IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 13204/17

In the matter between:

WHIP FIRE PROJECTS (PTY) LTD	Applicant
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	1st Respondent
EXACTECH (PTY) LIMITED	2nd Respondent

JUDGMENT delivered 28 February 2018

NDITA,J

[1] This is an application for the reconsideration of an *ex parte* search and seizure warrant issued by Davis J, on 28 July 2017 at the instance of the Competition Commission against 25 respondents, one of which

is Whip Fire, the applicant in this matter. More specifically, the order sought by the applicant is couched in the following terms:

1. `to the extent it is required, a direction allowing the matter to be heard as one of urgency;

2. a reconsideration in terms of Uniform Rule 6 (12) (c) of an order of Mr Justice Davis granted ex parte and in the absence of the applicant at the instance of the first respondent 26 July 2017 9the Davis order);

3. an order that the Davis order be wholly deleted as far as the applicant tis concerned and that all electronic data and documentation collected by the second respondent from the applicant's premises on 3 August 2017 in accordance with the Davis J Order be returned to the applicant.

4. an order that, in any event all electronic data and documentation collected by the second respondent from the applicant's premises on 3 August 2017 in accordance with the Davis J order be returned to the applicant,

5. a temporary order pending the outcome of the reconsideration and deletion of the Davis Order interdicting the processing of electronic data collected by the second respondent from the applicant's premises on 1 August 2017.

6. an order that the applicant's costs be paid by the respondent, and to extent that it opposes the relief sought, by the second respondent, also, jointly and severally with the first respondent.

The Parties

[2] The Applicant is Whip Fire (Pty) Ltd, a private company with limited liability incorporated in terms of the laws of the Republic of South Africa with its principal place of business at 33 Industria Street, Brackenfell, Cape Town. The First Respondent is the Competition Commission, a juristic person established in terms of section 19 of the Competition Act 89 of 1998 ("the Act"), with its principal place of business at DTI Campus, Building C, 77 Meintjies Street, Sunnyside Pretoria. The Second Respondent is Exactech (Pty) Ltd, a private company with limited liability duly incorporated in terms of the laws of te Republic of South Africa, with its principal place of business at Berzicht Office Park, cnr Christian De Wet and Rooihok Streets, Allen's neck.

[3] The factual background that underpins the issues for determination in this application is best understood from the founding affidavit deposed to by Mr Mohlala, the Mananger of the Cartel Division of the Competition Commission in the application for the warrant of search and seizure. The Commission is in terms of section 21 (1) (a) empowered to investigate and evaluate alleged contraventions of the Act. The application for

search and seizure that served before Davis J was made in terms of Section 48(B) 1 of the Act which provides that the Commission, in order to fulfil its responsibilities of investigating and evaluating allegations of contravention of the Act, may initiate a complaint against an alleged prohibited practice. In terms of s 49 B (2), it may also investigate complaints submitted to it by any person against an alleged prohibited practice.

[4] The Respondents are 25 entities involved in the supply, installation and maintenance of the control and protection systems. They also compete in the provisioning of inspection services. According to Mr Mohlala, all the Respondents are therefore parties in a horizontal relationship as envisaged in section 4 (1) read with 1(1) (xii) of the Act.

[5] The Commission sought before Davis J, a warrant to enter, search and seize information, documents, data and records from the premises belonging to the respondents based on allegations that they have agreements and /or are engaged in a concerted practice to fix prices and trading conditions, divide markets and tender collusively. Mr Mohlala averred that the conduct of the respondents contravenes the provisions of section 4 (1) (b) of the Act. The Commission relied on section 45 (1) and (2) of the Act when it applied for the warrant. Section 46 (1) reads thus:

'46. Authority to enter and search under warrant

(1) A judge of the High Court, a regional magistrate or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate if information on oath or affirmation, there are reasonable grounds to believe that:

(a) A prohibited practice has taken place, is taking place or is likely to take place on or in the premises; or

(b) Anything connected with an investigation in terms of this Act is in the possession of , or under the control of a person who is on or in those premises.

Section 49 (2) of the Act provides as follows:

"(2) A warrant to enter and search may be issued at any time and must specifically-

(a) identify the premises that may be entered and searched; and

(b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 48."

[6] The factual background which informed the application is premised on the fact that according to Mr Mohlala, cartel conduct is secretive and once detected, it requires swift action. Mr Mohlala stated that the investigation involving the Applicant in the reconsideration as well as the respondents in *ex parte* application, revealed longstanding collusive arrangements amongst fire control and protection systems companies, in particular the ones operating in Gauteng. The companies were alleged to have engaged in price fixing and collusive tendering in contravention of s 4

(b) (1) of the Act. The matter was referred to the Tribunal for investigation. In the course of the investigation, two of the Respondents, Afrion and Firego, Gauteng, readily admitted engaging in the prohibited conduct and concluded settlement agreements with the Tribunal. With regard to Afrion, the settlement agreement was made an order of the Tribunal on 19 July 2017. Mr Mohlala averred that the investigation had, at the time he deposed to the founding affidavit, been public knowledge for two years, yet none of the respondents had approached their involvement in the collusive practices. It is for this reason that the Commission sought to invoke the statutory provisions such as the search and seizure warrant to obtain evidence

[7] In justifying the need to bring the application on an ex parte basis, Mr Mohlala stated that the outcome of the investigation could be compromised if the application was brought in the normal way. Furthermore, so goes his evidence, the apprehension that if the respondents were given prior notice of the application, they would destroy the evidence of cartel engagement is reasonable because the Commission's investigations has established that:

7.1 The respondents are all registered members of ASIB, the 25th respondent. ASIB is Automatic Sprinkler Inspection Bureau Pty (Ltd), a private company duly incorporated in accordance with the laws of the Republic of South Africa, with its principal place of business situated at 147 Cnr Louis Botha and Tedhope Avenue, Houghton Estate, Johannesburg. ASIB has rules which all its members abide by.

Some of the rules exclude installers that are not members of ASIB from the market, whilst others reserve services of installed fire control and protection services to ASIB members.

7.2 The respondents have regular meetings convened under the auspices of ASIB wherein they discuss terms to apply when dealing with individual customers and tenders.

[8] Mr Mohlala explained that ASIB was formed by a group of short term companies to conduct inspections of fixed automatic fire installations, test alarm apparatus and issue certificates. Its declared function is to inspect fixed automatic fire sprinklers and pursuant thereto, issue Clearance Certificates for those systems that comply with its standards. ASIB standards are widely recognised and enforced by the majority of insurance companies as a prerequisite for insurance cover for owners of buildings wishing to obtain cover for their buildings. According to Mr Mohlala, the Commission's understanding is that a significant number of insurance companies require that ASIB must approve and certify the fire control and protection system installed in a building before such building can be insured. Mr Mohlala stated that this insistence by the insurance companies on this requirement has rendered the South African National Standards developed by the South African Bureau of Standards (SABS) of no use. Accordingly, the ASIB standards constitute an agreement by industry players who are members of ASIB to exclude, from the market non-members who use legally prescribed and acceptable standards in the

country. The net effect of such conduct is that the statutory prescribed role and standards of the SABS are rendered nugatory, in support of anti-competitive objectives that are in breach of the Act.

[9] Mr Mohlala stated that the Commission is in possession of information to the effect that ASIB refuses to provide clearance to any installations that have not been carried out by its listed members regardless of the quality of the installations and the qualifications of the personnel that designed and installed them. This in essence means that in order for installers to do any meaningful work, capable of being insured in South Africa, such installers must all be members of ASIB, notwithstanding the existence of alternatives. The Commission is furthermore aware of the fact that ASIB has firms that are listed under its name as approved suppliers of pipes, pump and sprinklers and that these suppliers only supply to installers that are members of ASIB. This means that installers that are not registered with ASIB do not get insured work, as well as supplies.

