seeking to purchase vehicles at authorised Toyota dealerships.

5. After pleadings had closed and discovery had been made, the Commission filed its witness statements.

6. On 31 January 2025, the Toyota Applicants filed their application to strike out under case number **CR174Feb22/STR161Feb25**. On 3 February 2025 FirstRand/WesBank filed their application, on similar grounds to those of the Toyota Applicants, under case number: **CR174FEB22/ STR159Feb25**.

7. The relief the Applicants seek is similar but not identical. Taken together, the Applications essentially seek the following relief:

1 an order striking out -

a. the witness statement of Mr Peter Burger filed by the Competition Commission on 13 December 2024.

b. the following paragraphs of the witness statement of Mr Nkhulu Kekana filed by the Competition Commission on 10 January 2025:

i. the second sentence of paragraph 31.

ii. paragraphs 33, 35, 37.4, 41 and 45 to 58 in their entirety.

1 a directive setting out a revised timetable providing for reasonable dates for the Applicants to file their witness statements and other relevant steps prior and subsequent thereto.

1 further and/or alternative relief.

8. The basis of the strike out applications is the assertion that the allegations in the Burger statement and certain allegations in the Kekana statement are impermissible or irrelevant in that –

8.1. they attempt to introduce new complaints; or

8.2. they fall outside the scope of the Complaint Referral, as set out in the pleadings before the Tribunal; and

8.3. they are unfairly prejudicial to the Toyota Respondents in the drafting of their witness statements, and compilation of an expert report.

9. WesBank contended that:[1]

6.1 First, Mr Burger's witness statement impermissibly and opportunistically seeks to introduce a new complaint against WesBank (submitted to the Commission by Mr Burger) into the complaint referral proceedings by the back door, in circumstances where that complaint has neither been referred nor consolidated with the present complaint referral, and no documents have been discovered by the Commission or WesBank in relation to that complaint.

6.2 Paragraph 35 of Mr Kekana's witness statement similarly refers to Mr Burger's complaint.

6.3 Second, paragraphs 45 to 58 (i.e. part H) of Mr Kekana's witness statement impermissibly seek to expand the scope of the complaint referral beyond the pleadings to include (for the first time) a different joint venture that was concluded between WesBank and McCarthy in the 1990s, and which was terminated in 2015. No case has been made out by the Commission that the establishment, operation or termination of the McCarthy joint venture is relevant to the Tribunal's consideration of the TFS joint venture that is the focus of the current complaint referral. Furthermore, WesBank has not previously been required to give any consideration to the history and detail of the McCarthy joint venture in its preparation for the current matter; and no discovery has been made by any of the parties in relation to the McCarthy joint venture.

6.4 Paragraphs 31 (the second sentence), 37.4 and 41 of Mr Kekana's witness statement impermissibly seek to broaden the relevant market in its complaint referral beyond the retail vehicle finance market to include, for the first time, the wholesale vehicle financing market. No case has been

[1] Para 6 of WesBank's founding affidavit.

pleaded or made out by the Commission as to why the wholesale vehicle financing market is a relevant market in the complaint referral. Furthermore, WesBank has not previously been required to give any consideration to the nature or features of that market in its preparation for the current matter; and no discovery has been made by any of the parties in relation to that market.

10. The application in respect of the Burger statement was settled at a pre-hearing held on 11 February 2025, when the hearing dates were moved to later in the year. This provided the parties with sufficient time to respond to the allegations in the Burger statement. It was agreed that this part of the strike out application would no longer be persisted with.

11. Against that background, we now turn to the legal principles applicable to applications for strike out.

LEGAL PRINCIPLES

12. Although the Tribunal Rules do not make specific provision for applications to strike out, where a matter is not provided for in the Rules, the Tribunal may have regard to the High Court Rules. It is the practice of the Tribunal to deal with applications to strike out in accordance with the practice of the High Court. Tribunal Rule 42(1) provides that *"Any proceedings not otherwise provided for in these Rules may be initiated only by filing a Notice of Motion in Form CT 6 and supporting affidavit setting out the facts on which the application is based".*

13. The purpose of an application to strike out is to remove scandalous, vexatious or irrelevant matter from the pleadings. The test for relevance "is whether the evidence objected to is relevant to an issue in the litigation".[2]

[2] Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at para 28.

