REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-ACT-OTH-2021/03064**

In the matter between:

NAMIBIAN COMPETITION COMMISSION	**PLAINTIFF**

and

SANTAM NAMIBIA LIMITED	**1st DEFENDANT**
HOLLARD INSURANCE COMPANY OF NAMIBIA LTD	**2nd DEFENDANT**
OLD MUTUAL SHORT-TERM INSURANCE COMPANY LTD	**3rd DEFENDANT**
MOMENTUM SHORT-TERM INSURANCE COMPANY LTD	**4th DEFENDANT**
GREG'S MOTOR SPARES (PTY) LTD	**5th DEFENDANT**
PG GLASS NAMIBIA (PTY) LTD	**6th DEFENDANT**
PERFECT GLASS CC	**7th DEFENDANT**

Neutral citation *Namibian Competition Commission v Santam Namibia Ltd* (HC-MD-CIV-ACT-OTH-2021/03064) [2022] NAHCMD 433 (24 August 2022)

Coram Schimming-Chase J

Heard **21 July 2022**

Delivered **24 August 2022**

Flynote Practice – Pleadings – Exception – On ground that particulars of claim do not disclose a cause of action – Allegations in pleading must be taken as correct – Pleading only excipiable if no possible evidence led on pleadings could disclose a cause of action – Particulars of claim setting out material facts disclosing cause of action – Exception dismissed.

Practice – Pleadings – Notice to strike – Governed separately by rule 58 – The paragraph(s) of the pleadings objected to, as well as the grounds for the objection should be stated in the notice. Notice to strike accordingly struck from the roll.

Legislation – Competition Act, 2 of 2033 – Section 53 – It is the responsibility of the Competition Commission to approach the court for a pecuniary penalty to be imposed – In meeting a pecuniary penalty the court is afforded a wide latitude not exceeding 10% of the global turnover of the undertaking concerned, based on its financial statements for the previous financial year – The legislation does not enjoin the Commission to prescribe or suggest what a penalty should be in these circumstances.

Summary The Namibian Competition Commission instituted action against a number of defendants for *inter alia* declaratory and interdictory relief, as well as the imposition of a pecuniary penalty in terms of the provisions of the Competition Act, 2 of 2003 ("the Act"). The particulars of claim were excepted to on the grounds that no cause of action was disclosed, due to the absence of detail required by s 36, 37, 38 and 53 of the Act. Additionally the excipients in the body of the exception, raised a 'strike' out, alleging that certain paragraphs of the particulars of claim were irrelevant, alternatively vexatious and prejudicial and should be struck out.

Held, the test for exceptions on the basis that the particulars of claim do not disclose a cause of action, is that the exception must be decided on the basis that the facts alleged in the claim are true and correct and that the pleading is excipiable upon every interpretation which the pleading can reasonably bear.

Held, the particulars of claim disclose a cause of action and compliance (for purposes of the allegations contained in the claim against the defendants) with the principles embodied in the Act.

Held further, it is not for the Commission to plead or suggest what amount the pecuniary penalty sought to be imposed by the court should be. This is a decision for the court to make in terms of the Act, having regard to the nature and circumstances attendant to the matter before it after all relevant evidence is led.

Held further, applications to strike are governed by rule 58, and not rule 57. The notice to strike brought within the body of an exception that the claim discloses no cause of action, and not containing a single ground in support of the allegation that the paragraph(s) in question are vexatious, irrelevant or scandalous is improper and falls to be struck from the roll.

ORDER

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[1] The exceptions are dismissed with costs, such costs to include the costs of one instructing and two instructed counsel, and not limited to the amount contained in rule 32(11).

1. The ‘strike out’ is struck from the roll with costs, such costs to include the costs of one instructing and two instructed counsel, and not limited to the amount contained in rule 32(11).

2. The matter is postponed to 26 September 2022 at 15h30 for a case planning conference.

3. The parties are directed to file a joint case plan on or before 21 September 2022.

JUDGMENT

SCHIMMING-CHASE, J

Introduction

[2] The exception raised in this action concerns in essence the application and/or interpretation of certain provisions of the Competition Act, 2 of 2003 ("the Act") and the Rules made under the Competition Act 2003 ("the Rules").[1] In addition to the exception, a motion to strike out certain paragraphs in particulars of claim, also falls to be considered.

[3] The plaintiff is the Namibian Competition Commission ("the Commission"),[2] a juristic person established in terms of s 4 of the Act.

[4] The Commission instituted action against seven defendants for *inter alia* the imposition of a pecuniary penalty on six of the defendants for alleged anti-competitive conduct in contravention of the Act.

[5] The first to fourth defendants cited in this action are duly incorporated short-term insurance companies (collectively referred to as the "insurance companies" where applicable). The insurance companies offer and provide short term insurance policies to their customers (policyholders) in Namibia, which policies *inter alia* insure policyholders against the risk of damage or destruction to insured automotive windscreens.

[6] The fifth to seventh[3] defendants are duly registered Namibian commercial legal entities that conduct business as windscreen retailers (collectively referred to as the "contracted windscreen retailers" where applicable) in Namibia. The contracted

[1] Rules made under the Competition Act, 2 of 2003, Government Gazette 41 of 2008 dated 3 March 2008.

[2] Hereinafter referred to as "the Commission", or "the plaintiff", interchangeably.

[3] No relief is sought against the seventh defendant.

windscreen retailers sell automotive windscreens and provide the service of replacing automotive windscreens that have been damaged or destroyed. The contracted windscreen retailers are also providers of goods and services to the insurance companies, alternatively to the insurance companies' policyholders.

[7] The second and fourth defendants (Hollard Insurance Company of Namibia and Momentum Short-Term Insurance Company)[4], who comprise some of the insurance companies cited in this action, are the excipients in this exception.

The particulars of claim

[8] The particulars of claim (excluding annexures thereto) is 32 pages. The relief sought against the six defendants as a result of their alleged anticompetitive conduct (outlined below) is an order

(i) declaring that the first to sixth defendants have contravened s 23(1), alternatively s 23(1) read with s 23(2)*(b),* further alternatively s 23(1) read with s 23(3)*(e)* and/or s 23(3)*(f)* of the Act;

(ii) declaring such agreements between the first to sixth defendants as may still be in existence to be void;

(iii) interdicting the first to sixth defendants from engaging in such conduct in the future;

(iv) imposing an appropriate pecuniary penalty against the first to sixth defendants in terms of s 53(1)(*a*) of the Act, in an amount not exceeding 10% of each respective defendant's turnover during their preceding financial year.