[10] In addition to the aforegoing, the Commission is in possession of information to the effect that in the event that the unregistered installers elect to import equipment, such equipment still has to be inspected and approved by ASIB for a fee in order for it to be used for insured work in the country. But then, ASIB does not on the other hand inspect equipment belonging to unregistered installers. Again, the result of all these regulations agreed upon by members of ASIB, is that unless an installer is

a member of ASIB, that installer cannot secure insured work in the country. These rules of ASIB also provide that unregistered installers cannot be subcontracted for work by the registered installers because the equipment that the registered installers use would not have been approved by ASIB. ASIB prohibits its members from subcontracting unregistered installers.

[11] The founding affidavit reveals that the Commission has also learned that ASIB registers members in accordance with geographic areas where they are supposed to operate, and members are discouraged from operating in areas where they are not registered. Moreover, according to the Commission's understanding, members of ASIB monitor each other for compliance with ASIB rules and complain to ASIB in cases where one of the members breaches any of the rules.

[12] The Commission interviewed industry participants and learned that properly qualified installers are also competent in the inspection of fire control and protection systems, yet the agreement by ASIB and its members is that the installers will not conduct inspection services as this function is reserved for ASIB. The inspection services are provided at extra cost by ASIB. The information obtained, according to Mr Mohlala, reveals that ASIB divides installers into categories, depending on the size of a company. The categories range from what is called supervising installers, installers, conditional installers and provisional installers.

Supervising installers are the biggest and are the ones who carry out big installation projects like malls and warehouses. Provisional installers are the smallest and are only permitted to small projects, mainly maintenance work. The effect of the listing is to limit the choice of a client to only those installers recommended by ASIB for certain projects. The listing not only restricts the client in respect of choice, it also restricts the client installers that may be capable of doing work listed in a lower category of ASIB. According to the Commission, these restrictions by ASIB limit competition among installers of fire control and protection systems.

[13] The founding affidavit in support of the search and seizure application also reveals that the Commission is in possession of an email from Mr. Nicholas Tubb of Fire and Instrument Services to Dave Odd and Neil Whittal of Belfa. The email appears to be in reaction to one of the complaints received by the Commission. It reads thus:

"Thought you might find this interesting, I think that if the Competition Commission decide to investigate this it will bring a lot more worms out of the woodwork as I think a lot of people out there that know ASIB's secrets."

According to Mr Mohlala, the email, from industry players who are also members of ASIB, seems to acknowledge that there are secret activities within ASIB that require and justify investigation by the Commission and

thus by extension underscores the necessity of the search and seizure warrant.

[14] Based on the facts elucidated above, Mr Mohlala averred that there was a reasonable suspicion that any attempt to confront the respondents or continue to surreptitiously obtain information regarding the conduct of the respondents may arouse suspicion, and thereby compromise the investigation of the matter. For all these reasons, so stated the Commission, a warrant to enter and search the premises of the respondents was justified on the basis that there were reasonable grounds to believe that: -

"(a) a prohibited practice has taken place, is taking place, or is likely to take place on or in those premises; or

(c) anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises."

[15] The Commission outlined the manner in which the search and seizure would take place and explained thus:

15.1 The Commission would only search and seize mirror images of all identified electronic equipment;

15.2 The searching process would be conducted by independent IT experts appointed by the Commission;

15.3 The Commission would provide key words to the IT experts to extract information that is relevant to the mirror images. The extracted information would be handed over to the respondents or their legal representatives to identify information that is legally privileged.

The IT experts would then remove the legally privileged information from the data set that would be ultimately provided to the Commission.

[16] The purpose of this search process was to ensure that the electronic data search would be conducted without unnecessarily disrupting business activities of the respondents whilst at the same time ensuring that there were safeguards against the risk of the Commission accessing legally privileged information.

[17] A list of names of inspectors who were to participate in the search and were all allegedly appointed as such in terms of 24 of the Act was attached to the founding affidavit. Their appointment certificates were similarly attached.

[18] The order was granted by Davis J, on the basis of all the facts I have alluded to above.

[19] I now turn to the founding affidavit deposed to in the application for reconsideration.

The Reconsideration Application

[20] For ease of reference, I refer to the Applicant in the Reconsideration application as the 'Applicant' and 'Whip Fire' interchangeably. Likewise, I refer to the Respondent as the Commission. Mr Alan Douglas Watt, who is a member and director of the applicant, stated that certain electronic data and documentation which was part of the order by Davis J was removed from the Applicant's premises, and as an incident of the reconsideration, the Applicant seeks that such data and documentation be returned to the Applicant. The second basis for the relief sought is that the applicant has appointed a forensic investigator to investigate the propriety of the removal of the data and documentation and, in particular, the integrity of the chain of custody protocol and the investigation has concluded that the data and documentation were acquired out of the ambit of an auditable chain of custody process.

[21] With regard to the reconsideration, Whip Fire states that the search and seizure order granted by Davis, J, ought not to have been granted in the first place because, first, , no initiation document was filed and second, the allegations against the respondents are vague and baseless, and third, as far as ASIB is concerned, it is open to any installer of fire protection to join ASIB, and there are no barriers to

membership and accreditation, and fourth, the integrity of the forensic process of seizing data and information from the applicant is questionable.

The Initiation Document

[22] The Commission failed to put up the initiating document (the CC 1 complaint form in terms of which complaints are initiated in terms of the Competition Act), making it impossible to assess (a) whether there has been a valid initiation in this matter and (b) what the proper parameters of the search warrant ought to have been. According to the Applicant, a valid initiation is a prerequisite for a valid investigation. The Applicant believes that if a court is unable to discern whether there was a valid initiation, a valid search and seizure warrant is precluded. In the matter at hand, so states the applicant, the Court was not placed in a position to assess the validity of the search and seizure operation sought to be carried out by the Commission as the initiating document was not filed. Without the documents, the warrants ought not to have been granted and the order issued falls to be reconsidered and set aside. Furthermore, the applicant failed to disclose all the salient facts pertaining to the relief sought.

Vague and baseless allegations

[23] The Applicant alleges that the Commission failed to put any sustainable or sufficient facts as would justify the conclusion that there are reasonable grounds to believe that a prohibited practice is taking place on the applicant's premises or that anything connected with an investigation in terms of the Competition Act is in the possession or under the control of the applicant and on its premises and instead relied on vague generalities. According to the Applicant, the affidavit deposed to by Mohlala is replete with speculation and conclusions, but there are neither facts nor evidence supporting the contentions that the Applicant has engaged in prohibited practices. Furthermore, the Commission is relying on the fact that it found evidence of anti-competitive behaviour in the fire industry in Gauteng and went on a fishing expedition in Cape Town. The Applicant suggests that an investigation by the Commissioner starts with a person or company bringing a leniency application to the Commission confessing its engagement in its anti-competitive activities. The confessor in a leniency application must make a full and frank disclosure so that the Commission can have a full understanding of the company's transgressions and the level of involvement so as to determine an appropriate penalty. According to the applicant, invariably, the leniency applicant will implicate others, and that

will prompt the Commission to investigate those parties, thereby breaking the cartel. In this context, Afrian and Fireco Gauteng should have made a full disclosure which then would give the Commission a heads up as to the identities of other market participants. To this end, the applicant disclosed that it is not in respect of Afrion only that the tribunal reached an agreement, it in fact confirmed Fireco's consent agreement on 25 July 2017 and an administrative penalty of R909 376, 29 was levied. The applicant further avers that in the light of the consent agreement with Afrion and Fireco, the Commission ought to have concrete evidence of those firms involved in the cartel activity. Yet, in the founding affidavit of the search and seizure application, Mr Mohlala has not suggested, even remotely, that the two leniency applicants, Afrion and Fireco have implicated the applicant in any wrong-doing. Furthermore, so avers the Applicant, the reason why the Commission was unable to point to such evidence is not far to find; it is because such evidence does not exist. The Applicant sates that the Commission failed to provide a proper basis for a reasonable suspicion that anti-competitive behaviour that implicates the Applicant is taking place. The Applicant further states the evidence presented by the Commission is made up of baseless suspicion and generality, and as such, the jurisdictional fact in section 46 of the Act had not been met, and the order issued falls to be reconsidered and deleted.