14. In *Rail Commuters*, the Court elucidated the test for relevance as follows: "All that concerns the Court is whether or not the passage or passages sought to be struck out is or are relevant in order to raise an issue on the pleadings."[3] If evidence cannot be led at the trial on the allegations which are challenged, those facts are to be regarded as irrelevant when pleaded.

15. In *Senwes*[4] the Constitutional Court set out the principles on which the Tribunal is to make a ruling where there is an objection to the introduction of evidence.

ASSESSMENT

Wholesale Vehicle Financing

16. In paragraph 31 of Mr Kekana's statement, he states:

> *There is no rational or justifiable explanation from the Toyota Group why in South Africa, it decided on a collusive arrangement in circumstances in which it had global expertise in vehicle financing market. <u>Secondly, TSA was already providing wholesale financing in South Africa</u>.*

The Applicants' objection

17. The Applicants contend that by introducing this allegation in the witness statement, the Commission has impermissibly sought to expand its case, by for the first time alleging that TSA was active in the wholesale vehicle financing market at the time that the TFS shareholders agreement was concluded.

18. WesBank submitted that the statement by Mr Kekana seeks to alter the nature of the Commission's case from 'one based on a horizontal restraint between WesBank and the TFS joint venture to one directed at a horizontal restraint between WesBank and TSA based on actual competition in the so-called wholesale vehicle financing market.'[5]

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[3] Rail Commuters Action Group v Transnet Limited 2006 (6) SA 68 (C) at 83-84.
[4] Competition Commission of South Africa v Senwes 2012 (7) BCLR 667 (CC).
[5] WesBank's heads of argument at para 12.

19. In the complaint referral, the Commission stated that the complaint was "*based on the Commission's finding that from or about April 2000 to date, the Respondents, whilst being firms in a horizontal relationship, entered into an agreement and/or engaged in a concerted practice to divide markets by allocating customers and/or suppliers in the market for the provision of vehicle finance in contravention of section 4(1)(b)(ii) of the Act.*"[6]

20. The Applicants contended that there is no suggestion, in the Commission's pleaded case, of actual competition between WesBank and TSA in the wholesale vehicle financing market.

21. The Applicants further submitted that in its reply to the joinder application, the Commission alleged that: *"At the time of concluding the shareholders' agreement, the Toyota respondents were <u>potential</u> competitors of WesBank in South Africa. As I understand it, TSA itself considered the idea of providing motor vehicle finance."*[7]

22. The Applicants contended that this allegation was raised there for the first time, and that no contention was raised in the Commission's pleaded case that there was competition between WesBank and TSA. They contend that no complaint was raised with regard to the provision of 'wholesale' finance to dealers: the complaint referred only to 'retail' loans to customers of the dealers.

23. The Toyota applicants submitted that TSA was not a respondent at the time the original complaint was delivered. Allegations with regard to the 'same line of business' did not apply to TSA. They submitted further that the intention of the Commission's expanded case is to impute conduct of Toyota Japan to TSA, by arguing that they are a single economic entity.

24. Toyota submitted that the scope of the complaint and the referral was limited to competition between WesBank and TFS. The Commission does not in its pleaded case assert a horizontal relationship between TSA and WesBank.

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[6] Commission's complaint referral at para 16.
[7] Commission's replying affidavit to Toyota Japan TFS UK and TSA at para 6.2.

25. Toyota also submitted that a plain reading of paragraph 17 of the Commission's complaint referral shows that the impugned conduct is in the retail market: *"In terms of the agreement, Wesbank is prohibited to offer vehicle finance to customers seeking to purchase vehicles at authorised Toyota dealerships".*

The Commission's answer

26. The Commission pointed out that in the complaint referral, it defined motor vehicle financing as "*includes offering vehicle finance, leases and dealership financing."*[8]

27. On this basis, the Commission submitted that[9]:

> *The Commission does not seek to broaden the relevant market. I have explained that the Commission's complaint is about the Shareholders' Agreement concluded by the Toyota respondents and WesBank. Secondly, the Commission defined the relevant market as motor vehicle finance which includes offering vehicle finance, leases and dealership financing. This was clarified in the supplementary replying affidavit at paragraph 83 that the Commission has defined the market as the market for the provision of motor vehicle financing in South Africa.*

28. Counsel for the Commission submitted that the statement in Mr Kekana's affidavit should not be looked at in isolation, and that it should be considered in the context of the complaint referral as well as all the pleadings filed.

