

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No: 23/CAC/SEP02

In the matter between:

SAPPI FINE PAPER (PTY) LTD Applicant

and

THE COMPETITION COMMISSION OF First Respondent
SOUTH AFRICA

PAPERCOR CC Second Respondent

JUDGMENT

MAILULA, AJA:

A. INTRODUCTION

1. This is an application for an interdict. Sappi Fine Paper (Pty) Ltd, the applicant, seeks relief in the following terms:

“1. setting aside the complaint lodged by the Commissioner of the first respondent against the applicant under case number 2002AUG156 and the investigation thereof by the first respondent, as being beyond the jurisdiction of the first respondent;

2. interdicting the first respondent from further investigating, referring or taking any other action in relation to such complaint;
2. ordering the first respondent to pay the applicant's costs in this application and, if the second respondent opposes this application, that the first and second respondents shall be jointly and severally liable to pay the applicant's costs in this application;
2. granting the applicant such further and/or alternative relief as this Honourable Court may deem fit."
2. Save for costs, and only in the event of opposition, the applicant does not seek any relief against Papercor CC, the second respondent.

B. JURISDICTION

3. The applicant approaches this Court under the provisions of [section 62](#) (2)(a) of the [Competition Act No 89 of 1998](#), as amended ("the Act") which provides:

“(2) In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over -

(a) the question whether an action taken or proposed to be taken by the Competition Commission or the Competition Tribunal is within their respective jurisdictions in terms of *this Act*;

4. [Section 62](#) (2)(a) confers jurisdiction to this Court as a court of first instance to decide jurisdictional issues with respect to the Competition Commission (and the Competition Tribunal). Both the first and the second respondents rightly concede this point.
5. However, the first respondent contends that this Court should not entertain the present application for it is premature as the first respondent has not yet referred the complaint to the Competition Tribunal. I will return to this later. Suffice it to say that this court does have jurisdiction to hear the present application.

C. URGENCY

6. The applicant decided to approach this Court for an interdict against the first respondent after it was informed of the second complaint and the pending investigation by the first respondent. It (the applicant) then requested the first respondent to suspend the investigation pending the finalisation of the application. The first respondent replied that it was not prepared to do so. The applicant then indicated in its letter dated 8 August 2002 that in that event, it would approach this Court on an urgent basis.
7. It was only in the answering affidavit that the first respondent gave an undertaking to suspend the investigation pending finalisation of the applicant's application.
8. Even though the question of urgency has now been "resolved" this question may be relevant with regard to taxation of the costs. In my opinion the applicant was in the circumstances entitled to approach this Court on an urgent basis.

D. CHRONOLOGY

9. 9.1. During 1999, the applicant and the second respondent were engaged in negotiations with a view of entering into a supply agreement, which negotiations broke down.
- 9.2. During March 2000, the second respondent launched an application for interim relief in the Competition Tribunal under Case Number 38/IR/MAR00 in terms of which the second respondent sought an order that the applicant supply paper to the second respondent. The applicant opposed the application.
- 9.3. Subsequent thereto and during May 2000, the second respondent lodged a complaint with the first respondent, under Case No.2000MAY44, which complaint was accepted by the first respondent on 8 June 2000.
- 9.4. The interim relief application was set down for hearing in October 2000. Prior to the date of the hearing, the interim application was postponed in order that settlement negotiations could be pursued. The interim application is still pending.
- 9.5. The settlement negotiations broke down.
- 9.6. After the lodging of the complaint with the first respondent by the second respondent,

there was correspondence between the first respondent and the applicant during the period June 2001 and November 2001.

9.7 On 10 August 2001, the first respondent advised the applicant that it had formed a view that the applicant is in breach of [Section 8\(d\)\(iii\)](#) of the Act in that the applicant “is attempting to condition the continuance of negotiations with Papercor on the latter’s payment of its legal fees incurred as a result of the interim relief application brought by Papercor before the Competition Tribunal”.

9.8 In a letter dated 14 August 2001, the applicant gave an undertaking, without admitting that it breached the relevant provisions, “not to force Papercor to accept the condition that Papercor pays [Sappi’s] legal costs incurred as a result of the Interim Relief Application ... as a condition of Sappi supplying paper to Papercor, whether at present or in the future”.