The Automatic Sprinkler Inspection Bureau (ASIB) allegations

[24] It will be recalled that the Commission in the search and seizure application alleged broad anti-competitive behaviours on the part of ASIB. More specifically, the Commission stated that it has information that suppliers and installers of fire control protection systems have concluded agreement to divide markets and that this is facilitated by the rules of ASIB which discourage members from operating outside particular geographic areas. The Commission further stated that because insurance companies require clients to have ASIB approved systems, installers of fire systems who are not ASIB accredited are excluded from the market.

[25] An extract from the ASIB website reveals its basic aims and objectives as follows:

"The Automatic Sprinkler Inspection Bureau (ASIB) was founded in 1970 by the thirty-five short term insurance companies that were operating at the time. The general philosophy was that whilst the insurance companies may differ in respect of premiums and ratings, they would not do so for the requirements for fixed fire protection and a uniform inspection standard was essential for them.

ASIB was tasked with regulating the industry by, amongst other things:

- Updating the Rules which hopelessly outdated
- Listing and grading sprinkler installing companies
- Control the standard of design and installation
- Inspect new and existing premises
- Issue clearance Certification for premises that complied with the required minimum standard. "

The applicant explains that ASIB as a trade association, publishes various editions of rules relating to installation and maintenance of fire protection equipment, but none of its rules and standards exclude participants from the market. According to the Applicant, it is open to any installer of fire protection to join ASB: there are no barriers to barriers to membership and accreditation. Furthermore, whilst it is true that most insurance companies insist as a condition of insurance that fire-protection systems be installed and maintained by ASIB-accredited installers, some do not, and are satisfied if the installer complies with the standards imposed by the South African Bureau of Standards.

[26] The Applicant says that the Commission has failed to present any evidence showing that ASIB's standards result in exclusion from the market or any other anti-competitive result. The reason for this assertion is two-fold. First, the Commission's case that the applicants and other

market players are engaged in horizontal restrictive practices is problematic because it is the insurance companies that insist that installers and providers of fire protection equipment be accredited to ASIB. The relationship is therefore vertical, not horizontal. This then means that the Commission ought to have investigated a section 5 contravention, not a section 4 one. Stated differently, the characterisation of the inquiry by Commission is incorrect. Second, so says the Applicant, the high water mark of the Commission's case is the email from Nicholas Tubb (Tubb) stating *"I think there a lot of people out there that knows ASIB's secrets."* According to the Applicant, the statement from Tubb is quite cryptic and cannot, on its own constitute evidence or conclusions of anti-competitive behaviour.

Chain of custody

[27] The assailed court Order sets out a procedure for the search and seizure of electronic data aimed at protecting legally privileged information. It envisages the appointment of an independent forensic expert to search and seize all electronic data on the premises of those businesses targeted by the Order, make mirror images of the data, delete personal information from the material gathered at the request of the owner thereof. The Applicant avers that it appointed a forensic

investigator, Mr Craig Pederson, to investigate the chain of custody protocols in respect of the search and seizure operation conducted by the Commission. Mr Pederson concluded that:

"the exhibits have been acquired outside of an auditable chain of custody process."

According to the Applicant, the forensic process lacked integrity, and for that reason, the Order must be reconsidered and deleted.

Appointment of inspectors not in compliance with section 24 of the Competition Act

A further reason to delete the Order, according to the applicant stems from the fact that the Second Respondent was to be appointed as an inspector in terms of s24 of the Competition Act, but there is no indication on these papers that this was not done. The Applicant asserts that the Commission has not complied with the order of Davis J, in that the appointment of inspectors does not comply with the provisions of Section 24 of the Competition Act. The section provides as follows:

'24 Appointment of inspectors

(1) The Commissioner may appoint any person in the service of the Competition Commission, or any other suitable person, as an inspector.

(2) The Minister may, in consultation with the Minister of Finance, determine the remuneration paid to a person who is appointed in terms of subsection (1), but who is not in the full-time service of the Competition Commission.

(3) An inspector must be provided with a certificate of appointment signed by the Commissioner stating that the person has been appointed as an inspector in terms of this Act.

(4) When an inspector performs any function in terms of this Act, the inspector must-

(a) be in possession of a certificate of appointment issued to that inspector in terms of subsection (3); and

(b) show that certificate to any person who-

(i) is affected by the exercise of the functions of the inspector; and

(ii) requests to see the certificate.'

In terms of paragraph 1.1. of the search and seizure warrant:

> 'The Commission shall appoint independent IT forensic experts to assist in securing and search of all electronic data seized at the premises of the respondents. The IT forensic experts shall be appointed as inspectors in terms of section 24 of the Competition Act No 89 of 1998, as amended.'

The applicant laments the fact that there is no indication on these papers to suggest that independent IT forensic experts were appointed. The search and seizure conducted at the Applicant's property is therefore tainted due to perceived shortcomings with the appointment of the IT experts.

[28] I now turn to consider the Commission's reply to the Applicant's averments.

The Respondent's replying affidavit

[29] In reply, the Commission denies the Applicant has made out a case for any of the relief that it seeks as it has not satisfied the requirements of an interdict. Neither was the urgency with which the matter was brought to court justified. Furthermore, the search and seizure warrant was lawfully granted as it needed to only satisfy one of the two requirements to be granted a warrant, which it did. Those are:

29.1 a prohibited practice has taken place, is taking place or is likely to take place on or in those premises; or

29.2 anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

According to Mr Mohlala, the Commission has reached the threshold for a successful search and seizure application as set out in the Act.

[30] I now turn to consider each of the Respondent's answers to the applicant's averments.

Failure to put up an Initiation Document

[31] In reply, Mr Mohlala emphasised that there is no requirement under the Competition Act for a complaint to be attached to an *ex parte* application. Furthermore, in terms of Rule 14 (c) (i) of the Rules for the Conduct of the proceedings in the Competition Commission, the Description of Conduct attached to a complaint, is restricted information for the period of the investigation. I deem it necessary at this stage to set out the entire Rule 14 (c) (i). It reads thus:

14. Restricted information. – (1) For the purpose of this Part, the following five classes of information are restricted:

. . .

"(c) Information that has been received by the Commission in a particular matter, other than that referred to in paragraphs (a) and (b), as follows:

(i) The Description of Conduct attached to a complaint, and any other information received by the Commission during its investigation of the complaint, is restricted information until the Competition Commission issues a referral or notice of non-referral in respect of that complaint, but a completed CC1 is not restricted information."

Furthermore, the Commission vehemently denies that material allegations were not disclosed to the Court during the search and seizure application.