29. The Commission submitted that[10]:

> *It is incorrect that the Commission never pleaded the allegations against the Toyota respondents. First, the Commission explained in its complaint referral that motor vehicle finance includes dealership financing.*

[8] Commission's complaint referral at para 12.
[9] Commission's affidavit to WesBank at para 21.
[10] Commission's answering affidavit to Toyota Application at paras 44, 45 and 48.

Wholesale financing is the same as dealership financing. The Commission also explained in its supplementary replying affidavit that 'at the time of concluding the Shareholders' Agreement, the Toyota respondents were potential competitors of WesBank in South Africa.' And TSA itself considered the idea of providing motor vehicle finance."

Motor vehicle finance, which includes dealership financing appears in the complaint referral. I deny that it is not clear what wholesale financing means. The Toyota Respondents' own discovered documents are littered with the words "wholesale financing" or "floor plans. Mr. Thabo Manaka, the chief executive officer of TFS SA confirms that TFS SA is a financial service company that provides financing to retail customers, corporates that use vehicle fleets in their business, financing to car rental companies and financing to Toyota dealership.

The Commission is not assuming that all vehicle financing falls into one market or that refinancing falls into the same market as "wholesale financing'. The Commission explained in its complaint referral that motor vehicle finance includes offering vehicle finance, leases and dealership financing. The Commission was alive to the fact that within the broad vehicle finance market, there are narrow or sub-markets.

Assessment

30. At the heart of the issue is [redacted] of the Shareholders' Agreement. It states:

[redacted]

31. In the initial complaint referral, the Commission defined financial services as follows:[11]

> *Financial services are defined in the agreement as financial assistance offered to customers at the time of purchasing motor vehicles. These include, but not limited to, retail financing and lease programmes for new and used vehicles, financial assistance for dealers to buy stock as well as insurance products for the purchased vehicles*.

32. The second sentence and the reference to *"financial assistance for dealers to buy stock…"* can indeed be understood to refer to wholesale[12] financing. To that extent, as a matter of definition, the complaint potentially covers wholesale financing or dealer financing.

33. However, an analysis of the pleadings reveals that nowhere in the complaint is the allegation made that as a matter of fact, the Shareholders' Agreement prevented the carrying on of wholesale or dealership financing. The complaint itself did not refer to at all wholesale or dealership financing, except in the definition which we have quoted. The allegations in the complaint referred only to vehicle finance made available to customers of the dealerships.

34. In our opinion, it is therefore correct that the impugned paragraphs of Mr Kekana's affidavit introduce a complaint that is different from that which was raised in the complaint referral.

35. The Applicants submit that this is impermissible and prejudicial to them. No factual allegations are made to which they are able to respond. They submit if the Commission wishes to rely on the provision of wholesale finance, it ought to seek to amend its referral to make a clear case for that conduct, which will enable them to answer that case.

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[11] Commission's complaint referral at para 22.

[12] The Merriam Webster Dictionary defines the word wholesale as the sale of commodities in quantity usually for resale (as by a retail merchant). https://www.merriam-webster.com/dictionary/wholesale#dictionary-entry-1 accessed 14 April 2025.

36. In our opinion this is correct. The present Applicants do not know what case the Commission will make with regard to wholesale or dealership financing.

37. The application to strike out paragraphs 31 (the second sentence), 33, 37.4 and 41 of Mr Kekana's witness statement must therefore be granted.

<u>The McCarthy Joint Venture</u>

38. The Commission seeks to introduce evidence in relation to the McCarthy Joint venture. The Commission contends that it is relevant to characterisation, and to understanding the intent and significance of [redacted] of the Shareholders' Agreement.

39. The Applicants submitted that the Commission needs to plead material facts in relation to characterisation, unless their argument is that the mere existence of the agreement is material. This ought to have been pleaded in the original complaint referral in order to allow the Applicants to respond to it.