[9] The proceedings were instituted in terms of s 33(8) of the Act pursuant to a complaint that was initiated by the Commission on 30 January 2017 against the first to third defendants and the fifth to seventh defendants, and on 14 March 2018 against the fourth defendant.

[4] Hereinafter referred to as 'Hollard' and 'Momentum' where applicable.

[10] The Commission subsequently investigated the allegations that exclusive distribution agreements as well as no-excess agreements exist between the insurance companies and the contracted windscreen retailers, in order to determine whether the alleged agreements contravene s 23(1), read with s 23(2*)(b),* s 23*(e)* and/or s 23(3)*(f)* of the Act, in that they amount to vertical agreements that limit or control production, market access or outlets, technical development or investment and/or entail the applying of dissimilar conditions to equivalent transactions with other trading parties, thereby placing other trading parties at a competitive disadvantage.

[11] These preferred or sole supplier agreements between the insurance companies and the contracted windscreen retailers were allegedly designed to discourage policy holders, alternatively resulted in, further alternatively contributed to policy holders being discouraged from having windscreen repairs done by their preferred suppliers.

[12] It is alleged that an arrangement that no excess fee will be payable, creates an incentive for policy holders to only have their vehicles' windscreens repaired by the contracted windscreen supplier concerned. It is further alleged that agreements that provided for the waiving of excess fees were designed to ensure, alternatively resulted in, further alternatively contribute to *de facto* exclusivity in favour of the contracted windscreen retailers concerned.

[13] As part of its investigation, the Commission duly issued a Form 4 Notice (i.e. a notice of proposed investigation) to each of the first to third and fifth to seventh defendants on 30 January 2017, and to the fourth defendant on 14 March 2018, as required by s 33(3) of the Act. Each of the defendants replied to the Form 4 Notice, after which the Commission conducted a 'full and further' investigation into their alleged anti-competitive conduct.

[14] On 10 July 2018, the Commission issued a notice of proposed decision ('the Form 6 Notice'), advising that the Commission proposed to make a finding that the defendants had contravened ss 23(1), 23(2*)(b)* and 23(3*)(f)* of the Act.

[15] It is alleged that the Form 6 Notice afforded the defendants and other affected

parties an opportunity to submit written representations to the Commission and invited them to indicate whether they wished to make representations in relation to the proposed decision at an oral conference. Each of the defendants availed themselves of their right in terms of s 36(2)(c)(i) of the Act to submit further written submissions to the Commission in respect of the Commission's proposed decision. The defendants also requested for an oral conference in terms of s 36(2*)(c)(*ii).

[16] After approving the establishment of a Committee for the oral conference proceedings in terms of s 37, an oral conference was held on 31 October 2018. The purpose of the oral conference was to permit each of the respective defendants to make oral representations as to why the Commission should not make its proposed decision final.

[17] After considering all the oral representations and written submissions made by each of the defendants, the Commission took a decision to endorse the finding that the defendants' conduct constitute contraventions of ss 23(1), 23(2*)(b),* 23(3)*(e)* and 23(3*) (f)* of the Act and that the Commission should proceed to initiate proceedings against the defendants in terms of s 38 of the Act for appropriate relief.

[18] On 18 December 2019, the Commission issued a Notice of Action to be taken under s 38 ('the Form 7 Notice'), advising the defendants that it planned to act in terms of s 38 of the Act, and provided reasons for the Commission's decision. The Form 7 Notice was duly published in Government Gazette No 529 of 2019 on 31 December 2019.

[19] The Commission alleged in the particulars of claim that it complied with all the procedural requirements that must be met before bringing the proceedings in terms of s 38 of the Act.

[20] The particulars of claim allege that the insurance companies and the contracted windscreen retailers concluded agreements within the contemplation of s 23(1) of the Act, with each other.

[21] It is further alleged that the Act does not require that a vertical (supplier-

customer) relationship must exist between the parties in order for the conduct to be prohibited in terms of the provisions of s 23(2).

[22] In the alternative, the insurance companies on the one hand and the contracted windscreen retailers on the other hand are parties in a vertical relationship that have concluded agreements within the contemplation of s 23(2)(b) of the Act with each other.

[23] In amplification of the above it is alleged that:

(a) the written agreements (attached and referred to in the particulars of claim) between the contracted windscreen retailers and the insurance companies describe the contracted windscreen retailers as 'suppliers';

(b) the contracted windscreen retailers are in fact suppliers of goods and services to the insurance companies, alternatively the insurance companies are responsible for defraying the costs of windscreen repairs in terms of the insurance policies with their policyholders and thus at the very least act as agents or middlemen between their policyholders and the contracted windscreen retailers;

(c) a business relationship exists between the insurance companies and the contracted windscreen retailers. As part of their business activities, the contracted windscreen retailers provide windscreen repairing services for vehicles, including those insured by insurance companies. The insurance companies on the other hand are involved in, *inter alia*, the defraying of costs for such repairs, and usually pay the contracted windscreen retailers directly for the goods and services provided;

(d) the contracted windscreen retailers and the insurance companies therefore each play a critical role in the vertical value chain relating to the supply of windscreens and related services.

[24] For purposes of the exception (raised by the second and fourth defendants) the agreements are alleged to have been concluded between *inter alia* the following

insurance companies and contracted windscreen retailers:

(a) the second and seventh defendants (Hollard and Perfect Glass CC);

(b) the second and sixth defendants (Hollard and PG Glass Namibia (Pty) Ltd);

(c) the fourth and fifth defendants (Momentum and Greg's Motor Spares (Pty) Ltd).

[25] These agreements:

(a) afforded the abovementioned contracted windscreen retailers preferential and/or sole distribution rights; and/or

(b) provided for a rebate system which allowed the insurance companies to receive rebates in return for having particular proportions of their business referred to a particular contracted windscreen retailer within a particular time period; and/or

(c) steered customers to the contracted windscreen retailers through the waiving of excess fees.

[26] In amplification of the above, the Commission alleges that the preferred or sole supplier agreements were concluded between *inter alia* the fourth and fifth defendants (Momentum and Greg's Motor Spares), in terms of which it was agreed that Greg's Motor Spares would be the preferred and/or sole supplier of windscreens to Momentum policyholders.

[27] These preferred or sole supplier agreements were designed to discourage policyholders, alternatively resulted in, further alternatively contributed to policyholders being discouraged, from having windscreen repairs done by their preferred repairers.