Allegations of anti-competitive conduct unfounded

[32] It will be recalled that the applicant assailed the Commission's investigations as vague and baseless. Mr Mohlala stated that the fact that the Applicant, Whip Fire is a member of ASIB is sufficient for the Commission to investigate. After all, so states the Commission, the Act only requires a reasonable belief that anything connected with the investigation is in possession of, or under the control of, a person who is on those premises. The Commission's suspicion that Whip Fire, as a member of ASIB, is likely to have documents pertaining to the ASIB Rules and Whip Fire's implementation of those rules is reasonable. Furthermore, Whip Fire's membership of ASIB is sufficient for the Commission to commence an investigation.

Lack of evidence showing anti-competitive behaviour against ASIB

[33] With regard to the allegation that the Commission has failed to present evidence showing that ASIB's standards result in exclusion from the market or any other anti-competitive results, the Commission reiterated that it is the very rules and conditions of listing in ASIB that

anti-competitive behaviour is alleged, and Whip Fire is sympathetic to the design of the same rules as set out in the founding affidavit it filed in support of the search and seizure. In a nutshell, the alleged anti-competitive practice by ASIB is described by the commission in the following manner:

1. market division on the basis of territories;

2. market division – by other respondents undertaking not to compete with ASIB – who all operate in the market as defined by the Commission, which includes the "*inspection*" services for fire control and protection services;

3. market division on the basis of the size of the operation;

4. ASIB engaging in market division

5. ASIB's rules constitute an agreement to engage in anticompetitive behaviour between the competitors in the market – these are thus horizontal practices).

6. The respondents, as members of ASIB, monitor each other and complain to ASIB when the latter's rules have not been complied with.

Integrity of the search

[34] The applicant's attack on the integrity of the search operation is two-fold. First, it is aimed at the inspectors who conducted the search, and second, it relates to the information gathering process. In so far as the latter is concerned, the Applicant, strongly relied on the report of Mr Pederson in assailing the integrity of the Commission's search and seizure carried out by the second respondent. In reply, the Commission explained that the IT process to be followed was set out with sufficient clarity in the warrant. Furthermore, so says the Commission, the people appointed to gather information are appointed in terms of the Act. According to the Commission, the process followed by the independent IT is beyond reproach and may be briefly summarised as follows:

34.1 The search is conducted by the expert by using a keyword search- which is then handed to the applicant's attorneys in order for them to remove any privileged information.

34.2 The independent IT expert seals the original electronic evidence bags which are signed on the seal by all parties present during the sealing and unsealing process. The papers reveal that Whip Fire's legal representative was present during the search.

34.3 After the information is unsealed, the legal representative for the Applicant would be entitled to attend when the IT experts are conducting the keyword searches on the electronic material and has an opportunity to exclude any information that falls within the keyword searched if it is legally privileged.

[35] The Applicant stated that the IT experts who conducted the search were not appointed in terms of section 24, neither was there any indication that they are independent.

[36] Regarding the expert report filed by Mr Pederson, the Commission states that Mr Pederson failed to suggest the norms and best practices he is referring to concerning the chain of custody and acquisition and therefore his opinion is broad, general and speculative. Also, Mr Pederson had no knowledge of the second respondent's practices and internal processes. According to the Commission, the acquisition process specifically refers to the copying of the data. The chain of custody relates to the movement of the device from which data has been copied. The Commission avers that the movement of the devices that were copied,including the movement of the drives containing the copied data, is auditable and verifiable as the relevant forms of chain and custody were signed by the device user or IT person at Whip Fire.

Vertical v Horizontal classification

[37] It will be recalled that the applicant bemoaned the fact that the Commission characterised its relationship with ASIB as horizontal, whereas in its view, it is vertical. In reply, the Commission states that the nature of the precise classification of anti-competitive conduct becomes known after the Commission has conducted its investigation. For this reason, the classification complaint by Whip Fire is premature. Furthermore, so says the Commission, after the Commission has conducted its investigation, it may issue either a notice of referral or non-referral. The real issue according to the Commission is that it has a suspicion on reasonable grounds that Whip Fire and other members of ASIB must be guilty of anti-competitive conduct.

EVALUATION

[38] As earlier alluded to in this judgment, Whip Fire, in seeking a reconsideration, assails the granting of the search and seizure on several grounds. The test applicable to a reconsideration is succinctly summarised in **Industrial Development v Sooliman**[1], wherein Sutherland J, explained as follows:

---

[1] Industrial Development Corporation of SA v Sooliman 2013 (5) SA 603 (GSJ) para 10

"[10] The critical phrase in the rule is 'reconsideration of the order'. The rationale is to address the potential or actual prejudice because of an absence of *audi alteram partem* when the *ex parte* order was granted. The rule is not a 'review' of the granting of the order. A 'reconsideration' is, as has been often said, of wide import. It is rooted in doing justice in a particular respect, i.e to allow the full ventilation of the controversy. In my view, it would be a pretence at just to craft a mechanical approach which disallowed a full ventilation, which would be the outcome if a relevant reply, if any, were to be prevented. The object of the rule should be, *ex post facto*, to afford an opportunity for a hearing afresh _ as if there had been no earlier observance of the audi alteram partem doctrine. To disallow a reply on principle serves no sound principle or policy that is inconsistent with the aim of full and proper ventilation of disputes, which is what a 'reconsideration' ought to be about."

[39] Before evaluating the issues that form the crux of the reconsideration application, I think it makes better sense to first deal with complaint relating to the search and seizure application having brought on an ex parte basis.

Non-service of the search and seizure application

[40] The Applicant also bemoaned the fact that the Commission sought and was granted the order on an *ex parte* basis and urged this court to have regard to that stated by Schutz JA in ***Pretoria Portland Cement***

Co Ltd and Another v Competition Commission and Others[2]*2003 (2) SA 385 (SCA)* at [72] when setting out the "*essential elements in common*" between Anton Pillar order and orders of the nature in issue in this matter, namely the:

> ".....ex parte nature, the drastic invasion of rights it brings about and the serious consequences it can have for the respondent. It is because of these features that the Courts have insisted on maintaining a firm grip upon the execution of Anton Piller orders."

[41] **Sutherland and Kemp** opine that it is generally neither necessary nor appropriate for the firm searched to be given a hearing before the warrant is issued or the search is conducted. The rationale for the necessity of moving an application for search and seizure without prior notice is captured in **Janse Van Rensburg v Minister of Trade and Industry**[3] the court explained thus:

"[22] Section 8(5) (a) was designed to protect the public by giving the Minister the power to stay business practices and to attach assets or prevent their being dealt with. These powers ensure that, during the period of investigation by the committee, the person subject to that investigation are prevented from continuing the allegedly unfair practices and alienating or hiding assets in order to defeat the prospective claims by or on behalf of members of the public. The purpose is to protect the

---

[2] Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 *(2) SA 385 (SCA*

[3] Janse van Rensburg NO v Minister 2001 (1) SA 29 at 40

possible victims of any unfair business practice. By its very nature, it must be an urgent incisive procedure if it is to have the desired effect. If notice is given to the person or persons against whom the section is to operate, the purpose of the action under the section will more than likely be frustrated. It follows that, if the section were to be read as requiring the hearings referred to by counsel for the Minister, the whole purpose of the provision would be defeated."