40. It is now well established that in the interpretation of documents, a purposive and contextual approach is to be adopted, and regard must be had to the apparent purpose to which it is directed, and the material known to those responsible for its production.[13]

41. In our opinion, the McCarthy Joint Venture and the events surrounding it may throw light on the Shareholders' Agreement, and may be admissible as similar fact evidence. Whether this is the case cannot be determined at this stage. However, in our view the possibility cannot be excluded at this stage. It would therefore be inappropriate to strike out the allegations in this regard.

42. The documents in relation to the McCarthy Joint Venture have been discovered. The Commission will be able to introduce evidence in this regard at the hearing, and the Applicants will have the opportunity to dispute its relevance and admissibility, and if necessary to challenge its correctness.

[13] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

43. For these reasons, in our opinion the applications to strike out the allegations pertaining to the McCarthy Joint Venture should be dismissed.

ORDER

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1. Accordingly, we make the following order:

    1.1. The applications to strike from the record the allegations contained in paragraphs 31 (second sentence), 33, 37.4 and 41 of Mr Nkulu Kekana's statement are granted;

    1.2. The applications to strike the allegations contained in paragraph 45 – 58 of Mr Kekana's statement are dismissed.

Signed by:Geoff Budlender
Signed at:2025-05-02 12:32:40 +02:00
Reason:Witnessing Geoff Budlender

Geoff Budlender

02 May 2025

Presiding Member | **Date**
Adv. Geoff Budlender SC

Concurring: Prof. Thando Vilakazi and Ms Andiswa Ndoni

Tribunal Case Manager:	Princess Ka-Siboto
For the Commission:	Adv. K Monareng instructed by Mogaswa and Associates
For the First and Second Applicants:	Adv Jerome Wilson, Adv. Margaretha Engelbrecht SC, Adv. Phumlani Ngcongco and Adv. Claire Avidon instructed by Cliffe Dekker Hofmeyr
For the Third to Sixth Applicants:	Adv. Mike Van Der Nest SC, Adv. Mark Wesley SC and Adv. Nyoko Muvangua instructed by Werksmans

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Panel	:	Geoff Budlender (Presiding Member)
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Heard on	:	03 March 2025
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REASONS FOR DECISION AND ORDER

INTRODUCTION

1. After the Competition Commission ("Commission") filed its witness statements in preparation for the hearing of the main complaint under case number **CR174Feb22,** FirstRand and WesBank a division of FirstRand ("WesBank Applicants"), as well as Toyota Financial Services South Africa Limited, Toyota Motor Corporation, Toyota Financial Services and Toyota South Africa ("Toyota Applicants") filed applications to strike out. In those applications they seek the striking out of a witness statement and parts of another witness statement filed by the Commission. The Commission opposes these applications.

BRIEF BACKGROUND

2. This matter arises from a complaint against WesBank a division of FirstRand, Toyota Financial Services ("TFS") and ROLA Motor Group ("ROLA") for allegedly dividing the market by allocating customers in the market for the provision of vehicle finance in contravention of section 4(1)(b)(ii) of the Act.

3. The Complainant alleged that all vehicle finance applications made directly to WesBank by customers seeking to purchase vehicles from Toyota dealerships are referred to TFS for processing.

4. The Commission alleges that from at least April 2000 to date, WesBank and TFS, being competitors in the market for the provision of vehicle finance, entered into an agreement and/or engaged in a concerted practice to divide the market by allocating customers and/or suppliers in contravention of the provisions of section 4(1)(b)(ii) of the Act. In terms of the agreement, WesBank

is prohibited from offering vehicle finance to customers seeking to purchase vehicles at authorised Toyota dealerships.

5. After pleadings had closed and discovery had been made, the Commission filed its witness statements.

6. On 31 January 2025, the Toyota Applicants filed their application to strike out under case number **CR174Feb22/STR161Feb25**. On 3 February 2025 FirstRand/WesBank filed their application, on similar grounds to those of the Toyota Applicants, under case number: **CR174FEB22/ STR159Feb25**.

7. The relief the Applicants seek is similar but not identical. Taken together, the Applications essentially seek the following relief:

1 an order striking out -

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b. the following paragraphs of the witness statement of Mr Nkhulu Kekana filed by the Competition Commission on 10 January 2025:

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1 a directive setting out a revised timetable providing for reasonable dates for the Applicants to file their witness statements and other relevant steps prior and subsequent thereto.