9.9 At a meeting held on 5 September 2001, the applicant offered to supply paper to the second respondent “on the same terms as are available to all other customers ... without such offer being conditional or in any way dependent on ... payment of ... costs in respect of the interim relief application”.

The offer was apparently not accepted by the second respondent as it had formed a view that it was entitled to payment or compensation from the applicant. The second respondent also advised the applicant that it would, in the circumstances, not withdraw the complaint.

9.10. In November 2001, the first respondent referred the second respondent’s complaint to the Competition Tribunal (“the Tribunal”) under Case number 62/CR/NOV01 for an order declaring the applicant’s conduct a prohibited practice in contravention of [Section 8\(d\)\(iii\)](#) of the Act, and imposition of a penalty.

The basis of the complaint referral was that the applicant would not consider supplying the second respondent with paper unless the second respondent paid the applicant’s legal costs in respect of the interim relief application. The first respondent considered the alleged conduct by the applicant to constitute a prohibited practice as contemplated in [section 8\(d\)\(iii\)](#) of the Act, i.e., “forcing a buyer to accept

a condition unrelated to the object of a contract”.

9.11. The applicant subsequently, on 19 December 2001, filed a notice of exception to the complaint referral on two grounds, namely, lack of jurisdiction and that it failed to disclose a cause of action. The first respondent filed its answering affidavit to the exception on 3 January 2002.

9.12. On 10 April 2002 the Tribunal heard the exception. The order and the Tribunal’s reasons were handed down on 17 April 2002.

The Tribunal dismissed the jurisdiction point raised but upheld the exception on the basis that the first respondent failed to disclose a cause of action in the complaint referral. The first respondent was granted leave to file amended pleadings within ten(10) days of the handing down of the order.

9.13. The first respondent then filed an amended complaint referral on 2 May 2002, out of time.

9.14. The amended complaint referral contained an alternative complaint that the applicant’s imposition of a condition relating to the payment of legal costs constituted an exclusionary act prohibited in terms of [Section 8\(c\)](#) of the Act. The first respondent alleged that the applicant used the demand for costs as “a device to force the complainant to walk away from the agreement”.

9.15. On 30 May 2002, the applicant filed a notice of exception to the amended complainant referral (“the second exception”) on the grounds that:

1. the complaint referral still did not disclose a cause of action; and

1. the alternative complaint contained in the amended complaint referral relied on a new fact which had not been included in the first complaint referral, that the first respondent was, in the circumstances, no longer able to refer such fact to the Tribunal as a result of the operation of [Section 50](#) of the Act.

9.16. On 24 July 2002, the first respondent filed a notice of withdrawal in terms of which the first respondent withdrew the entire initiating document in the complaint referral.

9.17. On 1 August 2002, the first respondent wrote a letter to the applicant, advising the applicant that the first respondent had initiated a complaint (“the second complaint”) against the applicant “based on certain alleged exclusionary practices” because the first respondent was concerned that the applicant may be in breach of [Sections 8\(c\)](#) and [8\(d\)\(iii\)](#) of the Act. The first respondent further advised the applicant that there would be a press release later.

9.18. In response thereto the applicant wrote a letter to the first respondent in which it noted that it had not been furnished with any details regarding the alleged breach. Further, that it presumed that the second complaint did not relate to the allegations forming the subject of the second respondent’s complaint. The applicant also requested details of the second complaint so as to allow it (the applicant) an opportunity to respond thereto before the details were released to the press.

9.19. On 5 August 2002, the press release was published in the Business Day newspaper.

9.20. On 8 August 2002, after the press release, the first respondent responded to the applicant’s letter dated 2 August 2002. The first respondent confirmed that:

(a) the alleged making the supply of paper to the second respondent conditional on the payment of legal costs formed the basis of the second complaint;

11.(b) the alleged conduct would also be entertained under [section 8\(c\)](#) of the Act as an exclusionary act in so far as the applicant was imposing a condition which excluded the second respondent from entering or expanding in the market;

3. information gathered during the investigation of the second respondent complaint would be used; and
3. the allegation pertaining to [section 8\(d\)\(iii\)](#) related to the “previous referral under case number 2000MAY44 of which the second respondent was the complainant”.