[28] Rebates[5] were agreed between *inter alia* the second and sixth defendants (Hollard and PG Glass Namibia), and between the second and seventh defendants (Hollard and Perfect Glass CC). In terms of these agreements, rebates were paid as a reward or incentive for the insurance company concerned remaining loyal to the contracted windscreen retailer. It is alleged that the agreements that provide for the payment of rebates were designed to ensure, alternatively resulted in, further alternatively contributed to, the channelling of business by the insurance companies to, and *de facto* exclusivity in favour of, the contracted windscreen retailers concerned.

[29] The fourth and fifth defendants (Momentum and Greg's Motor Spares) concluded agreements that provided that no excess, or excess fee[6], would be payable by a policyholder of the insurance company if the policyholder selected the contracted windscreen retailer to be responsible for the replacement and fitment of the windscreen on the policyholder's vehicle.

[30] The conclusion and terms of the second and sixth defendants (Hollard and PG Glass Namibia) agreement was pleaded thus: on 4 October 2016, at Windhoek, the second defendant, duly represented by Richard Aston, concluded a written Service Level Agreement with the sixth defendant duly represented by Conrad Coertzen, which came into effect on 1 October 2016.

[31] The agreement provides that the second defendant appointed the sixth defendant to replace goods and/or to provide services to policyholders, the second defendants' clients.

[32] In terms of that agreement, the second defendant agreed to appoint the sixth defendant to replace the goods and/or carry out the services on an exclusive basis, and in exchange for the provision of those goods and services, the second defendant agreed to remunerate the sixth defendant in accordance with the fees stipulated in the agreement. The parties further agreed that all quotations, invoices and goods replaced

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[5] In the context of this action, a rebate is a re-payment made by a contracted windscreen retailer to an insurance company in return for the latter referring policyholders to the retailer.

[6] The "excess" or "excess fee" is a contribution that a policyholder is ordinarily required to pay towards a claim, and when making a claim, on an insurance policy.

and/or services rendered by the sixth defendant to the second defendant must be in accordance with the fees contained in a schedule to the agreement.

[33] On 19 October 2016, the second defendant notified all brokers of its agreement with the sixth defendant and that no excess would apply in relation to SafeVue windscreens fitted by the sixth defendant for a motor claim. This notification was not withdrawn.

[34] In terms of the arrangement between the second and sixth defendants, alternatively in the implementation thereof, further alternatively when the sixth defendant sells and fits a SafeVue Glass windscreen to a policyholder of the second defendant, it waives the excess payable by the policyholder.

[35] On 12 April 2017, the second defendant unilaterally cancelled the written Service Level Agreement by giving 30 days' notice of termination to the sixth defendant. The second and sixth defendants continue to do business with each other, but without a written agreement.

[36] As regards the agreement concluded between the second and seventh defendants (Hollard and Perfect Glass), on or about 18 October 2016, at Windhoek, the second defendant duly represented by Richard Aston, concluded a written Service Level Agreement with the seventh defendant duly represented by Aidan Bates and Dries Duvenhage, which came into effect on 1 October 2016. A copy of the Service Level Agreement between the second and seventh defendants was attached to the particulars of claim.

[37] The terms of the agreement between the second and seventh defendants are materially the same as those contained in the agreement between the second and seventh defendants.

[38] On 12 April 2017, the second defendant unilaterally cancelled the Service Level Agreement by giving 30 days' notice of termination to the seventh defendant.

[39] As regards the fourth defendant’s agreement with the fifth defendant

(Momentum and Greg's Motor Spares), on or about 18 August 2016, at Windhoek, the fourth defendant duly represented by Peter Kawanab, concluded a written Memorandum of Agreement with the fifth defendant, duly represented by Frank Benjamin Snowden. This agreement was similarly attached to the particulars of claim and provides that the fifth defendant was appointed as the preferred supplier of goods and services to claimants of the fourth defendant. In exchange for the provision of the goods and services, the fourth defendant agreed to remunerate the fifth defendant in accordance with the rates, discounts and pricing contained in an annexure thereto.

[40] The parties agreed that they would accept each other's low average cost per claim pricing structure and in return would waive excess on Grandmark Glass Products fitted by the fifth defendant. In this regard, the fifth defendant agreed to waive all excess fees to their clients which fit Grandmark Glass supplied and fitted by the fifth defendant. All other glass supplied and fitted by the fifth defendant, the reason being, but not limited to, that Grandmark Glass is not available or the Client prefers another brand of glass, will attract the (standard) excess fees as stipulated in the fifth defendant's policy.

[41] The conduct of the defendants therefore concerns:

(a) the sale of aftermarket automotive windscreens to policyholders insured by the insurance companies;

(b) the service of the fitment of such windscreens to vehicles owned by policyholders and/or insured by the insurance companies;

(c) accordingly, the replacement of damaged or destroyed automotive windscreens by the contracted windscreen retailers; and

(d) the payment or reimbursement for these goods and services by the insurance companies to the benefit of their policyholders.

[42] As part of the Commission's claim, it is alleged that aftermarket (non-original) automotive windscreens are windscreens that are manufactured by undertakings that

are not contracted by the Original Equipment Manufacturer ("OEM"). Aftermarket automotive windscreens are as reliable as OEM windscreens and are less expensive.

[43] Once the owner of a vehicle (the policyholder) insures his or her or its vehicle with a specific insurance company, the policyholder is "locked in" and will utilise that specific insurer at the time of repair so as to defray the costs of the windscreen repair.

[44] The insurance companies notify policyholders, directly, or indirectly by notices addressed to their brokers, that they have appointed the contracted windscreen retailers as their preferred repairers.

[45] A policyholder is highly unlikely to opt to have their windscreens replaced by a windscreen retailer if the policyholder will have to pay more due to the fact that the insurance company might choose not to waive the excess in respect of the claim.

[46] There is no demand-side substitutability in that a policyholder would not likely choose to have his or her or its windscreen repaired at a non-contracted windscreen retailer. Under these arrangements, policyholders are induced, alternatively have an incentive, to use the insurers' preferred windscreen retailers. Accordingly, the relevant market is that for the sale of aftermarket automotive windscreens by windscreen retailers to, as well as their service of replacing damaged or destroyed windscreens for, insured clients in Namibia.

[47] The insurance companies (being the first to fourth defendants) together have contracted with almost 80% of all insured private clients and 97.9% of all insured commercial clients in Namibia. The contracted windscreen retailers together also account for the bulk of the revenue generated in the relevant market.