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8. The basis of the strike out applications is the assertion that the allegations in the Burger statement and certain allegations in the Kekana statement are impermissible or irrelevant in that –

8.1. they attempt to introduce new complaints; or

8.2. they fall outside the scope of the Complaint Referral, as set out in the pleadings before the Tribunal; and

8.3. they are unfairly prejudicial to the Toyota Respondents in the drafting of their witness statements, and compilation of an expert report.

9. WesBank contended that:[1]

6.1 First, Mr Burger's witness statement impermissibly and opportunistically seeks to introduce a new complaint against WesBank (submitted to the Commission by Mr Burger) into the complaint referral proceedings by the back door, in circumstances where that complaint has neither been referred nor consolidated with the present complaint referral, and no documents have been discovered by the Commission or WesBank in relation to that complaint.

6.2 Paragraph 35 of Mr Kekana's witness statement similarly refers to Mr Burger's complaint.

6.3 Second, paragraphs 45 to 58 (i.e. part H) of Mr Kekana's witness statement impermissibly seek to expand the scope of the complaint referral beyond the pleadings to include (for the first time) a different joint venture that was concluded between WesBank and McCarthy in the 1990s, and which was terminated in 2015. No case has been made out by the Commission that the establishment, operation or termination of the McCarthy joint venture is relevant to the Tribunal's consideration of the TFS joint venture that is the focus of the current complaint referral. Furthermore, WesBank has not previously been required to give any consideration to the history and detail of the McCarthy joint venture in its preparation for the current matter; and no discovery has been made by any of the parties in relation to the McCarthy joint venture.

6.4 Paragraphs 31 (the second sentence), 37.4 and 41 of Mr Kekana's witness statement impermissibly seek to broaden the relevant market in its complaint referral beyond the retail vehicle finance market to include, for the first time, the wholesale vehicle financing market. No case has been

[1] Para 6 of WesBank’s founding affidavit.

pleaded or made out by the Commission as to why the wholesale vehicle financing market is a relevant market in the complaint referral. Furthermore, WesBank has not previously been required to give any consideration to the nature or features of that market in its preparation for the current matter; and no discovery has been made by any of the parties in relation to that market.

10. The application in respect of the Burger statement was settled at a pre-hearing held on 11 February 2025, when the hearing dates were moved to later in the year. This provided the parties with sufficient time to respond to the allegations in the Burger statement. It was agreed that this part of the strike out application would no longer be persisted with.

11. Against that background, we now turn to the legal principles applicable to applications for strike out.

LEGAL PRINCIPLES

12. Although the Tribunal Rules do not make specific provision for applications to strike out, where a matter is not provided for in the Rules, the Tribunal may have regard to the High Court Rules. It is the practice of the Tribunal to deal with applications to strike out in accordance with the practice of the High Court. Tribunal Rule 42(1) provides that *"Any proceedings not otherwise provided for in these Rules may be initiated only by filing a Notice of Motion in Form CT 6 and supporting affidavit setting out the facts on which the application is based".*

13. The purpose of an application to strike out is to remove scandalous, vexatious or irrelevant matter from the pleadings. The test for relevance "is whether the evidence objected to is relevant to an issue in the litigation".[2]

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ASSESSMENT

Wholesale Vehicle Financing

16. In paragraph 31 of Mr Kekana's statement, he states:

> *There is no rational or justifiable explanation from the Toyota Group why in South Africa, it decided on a collusive arrangement in circumstances in which it had global expertise in vehicle financing market. <u>Secondly, TSA was already providing wholesale financing in South Africa</u>.*

The Applicants' objection

17. The Applicants contend that by introducing this allegation in the witness statement, the Commission has impermissibly sought to expand its case, by for the first time alleging that TSA was active in the wholesale vehicle financing market at the time that the TFS shareholders agreement was concluded.

18. WesBank submitted that the statement by Mr Kekana seeks to alter the nature of the Commission's case from 'one based on a horizontal restraint between WesBank and the TFS joint venture to one directed at a horizontal restraint between WesBank and TSA based on actual competition in the so-called wholesale vehicle financing market.'[5]

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[3] Rail Commuters Action Group v Transnet Limited 2006 (6) SA 68 (C) at 83-84.
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[5] WesBank's heads of argument at para 12.