9.21. On 10 September 2002, the applicant wrote to the first respondent advising the first respondent that it will be proceeding with the present application as per previous advices. The applicant further advised of its intention to approach this Court on an urgent basis in the event the first respondent continued with the investigation.

The applicant also requested copies of both the first and the second complaints initiated by the second and the first respondent, respectively.

5. THE APPLICANT’S CASE

10. The applicant avers that the first respondent lacks jurisdiction for the following reasons:

- 10.1. The first respondent is *functus officio*. applicant relies on the provisions of [section 50](#) of the Act;
- 10.2. The first respondent is by virtue of the provisions of the [section 67](#) (2) of the Act precluded from taking further action against the applicant, as the matter is *res judicata*.
- 10.3. The applicant is subjected to double jeopardy in that the alleged conduct has been investigated by the first respondent; and
- 10.4. The applicant is being prejudiced as a result of the first respondent acting *ultra vires* its powers.

10. The gist of the applicant’s complaint is that the first respondent’s investigation resulting from the second complaint initiated by the first respondent is based on the same or substantially the same conduct, which formed the basis of the first complaint initiated by the second respondent. The applicant contends that by virtue of the provisions of [section 50](#) and

[67\(2\)](#) of the Act, the first respondent cannot proceed with the investigation of the second complaint.

10. Further, the applicant avers that it has been placed in an untenable position of facing double jeopardy, as it had succeeded in its exception to the complaint referral by the first respondent following the first complaint initiated by the second respondent.

10. The applicant, further, alleges that it is being prejudiced by the first respondent's continued pursuit of the matter and that this action is *ultra vires* powers of the first respondent.

6. THE FIRST RESPONDENT'S CASE

14. The first respondent in its answering affidavit denies that it is acting beyond its powers. It avers that it is empowered in terms of the provisions of [section 49B\(1\)](#) of the Act to initiate and to investigate complaints against alleged prohibited practices.

14. The first respondent explains that after investigating the initial complaint it referred the complaint to the Tribunal "on a very confined issue for a finding in terms of [section 8\(d\)\(iii\)](#) of the Act, which relates to a conditional refusal to deal on the part of the applicant. The question of conditional refusal to deal was not alluded to in the initial complaint, it only occurred after the initial complaint had been lodged and only arose during the settlement negotiations between the applicant and the second respondent."

14. It avers, further, that in order to have properly proceeded against the applicant, the first respondent ought to have initiated a new complaint instead of adding same to the initial complaint; that in the circumstances the first respondent decided to withdraw the second respondent's complaint referral and to initiate a fresh complaint in order to overcome the technical irregularities and to address certain new facts that were not previously known to the first respondent.

17. The first respondent denies that the second complaint relates to substantially the same alleged conduct on the part of the applicant that formed the subject of the second respondent's complaint.

It, however, concedes that the amended complaint referral contained or introduced new facts.

18. It contends that there were further facts which came to the first respondent's attention, which the first respondent was previously not aware of. The additional facts, according to the first respondent, show that the applicant had over an extended period of time embarked upon a course of conduct that was tantamount to a refusal to deal. In the premises, that it needs time to properly investigate the new facts, decide whether to proceed with the complaint referral and, if so, formulate the complaint referral properly so that it contained all of the averments necessary to sustain the contraventions referred to in any ultimate complaint referral.

18. The first respondent denies that it is in any way precluded from proceeding with the investigation of the second complaint in that the proceedings have not been completed as contemplated in [section 67\(2\)](#) of the Act. The decision by the Tribunal upholding the first exception did not, it contends, render the proceedings complete as there has not been a final determination on the merits of the matter; that therefore the applicant is wrong to aver that the matter is *res judicata*.

18. The first respondent, however, concedes that the initial complaint would have lapsed by virtue of the provisions of [section 50\(5\)](#) of the Act.