[48] It is alleged that prior to the conclusion of the agreements, there was more or less an equal distribution of business between all of the windscreen retailers. However, during the period 2012 to 2018, and as a consequence of the conclusion of the agreements referred to, there was a noticeable increase in the share of business allocated to the contracted windscreen retailers at the expense of the non-contracted windscreen retailers.

[49] The Commission alleges further that the agreements between the insurance companies and the contracted automotive windscreen retailers contravene s 23(1), alternatively s 23(1) read with s 23(2)(b), further alternatively s 23(1) read with s 23(3)(e) and/or 23(3)(f), of the Act, and avers that each of the agreements has as its object the prevention or substantial lessening of competition in trade in aftermarket automotive windscreens and/or related repair services to and for insured clients in Namibia, in that the purpose of the agreements is to:

(a) induce, alternatively incentivise, policyholders to procure windscreens and related replacement services from the contracted windscreen retailers;

(b) steer policyholders towards the contracted automotive windscreen retailers, and away from their competitors;

(c) create a stream of business from the insurance companies to the contracted windscreen retailers, to the disadvantage of the latter's competitors;

[50] limit market outlets and/or access for rivals of the contracted windscreen retailers as contemplated **in** terms of subs (3)(e) of the Act;

(d) limit market outlets and/or access for the manufacturers of windscreens other than those referred to in and covered by the agreements as contemplated in terms of subs (3)(e) of the Act;

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing competitors of the contracted windscreen retailers at a competitive disadvantage as contemplated in terms of subs (3)(f) of the Act; and

(f) apply dissimilar conditions to equivalent transactions with the manufacturers of windscreens other than those referred to in and

covered by the agreements, thereby placing these windscreen manufacturers at a competitive disadvantage as contemplated in terms of subs (3)(f) of the Act.

[51] In amplification, the plaintiff alleges that each of the agreements, alternatively the network of similar agreements between the insurance companies and the contracted windscreen retailers, has the effect of preventing or substantially lessening competition in trade in aftermarket automotive windscreens goods and/or related repair services to and for insured clients in Namibia, in that:

(a) competitors of the contracted windscreen retailers are substantially foreclosed from the relevant market;

[52] the choice of policyholders is limited and/or restricted to the use of contracted windscreen retailers;

(c) the choice of policyholders is limited and/or restricted to the windscreens that the contracted windscreen retailers are obligated to supply interms of the agreements;

(d) the agreements have been implemented regardless of whether the price of the windscreens and services of the contracted windscreen retailer is or was the cheapest;

(e) the agreements have and/or have had the effect of increasing the costs of both the insurance companies and their policyholders;

(f) market outlets and/or access for rivals of the contracted windscreen retailers have been limited, as contemplated in terms of subs (3)*(e)* of the Act;

(g) market outlets and/or access for the manufacturers of windscreens other than those referred to in and covered by the agreements have been limited, as contemplated in terms of subs (3)(e) of the Act;

(h) the agreements apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing competitors of the contracted windscreen retailers at a competitive disadvantage as contemplated in terms of subs (3)*(f)* of the Act;

(i) the agreements apply dissimilar conditions to equivalent transactions with the manufacturers of windscreens other than those referred to in and covered by the agreements, thereby placing these windscreen manufacturers at a competitive disadvantage as contemplated in terms of subs (3)*(f)* of the Act.

[53] The particulars of claim state that the defendants have failed to provide a justification for the anticompetitive object or effect of the agreements, but in any event the defendants are liable to be found to have contravened the Act regardless of any pro-competitive effect that may arise from the agreements, unless the parties have sought and the Commission has granted an exemption in terms of Part III of the Act.

[54] No exemption has been sought or granted in terms of Part III of the Act.

[55] In the premises, the insurance companies and the contracted automotive windscreen retailers are liable for a contravention of s 23(1), alternatively s 23(1) read with s 23(2*)(b),* further alternatively s 23(1) read with s 23(3)*(e)* and/or 23(3*)(f),* of the Act.

Second and fourth defendants' exception

[56] The second and fourth defendants' (Hollard and Momentum's) exception are identical. The exception raised is that the particulars of claim do not disclose of cause of action. One ground of exception was abandoned.

(i) First exception

[57] The plaintiff's action amounts to proceedings instituted in terms of s 38 of the

Act, read with rule 18(2) of the Rules, following an investigation that has been conducted - and concluded by no later than 10 July 2018 - by the plaintiff against the defendants under case number 2017JAN002COMP.

[58] In terms of s 36(1) of the Act, if, upon conclusion of the investigation, the plaintiff proposes to make a decision that the Part I or the Part II prohibition has been infringed, the plaintiff must give written notice of its proposed decision to the fourth defendant which may be affected by that decision.

[59] In terms of s 36(2)*(b)* and *(c)* of the Act, the notice referred to in s 36(1) must:

[60] set out details of any relief that the plaintiff may consider to seek from the court by way of the institution of proceedings in accordance with s 38. The 'details' referred to in s 36(2)*(b)* and *(c)* do not refer to or grant the plaintiff the entitlement to simply use the general wording as used in s 38 by simply repeating the wording of the Act, by stating that the court will be requested to impose 'an appropriate pecuniary penalty'. The concept 'imposing an appropriate pecuniary penalty' does not contain any detail as envisaged in s 36(1). On the contrary, the concept 'imposing an appropriate pecuniary penalty' is the antithesis of 'detail';

(b) inform the defendants that it may, in relation to the Commission's proposed decision or any of the matters contemplated in s 36(2)*(b)*, within the period specified in the notice, submit written representations to the Commission and indicate whether it requires an opportunity to make oral representations to it.

[61] Section 36 of the Act, in peremptory terms, makes plain that the plaintiff may not propose to make a decision unless the plaintiff has concluded its investigation.

[62] The plaintiff published its s 38 decision in GN 529 on 31 December 2019.[7]

[63] In the Government Gazette the Commission made plain that its investigation was completed prior to 10 July 2018 as it gave notice of its proposed decision on 10

[7] The Gazette was attached to the exception.

July 2018 already.

[64] Section 38 of the Act, in terms of which section the Commission's action was instituted, requires consideration of s 37, which in turn requires consideration of s 36 (including the details of any relief that the plaintiff may consider to seek from the court which had to be set out in the proposal, and which are thus, effectively, incorporated into s 38).