[42] Recently, the court in **Farmer's Trust v Competition Commission of South Africa**[4] reaffirmed this principle and said that:

"[30] Counsel for the Commission argued that the Act seems to keep the bar low for the attaining of the warrant of arrest as this step is merely one of the starting points of the investigative process. This makes perfect sense in the context of the investigation into the possibility of prohibited practices which the Act seeks to prevent. Despite Farmer's Trust protestations against the fact that it was not given notice or be given an opportunity to be heard such a notice is not required.

. . .

[39] From the aforesaid it would seem to me certain principles evolved that should be kept in mind when the investigative processes are considered:

(a) Although a Respondent may be obliged to give evidence under oath, be subjected to hearing and be required to submit its business affairs and documentation to public scrutiny it was found that its rights are not affected in any

[4] Farmer's Trust v Competition Commission of South Africa (20188/17)[2017] ZAGPPHC 488 (11 May 2017)

sense. The decision to investigate and the process of the investigation do not adversely affect the rights of a Respondent that has a direct and external legal effect.

(b) The nature of an investigation requires that the Commission be given access to documents, without the suspected firm being given prior warning in order to prevent interference with the investigative process and possible destruction of evidence; and

(c) A suspect firm will be able to exercise its rights including the right to be heard in the event of the Commission issuing a notice of referral.

[40] It is not a forgone conclusion that a notice of referral will be issued. The Commission may, upon conclusion of its investigation, issue a certificate of non-referral. Farmer's Trust will have a full opportunity to view all the documents upon which the Commission will rely, access witness statements, hear witnesses, cross-examine witnesses, lead evidence and make submissions.

[41] The Act aims to serve the greater good and it is self-evident that in order to be able to do so the Commission must be able to investigate a complaint properly. It will be counter-productive if the Commission is required to inform a party about the possibility of a search and seizure as it will defeat the purpose of an investigation. Under these circumstances it is justifiable that a suspected firm is not given notice of the application in terms of section 46. If however it would turn out that the investigation was vexatious or brought in ill-faith a suspected firm may in due course be able to avail itself of any legal remedy available to it, to address any damages that it may have suffered.

[42] In the light of the aforesaid, Farmer's Trust can't succeed on the merits."

[43] To this end, the Commission in the matter at hand explained thus:

"The Commission suspects that the outcome in these investigations could be compromised if the Commission attempted to confront the respondents or notify them they are being investigated for their alleged role in the cartel conduct. The circumstances of this case in particular give rise to a reasonable apprehension that giving the respondents the notice of the application could afford them the opportunity to conceal or destroy any evidence of engagement in cartel conduct."

Accordingly, I am of the view that the Commission was, based on the facts elicited before the judge a quo, entitled to apply for relief on an *ex parte* basis, notwithstanding the inroads into the rights of Whip Fire. Whether sufficient facts justifying the order were placed before the judge a quo is another question.

[44] The applicant states that the Commission failed to put up an initiation document when it filed its *ex parte* application. According to it, the Commission ought to have initiated a complaint by filing a CC1 form. The upshot of Whip Fire's contention is that in the absence of a CC 1 form, the court cannot tell if there has been a valid initiation, and accordingly on this basis alone, the warrant should be set aside.

[45] For the sake of completeness, I deem it necessary to outline the information that must be furnished in Form CC1, namely:

1. Name of the person submitting the complaint;

2. Name of the person against whom the complaint is made;

3. Nature of the conduct that is the subject matter of the complaint and the parties involved, dates on which the conduct allegedly occurred, as well as the date on which the complainant became aware of the conduct and whether it is still continuing.

After completion of the Form, the complainant is directed to attach the form to any relevant documents, as well as a typed statement describing the conduct that is the subject of the complaint.

[46] The Commission strenuously argued that the Competition Act does not require that it completes a CC1 form. The Commission relied on *A Practical Guide to the South African Competition Act* at p 360 – where it is stated:

> "Can the Competition Commission commence its investigation without having formally initiated a complaint?

> The Competition Commission need not commence its investigative process by formally completing a Form CC 1 initiation statement. It may commence its investigation on the basis of information submitted by an informant, or information collated from market inquiries and other documents uncovered through an unrelated or related investigation. All that is required is that it makes a decision to open a case and that it has reasonable grounds for doing so."

In a similar vein, *Sutherland and Kemp* explain thus:

> "The Act does not specify that the Commission must document the initiation of a complaint or notify the parties concerned when a complaint is initiated. However, in practice, the Commission seems to initiate a complaint by way of an initiation statement in Form CC1, and to send the cover page of Form CC1 to the firms concerned as notification of the initiated complaint. In view of the statements by the Supreme Court of Appeal in *Woodlands*, it would now be prudent for the Commission to document the particulars of the complaint initiation, including the names of the entities concerned, the provisions of the Act they are suspected of contravening; and the information upon which the Commission founds its reasonable suspicion."

[47] I consider the applicant's argument that the Commission was obliged to annex a copy of form CC1 to its ex parte application unmeritorious. First, it is common cause that the complaint in the present matter was initiated by the Commission in terms of section 49 B (1). That being the case, no formal or substantive prerequisites for the valid initiation of a complaint are set out in the aforesaid section. Second, all

that is required is that the complaint must contain sufficient particularity in respect of the conduct it concerns.[5] Furthermore, in **Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others**[6] the court explained the substance of the judicial process envisaged in section 46 (1) and said the following:

"...

Thus the Commission first approached the Court by Notice of Motion, through its Registrar, in order to go before a judge, in the normal way. The Judge would then have weighed up the information placed before him in his official capacity on oath or affirmation, in order to decide whether there were reasonable grounds to believe in the existence of the jurisdictional facts set out in the subsection. In the course of exercising his discretion he would no doubt have had regard to the relative degrees of prejudice to the applicant for the warrant, which represented the public, if he should refuse a warrant yet in truth its suspicions are well-founded, or to the respondent if it should emerge that the belief on which its issuance was based was ill-founded. Apart from reaching a decision on the merits of the application the Judge also made decisions such as that the matter could be brought ex parte, that it could be heard in camera and that its order should not be made public"

[48] It is abundantly clear from the aforegoing that it is not a requirement that the Form CC1 should be placed before a judge determining a search and seizure application.

---

[5] See Competition Law of South Africa, Sutherland and Kemp, LexisNexis
[6] Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA)

In addition, the court in **Competition Commission v Yara**[7] extensively dealt with complaint procedure and held that the initiation of a complaint by Commissioner in terms of s 49B (1) can be informal and even tacit. The court's judgment clearly shows that Whip Fire's reliance on *Netstar* cannot be sustained. It said the following:

> "[21] A vital consideration in evaluating the cogency of the CAC's equation of the two complaint forms, is that with regard to formalities, the legislature draws a clear distinction between a complaint initiated by the Commission (in terms of s 49B(1)) and a complaint submitted by a private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former. Taken literally 'initiating a complaint' appears to be an awkward concept. The Commission does not really 'initiate' or start a complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B (1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the

[7] Competition Commission of South Africa v Yara (South Africa) (Pty) (Ltd) and Others 2013 (60 SA 404 (SCA)

sake of good order and certainty that would be so. But it is not a requirement of the Act.