7. THE SECOND RESPONDENT'S CASE

21. The second respondent has filed an answering affidavit. It avers that some of the allegations contained in the applicant's founding papers are inaccurate; that it therefore wishes to set the record straight, but does little more than stand by the first respondent's submissions regarding the facts as well as the law. I find it unnecessary for the purposes of this judgment to make further reference to the averments in the second respondent's answering affidavit as these do not take the matter further as it will more clearly appear hereunder.

8. THE DISPUTE

22. The decisive question herein is whether the second complaint is based on substantially the same conduct referred to the first respondent by the second respondent, or founded on new facts.

I. ANALYSIS OF THE FACTS

22. The first respondent avers that the second complaint is based on new facts which came to its attention after the initial complaint. This notwithstanding that it had responded to a letter from the applicant dated 2 August 2002 in terms of which it confirmed that the second complaint did indeed relate to the previous referral of the second respondent's complaint.

22. After the applicant was informed by the first respondent that the first respondent has initiated the second complaint, the applicant responded by way of a letter dated 2 August 2002, advising that it presumed that the second complaint did not relate to the allegations forming the subject matter of the complaint initiated by the second respondent, in respect of which the first respondent had filed a notice of withdrawal. The applicant, further, requested from the first respondent details of the second complaint in order to enable the applicant to respond thereto.

22. On 8 August the first respondent wrote to the applicant confirming that the second complaint relates to the costs condition imposed by the applicant. The relevant part of the letter reads:

“1. The allegation that [the applicant] is making the supply of paper to [the second respondent] conditional on the payment of legal costs will be entertained under section 8(c) of [the Act] as an exclusionary act ... insofar as [the applicant] is imposing a condition which excludes [the second respondent] from entering or expanding in the market. Further information gathered during [the second respondent's] complaint investigation would also be considered

2. [The first respondent's] allegation pertaining to [section 8\(d\)\(iii\)](#) does relate to the previous referral under case number 2000MAY44 of which [the second respondent] was the complainant. However, the current allegation is based on the second part of [section 8\(d\)\(iii\)](#) namely, “forcing a buyer to accept a condition unrelated to the object of the contract” insofar as [the applicant] is making the supply of paper to [the second respondent] conditional on payment of legal costs.

2. [The first respondent] intends using the abovementioned information as basis for its new investigation, which would predominantly be based on the alleged exclusionary behaviour of

[the applicant] towards [the second respondent].”

22. The first respondent concedes in its answering affidavit that the costs condition was referred to the Tribunal as part of the complaint referral, but that it was simply added thereto instead of initiating a new complaint.

22. It is clear from what has been stated hereinbefore (the first respondent’s letter dated 8 August 2002 as well as the admission in its answering affidavit) that the costs condition is not a new fact. It came to the first respondent’s attention long before the complaint referral. It, in fact, was the premise of the complaint referral.

22. Further, the first respondent states in paragraph 6.2.7 of its answering affidavit:

“6.2.7 It is accordingly correct that the amendment introduced new facts. After the amendment was filed further facts came to [the first respondent’s] attention that it was not previously aware of. I annex hereto marked “HBS 2”, a schedule recording these facts. These additional facts suggested that [the applicant], whilst professing a willingness to deal with [the second respondent], had in fact over an extended period of time embarked upon a course of conduct that was tantamount to a refusal to deal with [the second respondent].”

22. Counsel for the applicant rightly submitted that from a conspectus of the “new facts” as set out in annexure “HBS 2”, it is abundantly clear that these are not new. They relate to matters which formed the subject matter of the interim application and the initial complaint by the second respondent. In the initial complaint the second respondent alleged that the applicant was engaged in various prohibited practices including that the applicant was “effectively refusing to deal with the second respondent.” I deal with the annexures referred to in “HBS 2” ad seriatim:

29.1. The affidavits by previous customers of the applicant - Annexure A - formed part of the second respondent’s complaint and the interim relief application. The complaint was lodged with the first respondent in May 2000. The affidavits were used in support of the subject matter under investigation.