[65] *Ex facie* the particulars of claim, read with or without the Form 7 Notice, the proposal did not include the details required by the Act in respect of the so-called "appropriate pecuniary penalty" that the plaintiff may consider to seek from the court as envisaged in s 36(2)*(b)* of the Act which had to be set out in detail in the proposal.

[66] Thus, *ex facie* the particulars of claim, read with or without the Form 7 Notice, the Commission decided not to propose the details of the pecuniary penalty to be sought, but rather to use the general wording of the Act by simply deciding that 'an appropriate pecuniary penalty' will be sought against the defendants. As a result, the Commission is *functus officio* insofar as it decided to seek a pecuniary penalty in general terms (as opposed to the details in respect of which a decision had to be made by the Commission).

[67] As a result of the *functus officio* principle, and in any event, simply because of the fact that the Commission's proposal in terms of s 36(2)*(b)* of the Act did not include the details of the penalty, the Commission cannot seek the imposition of a detailed pecuniary penalty by the court in circumstances where the plaintiff itself, and on its own version, never decided the details of the penalty to be sought or imposed.

(ii) Second exception

[68] The plaintiff must, at all relevant times, have acted within a reasonable period of time. *Ex facie* the particulars of claim, read with the Form 7 Notice, the Commission's investigation was concluded before 10 July 2018, while it only instituted action against the defendants during August 2021, more than three years later. On the Commission's own allegations, it was in a position to make detailed decisions for purposes of its

proposed decision after its investigation was concluded by no later than 10 July 2018, while it only instituted action against the fourth defendant during August 2021, more than three years later.

[69] *Ex facie* the particulars of claim, read with or without the Form 7 Notice, the Commission did not act within a reasonable period of time in instituting these proceedings against the defendants, particularly once its investigation was concluded by no later than 10 July 2018.

[70] To take more than three years to institute action in circumstances where sufficient information was known to the Commission by the time it concluded its investigation (i.e. no later than 10 July 2018), and in the absence of an explanation for the delay, *prima facie* requires relief for condonation for not acting within a reasonable time. In the circumstances, it should have made out a case as to why it did not act within a reasonable period of time, and asked for condonation, if possible, when it instituted these proceedings.

[71] In the premises, and in circumstances where the Commission has clearly decided that it does not need to ask for condonation, its action is fatally defective and falls to be dismissed on this ground alone, as any punitive relief sought by the plaintiff after a reasonable period of time lapsed - without condonation being sought or granted - is *ultra vires* the plaintiff's powers.

(iii) Third exception

[72] On the plaintiff's own version the conduct which the Commission seeks to interdict has ceased. In law, an interdict cannot be obtained in such circumstances.

(iv) Fourth exception

[73] The plaintiff's particulars of claim must, at least, comply with the provisions of rule 45(5) and (6).

[74] The *facta probanda* on which the plaintiff may rely at the trial for asking the court

to impose a specific penalty includes the *facta probanda* as set out in s 53(3)*(a)* to *(g)*, being:

> '(3) In determining an appropriate penalty, the court must have regard to all relevant matters concerning the contravention, including -
> (a) the nature, duration, gravity and extent thereof;
> (b) the nature and extent of any loss or damage suffered by any person as a result thereof;
> (c) the behaviour of any undertaking involved;
> (d) the market circumstances in which it took place;
> (e) the level of profit derived therefrom;
> (f) the degree to which the undertaking involved has co-operated with the Commission and the Court; and
> (g) whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of this Act.'

[75] Even if the Commission may seek a penalty (which is denied as per the first exception), the Commission's claim lacks the necessary allegations to provide the defendants with a fair trial, or to place the court in a position to determine such a penalty. This is so because it is necessary and imperative for the Commission to allege - at the very least - an amount which it will seek as a penalty, and support same with allegations as envisaged in s 53 of the Act. The plaintiff must set out the *facta probanda*, not *probantia.* The Commission is accordingly not entitled in law to expect the defendants to plead, or to go to trial, or expect the court to do the its work for it, in the absence of an allegation as envisaged in s 53 of the Act, and/or in the absence of a specific amount sought to be imposed by the plaintiff through an order of court.

[76] Forcing the fourth defendant to go to trial in the prevailing circumstances, where no *facta probanda* is alleged and/or no specific amount is alleged, and in respect of which the fourth defendant cannot plead (and will presumably only be tendered in evidence by the plaintiff and then be fossilised in argument) threatens and/or infringes the fourth defendant's fair trial right as guaranteed in Article 12 of the Constitution.

(v) Strike out

[77] The strike out notice is embodied in the exception, and is raised in the last paragraph thereof with the heading ‘strike out’. What is stated therein is that the allegations contained in paragraphs 10 to 12 of the particulars of claim, including annexure POC1 thereto, are not only irrelevant, but also vexatious and prejudicial to the second and fourth defendants, and should be struck out.

Arguments

[78] Mr Heathcote SC, assisted by Mr Jacobs, appears for the excipients. Mr Gotz SC, assisted by Ms Kessery, appears for the Commission.

[79] For purposes of this judgment, the first and fourth exceptions are dealt with together. In essence they relate to the allegation that the necessary detail set out in s 53 have not been pleaded, resulting in the absence of a cause of action.

[80] The first and fourth exceptions are directed against the particulars of claim as amplified by the Form 7 Notice of action taken under s 38, which Mr Heathcote submits is informed by the Form 6 Notice of proposed decision provided for in s 36(2). The exception is based thereon that the particulars of claim do not allege, and the Form 7 Notice of action to be taken under s 38 (as informed by the Form 6 Notice of proposed decision), does not show that the requirements of ss 36, 37 and 38 have been complied with by the Commission when it gave its Form 7 Notice of action to be taken under s 38 (informed by the Form 6 Notice) and its proposed decision. This renders the cause(s) of action pleaded in the particulars of claim fatally defective. The complaint regarding to the absence of details, as I understand the argument, relates specifically to the relief sought in the form of the pecuniary penalty.

[81] It is important to note that up until the eve before the exception was heard, reliance was placed on the Form 6 Notice only, which is a notice of proposed decision that was issued some time before the Form 7 Notice. The references to the Form 6 Notice were deleted and replaced with references to the Form 7 Notice, which Mr Heathcote argued was a simple mistake, and did not affect the substance of the exception.