[22] The CAC's equation of the two forms of complaints gave rise to its further insistence that in both instances the complaint should contain sufficient information so as to enable the target of the complaint to respond. That appears from the next para 27 of the Netstar judgment which reads:

> *What is required is that the conduct said to contravene the Act must be expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is, and be able to prepare to meet and rebut it. It is true that the competition issues upon which the tribunal is called to adjudicate may be broader, more general and less clear-cut than those that arise in a conventional civil case in the High Court. That does not mean, however, that broad and unspecific generalities should take the place of a properly articulated complaint before the tribunal to which the target of the complaint can respond.'*

[23] The motivation that the complaint – whether submitted by a complainant or initiated by the Commission – must express the conduct said to contravene the Act with sufficient clarity for the party against whom the allegations are made to know what the charge is, and be able to rebut it, was expanded upon by the CAC in the later case of Loungefoam (Pty) Ltd v Competition Commission and others [2011] 1 CPLR 19 (CAC) para 53. In this case it added a further rationale for the requirement by saying (in para 49):

> *'[I]t affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act.'*

[24] But as I see it, the CAC's motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA) para 17, which in turn relies on statements in the decision of the Tribunal in Novartis SA (Pty) Ltd v Competition Commission (CT22/CR/B Jun 01 paras 35-61). What these statements of Novartis make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case."

[49] For all these reasons, it is therefore my judgment that the Commission is not required to put up the initiation form CC1 when applying for search and seizure warrant.

[50] I now turn to consider the allegation that the integrity of the search, more particularly, the copying of the documents is not forensically sound.

The integrity of the search

[451] The Applicant's attack on the integrity of the search conducted by the second respondent is largely premised on the expert report filed by Mr Pederson. Mr Pederson is a forensic investigator and head of digital forensics of a close corporation he owns. The principles governing the admission and evaluation of expert evidence are restated in **Schneider NO v AA 2010 (5) SA 203 (WCC)** at 211 E as follows:

> "In this connection it is necessary to deal with the role of an expert. In Zeffertt, Paizes, & Skeen The South African Law of Evidence at 330, the learned authors, citing the English judgment of National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68, set out the duties of an expert witness thus:

'1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in matters within his expertise . . . . An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise for the purposes of that particular case. An expert does

not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

A court will accept evidence of a witness if, and when it is satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'. In **Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA)** at [37] at paragraph 36, the court said that:

"[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning."

Similarly, in **Coopers (South Africa) Pty Ltd v Deutsche Gesellschaft fur Schädlingsbekämpfung mbH** 1976 (3) SA 352 the court said the following:

"[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which was either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real substance. A proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, is disclosed by the expert."

[52] As earlier alluded to, the applicant assails the chain of evidence acquired by the second respondent, Exactech, based on the opinion proffered by Mr Pederson to the effect that the manner of acquisition is forensically unsound. The difficulty I have Mr Pederson's evidence is that is that he has omitted to set out with clarity the industry norms and standards and their bases, against which he measured the acquisition phase. Mr Pederson does of course state that:

"Best practice within the field of Digital Forensic Investigation is understood within the industry that an auditable chain of custody from incidence response through analysis is required.

The chain of custody should note as much detail as required to be definitive, the serial number(s) and equipment description being imaged. The chain of custody is equally required to exhaustively show the movement of the evidence from the moment it is acquired through to secured storage and ultimately analysis. For this reason, a large degree of emphasis is placed on accuracy, signature and counter signature of all documentation as well as annotations of any peculiarities relative to the imaging process."

The above words signify very little without a clear explanation of the applicable industry norms and standards. Furthermore, Mr Pederson states that it is unclear which method was used to create cellphone images of cellular handsets even though the method itself is acceptable, he concludes that:

"I am unable from the documentation to establish whether a full image was created of the server or if selected files were copied it would be prudent to examine method in which files were copied if this is the case in order to ensure their forensic integrity."

I find it incomprehensible that in order to ensure the forensic integrity of the copied files, there must be an examination of the method of the copying of the files, yet the definite conclusion is that *"the exhibits were acquired outside of an auditable chain of custody of process."* I am in the circumstances not satisfied that Mr Pederson's opinions are founded on logical reasoning, and as such, they fall to be disregarded.

[53] With regard to the appointment of inspectors, it remains to be said that attached to the order issued Davis J, is a list of names of inspectors appointed in terms of sectionm24 of the Competition Act. Their appointment certificates, according to the Commission were attached to the ex parte application. There therefore cannot be any doubt that they were appointed in terms of the Act. As to the independence of the Second Respondent, Mr El Antonio Pooe, the CEO of Exactech filed an affidavit explaining that the latter is an independent private company which renders forensic IT services to a multitude of private and public institutions in and outside the Republic of South Africa. This version is uncontroverted. It follows that the applicant's attack of the appointment of inspectors and their independence is unfounded

Did the Commission establish anti-competitive conduct?

[54] I have already indicated in this judgment that one of the grounds upon which Whip Fire assails the granting of the search and seizure warrant is that the Commission's case for anti-competitive behaviour is vague and baseless. It will be recalled that the Commission's main basis of complaint is that ASIB's rules constitute an agreement to engage in anticompetitive behaviour between the competitors in the market – these are thus horizontal practices that have an anti-competitive effect. It was argued on behalf of WHIP Fire that ASIB's rules are not devised by its members: they are devised by ASIB and imposed on its members. The conduct complained of therefore is that of ASIB imposing its position as regulatory body. It is thus apparent, so goes the argument, that the Commission's complaint is that ASIB (not its members) excludes people from the market and that its rules have that effect *coupled* with the insistence by the insurance companies that participants in the industry be ASIB accredited. Furthermore, so goes the argument, the Commission's assertion that mere *membership* of ASIB is enough to provide a reasonable basis for suspecting that its members are taking part in anti-competitive practices is unsound as mere membership of a trade association is no evidence of wrong-doing.

[55] Of course, mere membership of a trade association cannot, on its own found a basis for participation in anti-competitive practices. Context of the practice alleged to be anti-competitive is important. The answer to this question necessitates an evaluation of the complaint lodged by the Commission. I deem it prudent to restate the provisions of the Act relating to anti-competitive conduct.

[56] Section 4 provides that:

"(1) An agreement between or concerted practice by, firms, or a decision by an association of firms is prohibited if it is between parties in a horizontal relationship and if ---

(a) . .

(b) It involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories or specific type of goods or services."

Section 5 states as follows:

"5 Restrictive vertical practices prohibited.-

(1) An *agreement* between parties in a *vertical relationship* is prohibited if it has the effect substantially preventing or lessening completion in a market, unless a party to the market can prove that any technological, efficiency or

other pro-competitive, gain resulting from that *agreement* outweighs that effect."

Sutherland and Kemp[8] explain horizontal practices thus:

"Restrictive horizontal practices occur where competitors co-operate rather than compete. They constitute archetypal anti-competitive acts."

[57] The Commission alleged that Whip Fire, as well as other respondents in the *ex parte* application entered into agreements with other firms and ASIB in a bid to prohibit competition by engaging in market division. The Act defines 'agreement' thus:

"'agreement', when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable."

[58] In **Netstar**[9] the Competition Appeal Court considered the definition of 'agreement' and stated that:

"[25] By contrast, an agreement arises from the actions and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have reached some kind of consensus. No

[8] supra
[9] Supra note 4 para 25

doubt in many cases, the same evidence may be relied upon as pointing towards either an agreement or a concerted practice. However, sight should not be lost of the fact that they are different. The definition of an agreement extends the concept beyond a contractual agreement. However, what it requires is some form of arrangement that the parties regard as binding upon both themselves and the other parties to the agreement. Absent such an arrangement there is no agreement even in the more extended sense embodied in the definition."

[59] Similarly, in Competition **Commission v Pioneer Foods (Pty (Ltd)** Cases 15/CR/Feb07 and 50/CR/May 08, the Tribunal concluded that an entity must verbally object when a competitor suggests or invites it to engage in prohibited conduct. It said:

"[The Court of First Instance] in Trefileurope v Commission also held that an undertaking does not abide by the outcome of meetings which have manifestly anti-competitive purpose does not relieve it of full responsibility for its participation in the cartel, if it has not publicly distanced itself from what was agreed in the meetings."