- 29.2. Annexure B - is a letter by the applicant to the first respondent dated 14 August 2001 wherein the applicant undertook not to persist in the cost condition. According to the date stamp, the first respondent received same on 15 August 2001.
- 29.3. The offer by the applicant to supply the second respondent was made on 3 September 2001 - Annexure C. No condition was imposed thereanent.
- 29.4. Annexure D is a letter from the applicant to the second respondent recording what transpired at the meeting held on 5 September 2001 and the subsequent advice by the second respondent on 11 September 2001 that the second respondent would not withdraw the initial complaint as it claimed the applicant had to compensate the second respondent.
- 29.5. The article, Annexure E, was published in June 2002 after the complaint referral. It, however, does not raise new facts but refers to the history of the “dispute” between the second respondent and the applicant.
- 29.6 The letter dated 29 September 2000 relating to the creditworthiness of the second respondent was used as evidence in the initial complaint by the second respondent - Annexure F.
- 29.7. Annexure G is a letter from the second respondent to the applicant dated 3 November 2000. It records the applicant’s willingness to supply the second respondent on a Rand to Rand basis dependent on the amount of security provided. It further records the objection by the second respondent to the cost condition. The letter was copied to the first respondent. The cost conditions was later taken up with the applicant by the first respondent in August 2001 and was later referred to the Tribunal in November 2001.
- 29.8 Annexure H - is a letter from the second respondent to the first respondent dated 9 November 2000. It makes reference to the negotiations between the second respondent and the applicant, the issue of the cost condition and the intention to appeal the Tribunal’s decision of 11 October 2000.

29.9 Annexure I, a letter by the applicant to the second respondent, is dated 9 November 2000. It deals with the history of the matter and the course of events.

29.10. In so far as the offer to deal and the supply of paper to the second respondent on a “cash on delivery” basis is concerned, the applicant pointed out the problems attendant thereto. In particular; that the applicant was not in a position to clear the relevant cheques beforehand. The first respondent was made aware of such difficulties in the letter dated 20 June 2001, Annexure J, before the complaint referral. It would appear that the first respondent received same on 21 June 2001 as per the date stamp.

29.11. Annexure K dated 3 October 2000, relates to the second respondent’s dealings with the applicant Kraft. The latter has nothing to do with the applicant.

29.12. Annexure L - is statements submitted to the first respondent by the applicant, dated 2 February 2001. These reflect that Mondi Paperlink fell short of the 1200 tons required on two of the 4 yearly quarters. The first respondent was furnished with the statements long before the complainant referral.

29.13. Annexure M - is an e-mail from Gaper Services to the second respondent, which was faxed to the first respondent on 29 June 2001, before the complaint referral. It refers to the fact that it can order directly from the applicant at a lower price.

29.14. Annexure N is the price list for 2001. It is, however, not clear as to when the first respondent received same. In any event the second respondent had registered its complaint regarding its inability to compete in the market if not supplied by the applicant, in May 2000.

30. It is clear from the analysis of the facts alleged by the first respondent to constitute new matter and hence the basis of a new complaint, that none of the allegedly new facts are new. All the annexures but for the press release relate to a period prior to the complaint referral. The article itself does not raise any new matter.

31.1. Further, it appears from an examination of the second complaint that the rationale behind the first respondent initiating the second complaint was its dissatisfaction with the Tribunal’s

finding with regard to the first exception. It records at paragraph 2 of the complaint:

“[H]owever, to ensure that the referral does not fail on the Tribunal’s apparent incorrect interpretation of the Act, it is proposed to refer the complaint in the alternative in other words on the basis of [section 8\(d\)\(iii\)](#) and in the alternative [section 8\(c\)](#)”.

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31.2. The first respondent states further in the complaint:

“1. Background

Case 2000May44 dealing with [the applicant’s] refusal to deal with the second respondent was referred to the Competition Tribunal under section 8(d)(iii) of the Competition Act 1998 (the Act)...

... It was felt by some [members] that the complaint should, in any event , in the alternative have been referred under section 8(c) of the Act.

The time for [the first respondent] to place any further documents before the Tribunal has lapsed ... There is little or no chance of this matter being dealt with successfully under the current referral.

...