19. In the complaint referral, the Commission stated that the complaint was "*based on the Commission's finding that from or about April 2000 to date, the Respondents, whilst being firms in a horizontal relationship, entered into an agreement and/or engaged in a concerted practice to divide markets by allocating customers and/or suppliers in the market for the provision of vehicle finance in contravention of section 4(1)(b)(ii) of the Act.*"[6]

20. The Applicants contended that there is no suggestion, in the Commission's pleaded case, of actual competition between WesBank and TSA in the wholesale vehicle financing market.

21. The Applicants further submitted that in its reply to the joinder application, the Commission alleged that: *"At the time of concluding the shareholders' agreement, the Toyota respondents were <u>potential</u> competitors of WesBank in South Africa. As I understand it, TSA itself considered the idea of providing motor vehicle finance."*[7]

22. The Applicants contended that this allegation was raised there for the first time, and that no contention was raised in the Commission's pleaded case that there was competition between WesBank and TSA. They contend that no complaint was raised with regard to the provision of 'wholesale' finance to dealers: the complaint referred only to 'retail' loans to customers of the dealers.

23. The Toyota applicants submitted that TSA was not a respondent at the time the original complaint was delivered. Allegations with regard to the 'same line of business' did not apply to TSA. They submitted further that the intention of the Commission's expanded case is to impute conduct of Toyota Japan to TSA, by arguing that they are a single economic entity.

24. Toyota submitted that the scope of the complaint and the referral was limited to competition between WesBank and TFS. The Commission does not in its pleaded case assert a horizontal relationship between TSA and WesBank.

[6] Commission's complaint referral at para 16.
[7] Commission's replying affidavit to Toyota Japan TFS UK and TSA at para 6.2.

25. Toyota also submitted that a plain reading of paragraph 17 of the Commission's complaint referral shows that the impugned conduct is in the retail market: *"In terms of the agreement, Wesbank is prohibited to offer vehicle finance to customers seeking to purchase vehicles at authorised Toyota dealerships".*

The Commission's answer

26. The Commission pointed out that in the complaint referral, it defined motor vehicle financing as "*includes offering vehicle finance, leases and dealership financing."*[8]

27. On this basis, the Commission submitted that[9]:

> *The Commission does not seek to broaden the relevant market. I have explained that the Commission's complaint is about the Shareholders' Agreement concluded by the Toyota respondents and WesBank. Secondly, the Commission defined the relevant market as motor vehicle finance which includes offering vehicle finance, leases and dealership financing. This was clarified in the supplementary replying affidavit at paragraph 83 that the Commission has defined the market as the market for the provision of motor vehicle financing in South Africa.*

28. Counsel for the Commission submitted that the statement in Mr Kekana's affidavit should not be looked at in isolation, and that it should be considered in the context of the complaint referral as well as all the pleadings filed.

29. The Commission submitted that[10]:

> *It is incorrect that the Commission never pleaded the allegations against the Toyota respondents. First, the Commission explained in its complaint referral that motor vehicle finance includes dealership financing.*

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Wholesale financing is the same as dealership financing. The Commission also explained in its supplementary replying affidavit that 'at the time of concluding the Shareholders' Agreement, the Toyota respondents were potential competitors of WesBank in South Africa.' And TSA itself considered the idea of providing motor vehicle finance."

Motor vehicle finance, which includes dealership financing appears in the complaint referral. I deny that it is not clear what wholesale financing means. The Toyota Respondents' own discovered documents are littered with the words "wholesale financing" or "floor plans. Mr. Thabo Manaka, the chief executive officer of TFS SA confirms that TFS SA is a financial service company that provides financing to retail customers, corporates that use vehicle fleets in their business, financing to car rental companies and financing to Toyota dealership.

The Commission is not assuming that all vehicle financing falls into one market or that refinancing falls into the same market as "wholesale financing'. The Commission explained in its complaint referral that motor vehicle finance includes offering vehicle finance, leases and dealership financing. The Commission was alive to the fact that within the broad vehicle finance market, there are narrow or sub-markets.

Assessment

30. At the heart of the issue is clause 31.2 of the Shareholders' Agreement. It states:

[redacted]

31. In the initial complaint referral, the Commission defined financial services as follows:[11]

> *Financial services are defined in the agreement as financial assistance offered to customers at the time of purchasing motor vehicles. These include, but not limited to, retail financing and lease programmes for new and used vehicles, financial assistance for dealers to buy stock as well as insurance products for the purchased vehicles*.