[82] The background to Mr Heathcote's argument on the issue, is based on the constitutional requirement[8] that as an administrative body, the Commission must act both fairly and reasonably with any legislative requirements imposed on it. As opposed to the South African legal position, the Commission's action must be both procedurally and substantively fair in order to found a cause of action against a party for a breach of the provisions of the Act. Therefore, so the argument goes, once the Commission has complied with the relevant legislation, it does not automatically mean that once it has complied with the relevant legislation, it has automatically acted fairly and reasonably. Accordingly, the allegation that the Commission only procedurally, and not substantively, complied with the Act for purposes of instituting its action, is fatally defective.

[83] Emphasis was also placed on the lack of detail contained in the notice of proposed decision (the Form 6 Notice) issued by the Commission in terms by s 36(2)(b) and (c), which is to be incorporated into the provisions of s 38. The details referred to in s 36(2)*(b)* and *(c)* do not grant the Commission leave to simply repeat the wording of the Act by stating that the court will be requested to impose an 'appropriate pecuniary penalty'. The Commission was required to provide detail on the pecuniary penalty sought in the Form 7 Notice read with s 36(1) in the absence of which no cause of action is disclosed because it decided to seek a pecuniary penalty in general terms (as opposed to the details in respect of which a decision has to be made by the Commission).

[84] As a result of the *functus officio* principle, and in any event, simply because of the fact that the Commission's proposal in terms of s 36(2)*(b)* of the Act did not include the details of the penalty, the Commission cannot seek the imposition of a detailed penalty by the court when it never decided the details of the penalty to be sought or imposed.

[85] Mr Gotz argued, in relation to the first and fourth exceptions that this exception is of itself vague and embarrassing as 'multiple possible meanings can be ascribed to the array of allegations contained therein'.

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[8] See Article 18.

[86] He submitted in this regard that the particulars of claim indeed disclose sufficient details of the relief that the Commission may consider seeking from the court as envisaged in s 36(2)*(b)* read with s 38 of the Act and read with the Form 7 Notice, including an appropriate penalty as envisaged by ss 53(1)*(a)* and 53(2), and further that the Commission is not required to propose the details (i.e. the actual financial amount) of the pecuniary penalty sought.

[87] In the alternative, it was argued that there was no necessity for the Commission to plead these details in the particulars of claim. To this extent, it was submitted that the necessary details of the pecuniary penalty sought by the Commission in this action are clear from the particulars of claim (read with or without the Form 7 Notice), namely that the Commission seeks an appropriate pecuniary penalty in an amount not exceeding 10% of the defendants' turnover during its preceding financial year. In those circumstances it was not necessary to allege the precise amount of the penalty and to support it with the allegations envisaged in s 53(3). The court, in this regard, is responsible for determining an appropriate penalty after hearing the merits of the case and considering all factors cited under s 53(3) in light of the evidence presented. Reliance was placed on the decision of Masuku J in *Namibian Competition Commission v Frans Indongo Group (Pty) Ltd NO.*[9]

[88] Mr Gotz argued further that the Commission is also not *functus officio* in respect of the penalty sought in its particulars of claim, and that the Commission appears in these proceedings as a prosecutor of the complaint and as a litigant, and can in the exercise of its prosecutorial discretion seek the relief that it does in the particulars of claim, or amend the relief if it so chooses, as any litigant would be entitled to.

[89] With regard to the second exception, it is argued that the allegation that the Commission did not act within a reasonable period of time cannot be taken by way of exception. This objection is in the nature of a special plea and may require that evidence be produced in due course. In any event, a delay, if established does not result in no cause of action being disclosed.

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[9] *Namibia Competition Commission v Frans Indongo Group (Pty) Ltd NO* HC-MD-CIV-MOT-GEN-2020/00180) [2021] NAHCMD 297 (4 June 2021), dealt with below.

[90] Moreover, the inquiry into whether the claim can be dismissed on this basis necessarily entails an inquiry into whether the excipients might have been prejudiced by any alleged delay, which plainly cannot be decided on exception. This is a factual inquiry in respect of which the court may exercise its discretion once all the evidence is before it, and therefore the Commission is not required, for purposes of establishing a cause of action, to seek condonation from the court at this stage.

[91] As regards the third exception, Mr Gotz argued that the complaint relating to the interdictory relief sought is an issue that must be decided by the court, after it has heard the facts of the case and had an opportunity to consider all of the evidence. It is not appropriate to raise this complaint at this juncture. In any event, the relief sought, namely that the defendants be interdicted from engaging in the conduct in the future, is plainly a competent remedy.

Applicable legal principles and legislative provisions

[92] It is trite that where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as true and correct. [10] In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable. The test on exception is whether on all possible readings of the pleading, no cause of action is made out. Particularly, and because exceptions provide a useful mechanism to weed out cases without legal merit, an over technical approach destroys their utility. The purpose of the exception is not to scrutinise pleadings for every possible flaw and imperfection.[11]

[93] Thus, unless the grounds for exception appear *ex facie* the document excepted to, the exception will be bad in law, for no other document can be looked at.[12]

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[10] *Stewart v Botha* 2008 (6) SA 310 (SCA) para [4] .

[11] *Van Straten NO v Namfisa* 2016 (3) NR 747 (SC) at 755I/J-756B and the authorities there collected.

[12] *Oceana Consolidated Co v the Government* 1907 TS 786; *Gemfarm Investments (Pty) Ltd v Trans Hex*

[94] A consideration of the provisions of the Act reveals firstly in the preamble, that it was promulgated to safeguard and promote competition in the Namibian market; to establish the Commission and to make provision for its powers, duties and functions, and to provide for incidental matters. The Commission is also responsible for investigating contraventions of the Act by undertakings.

[95] In terms of s 23(1), agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in terms of the Act. According to s 23(2)*(b),* agreements and concerted practices contemplated in s 23(1) include agreements concluded between parties in a vertical relationship, being an undertaking and its suppliers, or both.

[96] Section 23(1) applies in particular to any agreement, decision or concerted practice which (i) limits or controls production, market outlets or access, technical development or investment and (ii) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage.

[97] In terms of s 33(1) the Commission may either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute, *inter alia* a restrictive practice which is prohibited by the Act. Section 33 further provides that if the Commission decides to conduct an investigation, the Commission must, in writing, give notice of the proposed investigation to every undertaking, the conduct of which is to be investigated and must in the notice indicate the subject matter and purpose of the investigation; and invite the undertaking concerned to submit to the Commission within a period specified in the notice, any representations which the undertaking may wish to make to the Commission in connection with any matter to be investigated.