- The referral and the process through which it was referred was flawed to the extent that [the applicant] could probably defend the referral without having to respond to the substantive issues; and
- We need to include section 8(c) into the referral as an alternative. Moreover we need more time to successfully prepare for a section 8(d)(iii) in the light of the Tribunal’s apparent reluctance to deal with the complaint under this section.

2 Deliberation

. . . The only manner in which this can be addressed is through an initiation by the Commissioner as is provided for in section 49(b)(1)[*sic*] of the Act.

Staff is satisfied that:

- There is sufficient evidence to support a section 8(c) referral.
- There is sufficient evidence to support a section 8(1)(d)(iii) referral...”

32. The extracts from the initiation report by the first respondent indicate in no uncertain terms that the second complaint is based on substantially the same conduct forming the basis of the initial complaint by the second respondent - alleged prohibited practice or exclusionary conduct on the part of the applicant in refusing to deal with the second respondent. The core of the complaint, being the costs condition in so far as the first respondent is concerned. That is again the issue the first respondent wishes to investigate further.

I should add that the first respondent in its initiation papers contradicts itself. It alleges on the one hand that it needs more time to investigate and on the other that it has sufficient evidence to support both section 8(d)(iii) and section 8(c) referrals. Whatever the position, it is clear that the first respondent intends referring the complaint only on the question of the cost condition.

32. In the light of the foregoing the first respondent's contention that there are new facts which came to light can therefore not be true. The cost condition came to its attention some time before the complaint referral. In order to circumvent the problem it was faced with regarding the exception, all the first respondent did was to substitute itself for the complainant. The conduct forming the basis of the complaint being the same, i.e., the alleged applicant's continuing refusal to deal with the second respondent.

10. THE LAW

34. Section 50 of the Act provides:

“(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.

2. Within one year after a complaint was submitted to it, the Commissioner must-

1. subject to subsection (3), refer the complaint to the Competition

Tribunal, if it determines that a prohibited practice has been established; or

2. in any other case, issue a notice of non-referral to the complainant in the prescribed form.

2. When the Competition Commission refers a complaint to the Competition Tribunal in terms of section 2(a), it -

1. may-

1. refer all the particulars of the complaint as submitted by the complainant;

2. refer only some of the particulars of the complaint as submitted by the complainant; or

3. add particulars to the complaint as submitted by the complainant, and

1. must issue a notice of non-referral as contemplated in subsection (2) (b) in respect of any particulars of the complaint not referred to the Competition Tribunal.

4. . . .

4. If the Competition Commission has not referred a complaint to the Competition Tribunal, or issued a notice of non-referral, within the time contemplated in subsection (2), or the extended period contemplated in subsection (4), the Commission must be regarded as having issued a notice of non-referral on the expiry of the relevant period.”

35. The Act provides for the investigation by the first respondent of alleged prohibited practices and the referral to the Tribunal by the first respondent (or in appropriate circumstances the complainant). It is the function of the first respondent to investigate and evaluate alleged prohibited practices.

See: Sections 21(c) and (g) of the Act;

Norvatis SA (Pty) Ltd and Others v The Competition Commission and Others,
CT22/CR/B/JUNE01, 2.7.2001; and

**Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and
Another,** Case No. 480/2001 SCA.

After receiving a complaint, the first respondent investigates the conduct forming the subject matter of the complaint. Thereafter it should formulate a view as to whether a prohibited practice has been established or not. If the first respondent is of the view that there is merit in the complaint and that it ought to refer same to the Tribunal, it may refer the complaint in its entirety or only some of the particulars thereof. The first respondent may, if it deems it necessary, add further particulars to the complaint referral (section 21(g) and section 50 of the Act).

35. Where the first respondent decides not to refer the complaint to the Tribunal, it must issue a certificate of non-referral.

35. The first respondent is given a period of one year, which may be extended, to investigate and refer the complaint to the Tribunal. If the first respondent fails to do so within the prescribed period, it is in terms of section 50(5) deemed to have issued a certificate of non-referral.