32. The second sentence and the reference to *"financial assistance for dealers to buy stock…"* can indeed be understood to refer to wholesale[12] financing. To that extent, as a matter of definition, the complaint potentially covers wholesale financing or dealer financing.

33. However, an analysis of the pleadings reveals that nowhere in the complaint is the allegation made that as a matter of fact, the Shareholders' Agreement prevented the carrying on of wholesale or dealership financing. The complaint itself did not refer to at all wholesale or dealership financing, except in the definition which we have quoted. The allegations in the complaint referred only to vehicle finance made available to customers of the dealerships.

34. In our opinion, it is therefore correct that the impugned paragraphs of Mr Kekana's affidavit introduce a complaint that is different from that which was raised in the complaint referral.

35. The Applicants submit that this is impermissible and prejudicial to them. No factual allegations are made to which they are able to respond. They submit if the Commission wishes to rely on the provision of wholesale finance, it ought to seek to amend its referral to make a clear case for that conduct, which will enable them to answer that case.

[11] Commission's complaint referral at para 22.

[12] The Merriam Webster Dictionary defines the word wholesale as the sale of commodities in quantity usually for resale (as by a retail merchant). https://www.merriam-webster.com/dictionary/wholesale#dictionary-entry-1 accessed 14 April 2025.

36. In our opinion this is correct. The present Applicants do not know what case the Commission will make with regard to wholesale or dealership financing.

37. The application to strike out paragraphs 31 (the second sentence), 33, 37.4 and 41 of Mr Kekana's witness statement must therefore be granted.

<u>The McCarthy Joint Venture</u>

38. The Commission seeks to introduce evidence in relation to the McCarthy Joint venture. The Commission contends that it is relevant to characterisation, and to understanding the intent and significance of clause 31.2 of the Shareholders' Agreement.

39. The Applicants submitted that the Commission needs to plead material facts in relation to characterisation, unless their argument is that the mere existence of the agreement is material. This ought to have been pleaded in the original complaint referral in order to allow the Applicants to respond to it.

40. It is now well established that in the interpretation of documents, a purposive and contextual approach is to be adopted, and regard must be had to the apparent purpose to which it is directed, and the material known to those responsible for its production.[13]

41. In our opinion, the McCarthy Joint Venture and the events surrounding it may throw light on the Shareholders' Agreement, and may be admissible as similar fact evidence. Whether this is the case cannot be determined at this stage. However, in our view the possibility cannot be excluded at this stage. It would therefore be inappropriate to strike out the allegations in this regard.

42. The documents in relation to the McCarthy Joint Venture have been discovered. The Commission will be able to introduce evidence in this regard at the hearing, and the Applicants will have the opportunity to dispute its relevance and admissibility, and if necessary to challenge its correctness.

[13] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

43. For these reasons, in our opinion the applications to strike out the allegations pertaining to the McCarthy Joint Venture should be dismissed.

ORDER

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1. Accordingly, we make the following order:

   1.1. The applications to strike from the record the allegations contained in paragraphs 31 (second sentence), 33, 37.4 and 41 of Mr Nkulu Kekana's statement are granted;

   1.2. The applications to strike the allegations contained in paragraph 45 – 58 of Mr Kekana's statement are dismissed.

Signed by:Geoff Budlender
Signed at:2025-05-02 12:32:40 +02:00
Reason:Witnessing Geoff Budlender

Geoff Budlender

Presiding Member **Adv. Geoff Budlender SC**	**02 May 2025** **Date**

Concurring: Prof. Thando Vilakazi and Ms Andiswa Ndoni

Tribunal Case Manager:	Princess Ka-Siboto
For the Commission:	Adv. K Monareng instructed by Mogaswa and Associates
For the First and Second Applicants:	Adv Jerome Wilson, Adv. Margaretha Engelbrecht SC, Adv. Phumlani Ngcongco and Adv. Claire Avidon instructed by Cliffe Dekker Hofmeyr
For the Third to Sixth Applicants:	Adv. Mike Van Der Nest SC, Adv. Mark Wesley SC and Adv. Nyoko Muvangua instructed by Werksmans