[98] Section 36(1) provides that if upon conclusion of an investigation, the Commission proposes to make a decision that a Part I or Part II prohibition has been

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Group Ltd and Another 2009 (2) NR 477 (HC) at 497D.

infringed (in this case the provisions of s 23), it must give written notice of the proposed decision to each undertaking that may be affected by that decision. This is the Form 6 Notice.

[99] Section 36(2) provides further that the notice of proposed decision must:

[100] state the reasons for the Commission's proposed decision;

[101] set out the details of any relief that the Commission may consider seeking from the court by way of institution of proceedings in accordance with s 38;

[102] inform each undertaking that it may, in relation to the Commission's proposed decision or any matters contemplated in paragraph 36(2)*(b),* within the specific period specified in the notice, submit written representations to the Commission; and indicate whether it requires an opportunity to make oral representations to the Commission..

[103] If an undertaking indicates that it requires an opportunity to make oral representations to the Commission, a conference will then be convened in accordance with the provisions of s 37.

[104] After consideration of any written representations and of any matters raised at a conference, the Commission may, in terms of s 38, institute proceedings for an order

(a) declaring the conduct which is the subject matter of the Commission's investigation, to constitute an infringement of the prohibition concerned;

(b) restraining the undertaking or undertakings from engaging in that conduct;

(c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;

(d) imposing a penalty; or

(e) granting any other appropriate relief.

[105] Section 53 deals with pecuniary penalties for contraventions of the prohibitions contained in Part I or II of the Act. In terms of s 53(1)*(a),* the court may impose a pecuniary penalty for a contravention of the provisions of the Act that prohibit restrictive business practices. Section 53(2) provides that a pecuniary penalty may be imposed for any amount which the court considers appropriate, but not exceeding 10% of the global turnover of the undertaking concerned during the preceding financial year. Section 53(3) further sets out the relevant factors which the court must have regard to in determining the appropriate penalty. Such factors have been set out in paragraph 70 above.

[106] There are two aspects of the Rules that also require consideration, as they relate to the two notices that form part of the exception raised. Rule 17 provides that a notice containing a proposed decision of the Commission as contemplated in s 36(1), must be in the form of Form 6. The Form 6 Notice contains the heading 'notice of proposed decision of commission in relation to the investigation' (s 36(1), Rule 17). The name of the undertaking concerned and the name and file number of the complaint is also required to be inserted in this Notice. There are 5 paragraphs requiring the insertion of pertinent information, two of which are relevant to the determination of the exception. The paragraphs read as follows:

'3. The reasons for the proposed decision are:

_____

_____

4. The Commission considers to seek the following relief from the court by way of institution of proceedings in accordance with section 38:

_____

_____,

[107] It is not in dispute that paragraph 3 above relates to s 36(2)*(a)* (which requires the Commission to state the reasons for the proposed decision), and that paragraph 4 above relates to s 36(2)*(b),* which requires he Commission to set out the details of any relief that it may consider to seek from the court by way of institution of proceedings in accordance with s 38.

[108] As regards the provisions of s 38, Rule 18 of the Rules provides *inter alia* that the Commission must give notice in the Gazette in the form of Form 7 of any action which it wishes to take under s 38 (Rule 18(1)).

[109] The Form 7 Notice similarly contains a heading, namely 'notice of action to be taken under section 38'. Apart from the inclusion of the names of undertaking(s) concerned and the name and file number of the complaint, Form 7 is also reproduced below for ease of reference:

> '1. The Commission has received a complaint against the abovenamed respondent on _____ and has given notice of its proposed decision on _____.
>
> 2. The Commission gives notice that it intends to take the following action under section38:
>
> _____
>
> against _____
>
> _____
>
> 3. The nature of the conduct that is the subject matter of the action is:
>
> _____
>
> _____',

Discussion

[110] At the outset, it is to be noted that the Form 6 Notice is not before court. It has not been attached to the particulars of claim. The Form 7 Notice is also not attached to

the particulars of claim, but due to the fact that it has been gazetted, the court can take judicial notice thereof in terms of s 5 of the Civil Proceedings Evidence Act, 25 of 1965.[13]

[111] In my considered view, the Commission has substantially complied with the Form 7 Notice contained in Rule 18 and s 38. It has included in the body of the Notice, the information that the Commission received a complaint and initiated an investigation against various short term insurance companies and automotive windscreen retailers, and further that the Commission investigated the matter and on or about 10 July 2018 gave notice of its proposed decision.[14]

[112] Also included is the provision of notice that the Commission intends to take certain action in terms of s 38 of the Act following an investigation and consideration of all representations, including written representations made in terms of s 36 by the defendants in this matter (whole names and particulars are set out), and matters raised at the conference in terms of s 37, and that the Commission has decided to institute proceedings against the defendants for the relief set out in the prayers in the particulars of claim which are repeated in the Form 7 Notice. The nature of the conduct that is the subject matter of the action is also set out in some detail in the Form 7 Notice, and is materially reproduced in the particulars of claim.

[113] It is also my considered view that the details of the relief that the Commission may consider to seek from the Court by way of the institution of proceedings (in terms of s 38), is only required to be inserted in the Form 6 Notice (read with s 36(2)(b), and not the Form 7 Notice (read with s 38). There is nothing in s 38, or Form 7, that requires the information contained in Form 6 to be reproduced in Form 7. The two sections contain different provisions, and the accompanying Forms also contain different information that must be included in the separate Forms. I am accordingly not persuaded by the argument put up on behalf of the excipients that the information in Form 6 read with s 36(2)*(b)* must be incorporated into the Form 7 Notice, because the provisions of s 36(2)*(b)* must be incorporated, as it were, into s 38.

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[13] Section 5 provides that judicial notice shall be taken of any law of government notice of any other matter that has been published in the Gazette.

[14] The Form 6 Notice.

[114] In any event, I am of the view that the Form 7 Notice substantially complies with the applicable section and sets out sufficient detail of the nature of the defendant's conduct that forms the subject matter of the action. It falls to be reiterated that Form 6 is not attached to the particulars of claim and does not fall to be considered. It is not argued in this regard, that Form 6 should have been attached to the claim, particularly given the last minute deletions of references to the Form 6 Notice, and insertions of the Form 7 Notice in the excipients' heads of argument.

[115] Also, it must be borne in mind, for purposes of deciding the exception that the Commission alleged that is has complied with all the procedural requirements that must be met before bringing these proceedings in terms of s 38. That allegation, together with the other allegations made in the Commission's claim, is taken as true and correct for purposes of deciding the exception.