38. In the instant matter, the first respondent, after accepting and investigating the complaint initiated by the second respondent, elected to proceed only on the issue of the costs condition. The first respondent is, of course, empowered in terms of section 50(3)(a)(iii) to add further particulars to the complaint submitted by the complainant in the complaint referral to the Tribunal. It does not, nor did it in the instant case, have to initiate a fresh complaint. In the circumstances the first respondent is, in respect of the rest of the particulars of the complaint by the second respondent deemed to have issued a notice of non-referral [section 50(5)].

38. The first respondent correctly concedes that the initial complaint by the second respondent

has lapsed, by virtue of the provisions of section 50(5) of the Act. It, however, contends that in terms of the provisions of section 49B(1) of the Act, it can initiate and proceed with the investigation of the second complaint against the applicant. I do not agree. The second complaint (to the extent that it is a fresh complaint) can only relate to an alleged contravention of the Act as specifically contemplated by an applicable provision thereof by that complaint. As correctly observed by Van der Merwe, J in **Seven-Eleven Corporation SA (Proprietary) Limited and Another v Simelane NO and Others**, [2002 \(1\) SA 118](#) (T), the first respondent is not empowered to investigate conduct which it generally considers to constitute anti-competitive behaviour. In my opinion, the investigation is clearly beyond its jurisdiction and the application ought to succeed on this ground alone.

38. The applicant further contends that the first respondent cannot proceed with the investigation of the second complaint as the matter is *res judicata* it is to its prejudice as it is being subjected to “double jeopardy”.

41. The protection against “double jeopardy” is provided in section 67(2) of the Act, which reads:

“(2) A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct”.

42. I agree with the submission by counsel on behalf of both the applicant and the first respondent, that there are two primary jurisdictional facts or requirements to be satisfied for the operation of the section. These are:

42.1 the complaint must relate to substantially the same conduct; and

42.2 in respect of which a firm was a respondent in completed proceedings.

43. The conclusion to which I have arrived is that the second complaint, as more clearly demonstrated in the initiating document (Annexure HBS 3 to the first respondent’s answering affidavit) as well as the letter from the first respondent to the applicant dated 8 August 2002 (Annexure WVR11 to the founding affidavit), relates to substantially the same conduct forming the subject matter of the initial complaint by the second respondent. I am

therefore satisfied that the first requirement has been met.

43. The crux of the argument in respect of the second respondent is that the proceedings before the Tribunal have not been completed. It was submitted that the upholding by the Tribunal of the first exception and the subsequent withdrawal of the complaint referral did not render the matter *res judicata*. Further, that the subsequent withdrawal did not in any way serve to preclude the first respondent from “reinstating” the matter.

43. The Act does not define “completed proceedings”. It was submitted on behalf of the first respondent that the closest analogy would be with the criminal proceedings and that the proceedings can only be considered to have been completed if a plea of *autrefois acquit/convict* could successfully be raised. In this regard, it was submitted that the exception is analogous to the situation contemplated in section 85 of the Criminal Procedure Act 51 of 1977, in terms of which an accused can object to a charge before pleading thereto; that in the present matter the applicant has not filed its answer, equivalent of a plea to the charge, and the decision on the exception cannot be equated to the doctrine of *autrefois acquit/convict* equivalent of *res judicata* civil proceedings.

43. Both the first and the second respondents contend that the upholding of the exception and the subsequent withdrawal of the complaint referral does not render the matter *res judicata*, the decision was not based on the merits but on a technicality. Reliance is in this regard placed upon the *dicta* in *inter alia* the following decided cases:

African Farms and Townships Ltd v Cape Town Municipality, [1963 \(2\) SA 555](#) (A);

African Wanderers Football Club (Pty) Ltd v Wanderers Football Club, [1977 \(2\) SA 38](#) (A); and

Bafokeng Tribe v Impala Platinum Ltd and Others, [1999 \(3\) SA 517\(B\)](#).

(See also **S v Moodie** [1962 \(1\) SA 587](#) (A) with regard to criminal proceedings.)

43. Following these decisions, for a party to succeed on a plea of *res judicata* he/she/it must prove on a balance of probabilities that a final judgment was granted in:

48.1 the matter that involve the same parties

48.2 on the same cause of action, and

48.3. with respect of the same subject matter on thing. (case law)

In my view the proceedings under the provisions of the Act are a hybrid between the criminal and civil proceedings.