To the extent that it is necessary, I should add that the basic rationale of European law, that passive participation without some indication that the firm in question distances itself from the arrangement, is not incongruent with the principle in our common law that silence may amount to acceptance of an offer where there is a duty to speak. See Christie The Law *of Contract in South Africa (6"* ed) at 70 and the

authorities cited therein. The duty to speak exists, in this context, in order to reject participation in the most egregious of anti-competitive forms of behaviour.

[60] It was contended on behalf of the Commission that its main complaint is that competitors in the same market (including ASIB) appear to have agreed not to compete with ASIB. The Commission's case against the Applicant is largely premised on it being a member of ASIB and therefore being part of the rules resulting in the suspected anti-competitive behaviour, more particularly, the division of the market. In the ex parte application, the Commission defined the market squarely as follows:

> "The Respondents are involved in the supply, installation and maintenance of fire control and protection systems. They also compete in the provision of inspection services for fire control and protection systems. The Respondents are therefore parties in a horizontal relationship as contemplated in section 4(1) read together with section 1 (1)(xiii) of the Act. The First to the Twenty-Fourth Respondents are all members of ASIB. Similarly therefore, ASIB is also an association of firms in a horizontal relationship as contemplated in section 4(1) of the Act."

[61] The nub of the Commission's complaint is the market division allegedly agreed to between the Applicant and ASIB. According to the Commission, while the respondents to the ex parte application could or

should compete in, *inter alia*, providing "inspection" services for fire control and protection services, in practice these are in terms of the agreement between the parties, reserved for ASIB. This is evident from a letter from ASIB to Associated Fire Natal Pty Ltd which reads thus:

> "We do not accept any sprinkler company offering an inspection service. We are privy to some letters that have been issued by certain companies to our mutual clients. This means that the company offering this service, thinly disguised usually as a "maintenance" or a "service" contract is effectively in competition with this company. We have no intention opposition companies to the ASIB. Should this come to light during the year of registration, the company will be removed from out list and we will circulate our client list accordingly."

The reservation of the inspection market by ASIB for itself is in my view, the direct result of a horizontal market as argued by counsel for the Commission.

[62] Flowing from the above discussion, it can be easily discerned that the Commission has met the threshold set out in the Competition Act, namely, that the information on oath clearly shows that there were reasonable grounds to believe that a prohibited practice has taken place or is likely to take place in the premises of the applicant. In my view, the allegations made by the Commission in the founding affidavit, as

correctly argued by counsel for the Commission, show that by virtue of Whip Fire's membership of ASIB, Whip Fire may be guilty of anti-competitive practice. This is so because Whip Fire did not distance itself from. and can be deemed to have knowingly consented to the conduct of ASIB as the rule below demonstrates:

"We do not accept any sprinkler company offering an inspection service. We are privy to some letters that have been issued by certain companies to our mutual clients. This means that the company offering this service, thinly disguised usually as "maintenance" or "a service" is effectively in completion with [ASIB]. Should this come to light during the year of registration, the company will be removed from [our] list and we will circulate our client list accordingly."

It continues:

"An installer who 'declares' that the installation is in complete compliance with the rules without an inspection [by only ASIB], or issues any form of 'certification' to a client is effectively reducing this industry to what will become a competition market whereby the lowest standard will prevail and ultimately fixed fire protection will open to any backyard operation [that is, any operation that is not certified by ASIB]."

It is my judgment that the allegations made by the Commission are sufficient to give rise to a reasonable suspicion that the Applicant and the ASIB are in a horizontal relationship. In the result, I hold that the

Commission has made out a case for a reasonable suspicion of wrong-doing on the horizontal level.

The vertical and horizontal relationship between the parties

[63] Notwithstanding finding that the Commission made out a proper case for a reasonable suspicion that the Applicant was engaged in anticompetitive behaviour on a horizontal level, I must still determine the vertical relationship between the parties. This is so because according to the Applicant, the restrictive practice complained of by the Commission, is a vertical restrictive practice not a horizontal one. That being the case, so contended the Applicant, the court could not determine the search and seizure application on the basis that an investigation into a horizontal practice as contemplated by section 4(1)(b) of the Act had been initiated. Therefore the requisite jurisdictional fact for a warrant based section 4(1) (b) of the Act, namely a restrictive horizontal practice was absent and for that reason the order issued by Davis J, should be set aside. According to the argument, the Commission's case because had been unalterably set by its initiating document, the CC 1 form. In the circumstances, only course open to the Commission would be to initiate a fresh investigation.

[64] The Applicant placed reliance for the above contention on **Netstar (Pty) Ltd v Competition Commission**[10] where the court held that:

'. . . . [I]t is necessary once again to emphasize that the Tribunal is not at large to decide whether conduct is anti-competitive and then to formulate reasons for that finding. It is . . . . bound to apply the Act and engage with the issues as they arise from a proper construction of the Act's provisions. It does so in the light of a specific complaint that has been referred to it for determination and its only function is to determine whether in the light of the Act's provisions and the evidence placed before it or obtained by it pursuant to the exercise of its inquisitorial powers, that complaint is made out.'

[65] My difficulty with the Applicant's contention, first, is that the Act is very clear of the threshold that must be met by the Commission at this stage of the investigation. In terms of section 46, there need only be reasonable grounds to believe that a prohibited practice has taken place, is taking place, or is likely to take place, on or in those premises and that anything connected with an investigation in terms of the Act is in the possession of, or under the control of a person who is on or in those premises. I have already held that the Commission plainly has made out a case in its founding papers to justify a reasonable suspicion. In essence, that should be the end of the matter. Second, the Applicant's reliance on the reliance on the reasoning in **Netstar** is apposite in the

[10] *Netstar (Pty) Ltd v Competition Commission SA* (99/CAC/May 10) [2011] ZACAC 1 (15 February 2011) para 61.

light of the fact that same was overturned by the Supreme Court of Appeal in **Yara**. Third, **Netstar** was not dealing with the question of reconsidering the issuing of a warrant, it dealt with an exception – which applies post-referral. The present application is concerned with the preliminary investigative stage of anti-competitive behaviour. It may well be that they may not even be a referral. Fourth, it is common cause that the complaint in this case was initiated by the Commissioner, and not by a complainant – and accordingly Whip Fire's argument premised on **Netstar** is of no relevance to this application. However, for the sake of completeness, I turn to evaluate why in my view, the Applicant's insistence that the characterisation of the relationship between the parties is at this pre-referral stage, unsound.

[66] In ***Yara***, the Court explained the referral rule in relation to the complaint thus:

> [21] A vital consideration in evaluating the cogency of the CAC's equation of the two complaint forms, is that with regard to formalities, the legislature draws a clear distinction between a complaint initiated by the Commission (in terms of s 49B(1)) and a complaint submitted by a private person (in terms of s 49B(2)(b)). While the latter has to be in the 'prescribed form', no formalities are prescribed for the former. Taken literally 'initiating a complaint' appears to be an awkward concept. The Commission does not really 'initiate' or start a

complaint. What it does is to start a process by directing an investigation, which process may lead to the referral of that complaint to the Tribunal. And it can clearly do so on the basis of information submitted by an informant, like Mrs Malherbe in the Glaxo case; or because of what it gathers from media reports; or because of what it discovers during the course of an investigation into a different complaint and/or against a different respondent. Since no formalities are required, s 49B(1) seems to demand no more than a decision by the Commission to open a case. That decision can be informal. It can also be tacit. In argument, counsel for Omnia informed us that, in practice, the initiation usually takes the form of a memorandum. I have no doubt that for the sake of good order and certainty that would be so. But it is not a requirement of the Act.

[23] The motivation that the complaint – whether submitted by a complainant or initiated by the Commission – must express the conduct said to contravene the Act with sufficient clarity for the party against whom the allegations are made to know what the charge is, and be able to rebut it, was expanded upon by the CAC in the latter case of Loungefoam (Pty) Ltd v Competition Commission and others [2011] 1 CPLR 19 (CAC) para 53. In this case it added a further rationale for the requirement by saying (in para 49):

> '[I]t affords the firm that is the target of the investigation an opportunity to engage with the Commission, dispel its concerns and demonstrate that it has not engaged in conduct prohibited by the Act.'

[24] But as I see it, the CAC's motivation conflates the requirements of an initiating complaint and a referral and misses the whole purpose of an initiating complaint. In fact, it is in direct conflict with the judgment of this court in Simelane NO v Seven-Eleven Corporation SA (Pty) Ltd 2003 (3) SA 64 (SCA) para 17, which in turn relies on statements in the decision of the Tribunal in Novartis SA (Pty) Ltd v Competition Commission (CT22/CR/B Jun 01 paras 35-61). What these statements of Novartis make plain is that the purpose of the initiating complaint is to trigger an investigation which might eventually lead to a referral. It is merely the preliminary step of a process that does not affect the respondent's rights. Conversely stated, the purpose of an initiating complaint, and the investigation that follows upon it, is not to offer the suspect firm an opportunity to put its case. The Commission is not even required to give notice of the complaint and of its investigation to the suspect. Least of all is the Commission required to engage with the suspect on the question whether its suspicions are justified. The principles of administrative justice are observed in the referral and the hearing before the Tribunal. That is when the suspect firm becomes entitled to put its side of the case.

[25] Not unexpectedly, the formalism insisted upon by the CAC gave rise to difficulty where the investigation following upon a complaint revealed some anti-competitive conduct other than that objected to in the original complaint, as in fact happened in this case. The panacea proposed in Loungefoam (para 48) is for the Commission 'to amend the original complaint initiation, institute an investigation (however cursory) and then refer this complaint . . . to the Tribunal . . .'. But in the judgment of the CAC in the present case it specifically

held (in para 39) that there is no provision in the Act or the rules of the Tribunal for amendment of a complaint. With regard to a complaint submitted by a private person this must clearly be so. I cannot see how the Commission can amend the complaint submitted by another. But it seems equally clear that the same position does not necessarily prevail with regard to complaints initiated by the Commission.

. . .

[27] The proposition relied upon in Netstar (para 26) in support of the referral rule, that the Tribunal's jurisdiction is confined to a consideration of the complaint formulated in the referral and that the terms of that complaint are likewise constrained by the terms of the complaint as initiated by the Commission, are in conflict with the judgment of the Constitutional Court in Competition Commission of South Africa v Senwes Ltd 2012 (7) BCLR 667 (CC). In Senwes the Constitutional Court held that the Tribunal was not precluded from determining a complaint not covered by the referral. It found that, although the Tribunal cannot initiate a hearing, 'this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral' (para 48). If the Tribunal may consider a complaint not raised in the referral it must follow, a fortiori, in my view, that a referral is not confined to the parameters of the original complaint. Senwes thus appears to be wholly destructive of the CAC's formulation of the referral rule.

[28] Once it is appreciated that the initiation by the Commission demands no more than an informal and even tacit decision to set the process in motion, it becomes apparent that the enquiry into whether or not the Commission can

> introduce a new complaint by amending a complaint initiated by itself, is inappropriate. All the Commission has to do is to decide to initiate a new complaint, to investigate that complaint and, if appropriate, refer that complaint to the Tribunal. If the Commission already has enough information to warrant a referral, the intervening investigation can be quite cursory, as envisaged by the CAC in Loungefoam. What also seems clear to me, is that the concept of an informal initiation – by way of a decision to open a case – leaves no room for the referral rule as applied by the CAC. To demand that the referral corresponds with the contents of the complaint simply makes no sense if the complaint, as initiated, consists of nothing more than an informal decision to investigate.

[67] It is plain from the **Yara** judgment that the whole purpose of initiating a complaint is to trigger an investigation. An investigation may reveal whether the relationship between the parties investigated is horizontal or vertical. Should it become necessary, the Commission might well initiate various other investigations in order to incorporate vertical practices or include other respondents or include other horizontal practices and then at that stage it may refer all of those practices to the Tribunal. Accordingly, Whip Fire's insistence that the relationship with ASIB be characterised at the investigation stage is premature. Such a contention is justified neither by the Act nor by **Yara**. The bottom line is that the Commission has expressly relied upon horizontal practices in the founding affidavit. As correctly argued by counsel for the Commission,

even if Whip Fire's characterisation were correct – following the clear guidance in the ***Yara*** case, it would not justify the setting aside of the warrant. It is always open to the Commission to initiate a further complaint against the insurers at a later stage should it wish to tackle any difficulties at the vertical level as well as the difficulties at the horizontal level.

[68] It will be recalled that the Applicant in prayer 5 of its notice of motion sought.a temporary order pending the outcome of the reconsideration and deletion of the Davis Order interdicting the processing of electronic data collected by the second respondent from the applicant's premises on 1 August 2017. I did not issue an order for the granting of such relief because in my view, no proper case had been made out. This is so because an interim order against the exercise of statutory functions, as is the case in the matter at hand will only be granted in the *"clearest of cases".*[11] In OUTA[12] Masoneke DCJ restated the applicable test thus:

> "43. A little less than 40 years before the advent of our Constitution, in *Gool*,[31] a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the Minister *pendente lite* from exercising certain

[11] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)
[12] Ibid

powers vested in him by a statute. Ogilvie Thompson J, writing for a unanimous Court, considered the requirements for an interim restraining order announced in *Setlogelo* and said the following:

> "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the Court does not readily grant such an interdict."[32]

And later the learned Judge observed:

> "The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief.
>
> I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that *jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief."*

Masoneke DJC further cautioned that:

> "A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against

an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict."

[69] In the present matter the following is undisputed:

69.1 The Commission, in carrying out the search and seizure processes, was performing its functions under the Competition Act.

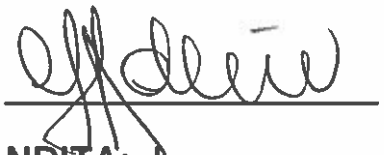
69.2 In doing so, the Commission was also acting on behalf of the public and in the public's interest in investigating alleged prohibited practices under the Competition Act. This is so because the negative impact of cartels on the public is substantial – they deprive consumers of the benefit of competition between the participants in that market.

[70] In my view, the Applicant failed to place any facts from which it could be concluded that an interdict justifying the restraining of statutory power is justified. Similarly, with regard to the rest of the relief that was sought by the Applicant, it is clear from the aforegoing reasons that the requirements for a final interdict have not been satisfied in that the applicant did not show that it has a clear right, neither has it demonstrated absence of alternative remedy.

CONCLUSION

[71] I have in this judgment held that applicant has failed to establish its entitlement to the relief sought in the notice of motion. In the result, the following order will issue:

The applicant's application is dismissed with costs, including the costs of two counsel.



NDITA: J