43. It is common cause that, after the Tribunal upheld the first exception, on the grounds that no cause of action was disclosed, the Tribunal granted the first respondent leave to amend within a stated period. The amended complaint referral was filed out of time. the applicant filed a second exception on the grounds that

49.1 same still did not disclose a cause of action; and

49.2 it included a “new fact”.

Subsequent thereto the first respondent withdrew the entire complaint referral.

43. Both the first and the second respondents submit that the proceedings before the Tribunal have not been completed as contemplated in section 67(2) of the Act, in that no final/decisive judgment has been reached.

43. The second respondent further submits that the first respondent was granted leave to amend keeping alive the initial “proceedings”. I do not agree with this submission for when the first respondent withdrew the complaint referral there was nothing in place “to be kept alive”. I deal with this aspect further in paragraph 53 below.

43. The predecessor to section 67(2) reads:

“(2) A complaint may not be initiated against any firm that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct”

The new section 67(2) refers to referral to the Tribunal whereas the old section 67(2) referred to initiation proceedings” before the Tribunal the old section simply referred to proceedings.

43. It is apparent from the above that there is a difference in the wording between the present section and its predecessor. However, the effect is the same. The Legislature enacted the relevant provisions to avoid a firm being “tried” twice for the same or substantially the same conduct. Put differently the aim of the Legislature in introducing section 67(2) was to avoid “double jeopardy”. In my view a second complaint can only be initiated if it relates to a different subject matter and premise.

In the present case, the Tribunal considered the merits of the complaint (the affidavits described the complaint as the costs condition) and concluded for substantive reasons that the facts relied upon by the first respondent failed to disclose the essentials of a valid complaint. In substance the Tribunal upheld an exception on the merits.

43. What the first respondent decided to do *in casu* was to withdraw the entire complaint referral so that there is no “defective declaration” before the Tribunal. By virtue of the provisions of section 50(5), this rendered all the proceedings attendant thereto and pursuant to the initial complaint completed, at least, in so far as the first respondent is concerned. The first respondent’s contention that it can withdraw and reinstate the complaint referral can thus be true only in instances where the complaint is still under its jurisdiction and the prescribed time has not lapsed. *In casu* time has expired. The subsequent withdrawal of the complaint referral had the effect of concluding the proceedings.

54. All the first respondent had to do in the instant case was to amend its complaint referral, alternatively to appeal the decision. Initiating a “fresh” complaint (which in its own letter dated 8 August 2002 concedes is the same complaint) amounts to harassment and vexatious investigation, which is no doubt prejudicial to the applicant subjected, as it would be, to multiple investigations on the same issue. This, in my view, cannot be what the Legislature intended. It would in any event not be consonant with the spirit of the Constitution. Allowing the first respondent to investigate the same conduct again will only result in a nullity as it will not be able to refer the matter to the Tribunal.

54. It was submitted on behalf of the Commission that Sappi has not succeeded in showing all the requirements for an interdict, namely,

(a) a clear right;

(b) harm, act of interference; and

(c) no other remedy;

Hence in the premises no final interdict could be granted. I do not agree with this submission. It has been shown that the first respondent has acted beyond its powers to the applicant's prejudice. Accordingly, the applicant ought to succeed.

11. COSTS

57. There is no reason why costs should not follow the event. This is a complex and involved matter on both the facts and the law. It in my opinion justifies the employment of two counsel.

Accordingly, both the first and second respondents should, jointly and severally, bear the costs of the application, and such costs to include the costs attendant to the employment of two counsel.

11. ORDER

58. Accordingly, I make the following order:

58.1 The complaint lodged by the first respondent against the applicant under case number 2002AUG156 and the investigation thereof by the first respondent, is hereby declared beyond the jurisdiction of the first respondent, and is set aside.

58.2 The first respondent is hereby interdicted from further investigating, referring or taking any other action in relation to such complaint.

58.3 The first and second respondents are jointly and severally, the one paying the other to be absolved liable to pay the applicant's costs of the application including the costs attendant to the employment of two counsel.

DAVIS JP and PATEL AJA .