[116] To this must be added that any substantial non-compliance alleged to be contrary to the provisions of Article 18 of the Constitution, should be raised either in the defendants' plea, or in separate administrative proceedings to review and set aside the Commission's decision. These are action proceedings and the Commission remains responsible in law to prove the allegations it makes at trial, especially the allegation that it has complied with the legislative requirements(both procedurally and substantively), and the allegation that the defendants indeed contravened the Act. In addition, nothing prevents the excipients from requesting additional discovery (should the Form 6 Notice not be discovered by the Commission in terms of Rule 28 at the appropriate stage) in terms of rule 28(8)*(a).*

[117] Insofar as the excipients submit that the lack of details relating to the appropriate amount that would be sought in the form of a pecuniary penalty renders the claim excipiable, this argument similarly does not hold water. In *Namibia Competition Commission v Frans Indongo Group (Pty) Ltd NO*[15] Masuku J had occasion to deal with the issue of the court's determination of a pecuniary penalty in terms of the Act. In this case, the Commission, via motion proceedings sought the imposition of a pecuniary

[15] *Namibia Competition Commission v Frans Indongo Group (Pty) Ltd NO* HC-MD-CIV-MOT-GEN-2020/00180) [2021] NAHCMD 297 (4 June 2021).

penalty in terms of s 51 read with s 53 against the respondent, for a breach of the provisions of the Act relating to a prohibited merger, in contravention of s 44 of the Act. In the founding papers, the Commission provided a figure which it deemed acceptable as a pecuniary penalty that can be imposed.

[118] After a detailed exposition of the relevant provisions of the Act, Masuku J held that it is the court and not the Commission that must determine an appropriate penalty after considering the particular facts and circumstances of the matter at hand. In this regard, he stated the following:

'[64] . . . the court has a wide latitude in imposing a pecuniary penalty. This penalty is obviously in monetary terms, which the court should consider appropriate regard had to the nature and circumstances attendant to the matter before it. It becomes clear from the use of the word 'appropriate' that the amount of the penalty must be individualised and answer to the particular facts and circumstances of the matter at hand.

[65] Like in criminal matters, where a fine is to be imposed for a crime found to have been committed, it must take into account the peculiar circumstances of the case. In this regard, it is very difficult to find a set of circumstances that meet those of another in every respect. It is accordingly important for the court in meting an appropriate penalty, to take into account the peculiar facts of the matter and then to impose a penalty that fits the nature of the contravention, the person of the contravener and meet the objects of the Act in setting out the contraventions in the Act.

[66] In meting out a pecuniary penalty, the court is afforded a wide latitude. That notwithstanding, the legislature has imposed a maximum amount that may not be exceeded, whatever the circumstances. In s 53(2), the legislature imposed a ceiling amount, namely, not more than 10% of the global turnover of the undertaking concerned. This must be based on its financial statements for the previous financial year.

[67] It is plain, when one has regard to s 53(3) that the court is enjoined, in arriving at an appropriate penalty, to take into account all relevant matters. In this regard, as in many legal scenarios, relevance is a flexible concept that defies precise meaning. It depends mostly on the facts of the case and the wisdom, experience and sagacity of the trier of fact'.

. . .

[96] It is also important to mention, whilst still on this subject, to recall that the legislature reposed the pecuniary powers in the courts alone. The legislation does not, as far as I could read it, create a niche for the applicant to prescribe or suggest what the penalty should be. The court should accordingly guard against abdication of its legislative remit, and allow other bodies, which are party to the proceedings, to hold sway in the determination.

. . .

[101] The applicant does not feature in the proceedings as an amicus curiae. It is a fully-fledged protagonist that approaches the court for a particular outcome. In this case, it came with a figure that it tried to justify to the court as being appropriate. Courts should, in these circumstances, be wary of deferring to parties who have a clear and substantial interest in the outcome sought from the court.

[102] Although the situation may differ slightly, there is some similarity between the applicant and the prosecution in a criminal matter. The applicant, like a prosecutor would do, placed the factors to be taken into account in the determination of the appropriate penalty. It would be extremely unsettling, if not totally out of order for a court, in a criminal matter, to be advised that it should defer to the views of the prosecution regarding a penalty to be imposed on an accused person. Where does that leave the other protagonist, namely, the defence in this equation?'

[119] I am in respectful agreement with the above reasoning. This court is enjoined to determine a pecuniary penalty, based on the relevant facts and circumstances that are alleged in the particulars of claim that will come to light at the trial after all evidence is led. In executing its responsibility the court must have regard to the relevant matters concerning the contravention (if proved) set out in 53(3), and any pecuniary imposition may not exceed 10% of the global turnover of the undertaking during its preceding financial year. Therefore it is not necessary for the Commission to include the details relating to what it might deem to be an appropriate pecuniary penalty, in its particulars of claim. This function lies with the court, and not with the Commission.

[120] I am also mindful of the fact that the excipients complaint regarding the amount of the pecuniary penalty is directed at the relief sought by the Commission, and not the Commission's cause of action, which lies in s 23 of the Act. I am bolstered in my view

by the judgment of this court in *Naanda v Edward*[16] where it was held that an exception directed at the relief sought is ill-advised for the simple reason that the defendants are not called upon to plead to the relief sought from the court.[17]

[121] In light of the foregoing, the first and fourth exceptions are bad and fall to be dismissed.

[122] As regards the second exception, I am of the considered view that a delay in instituting proceedings as alleged by the excipients, does not result in the particulars of claim not disclosing a cause of action. I reiterate that the Commission's cause of action is set out in the particulars of claim and concerns a contravention of s 23. Therefore, this exception is also bad and similarly falls to be dismissed.

[123] As regards the fourth exception, the complaint, for ease of reference, is that on the plaintiff's own version, the conduct which the plaintiff seeks to interdict has ceased in law, and an interdict cannot be obtained in such circumstances. Again, I point out that this complaint relates to the relief sought and not the cause of action. The Commission has not alleged specifically that the conduct has ceased, and the Commission seeks an order interdicting the first to sixth defendants from engaging in the conduct complained of in the future. I do not see how this relief does not found a cause of action. The relief sought, namely that the defendants be interdicted from engaging in the conduct complained of in the future is clearly a competent remedy, the basis of which is set out in the particulars of claim. This exception also falls to be dismissed for the aforegoing reasons.

[124] Lastly, I deal with the notice to strike. As mentioned in the beginning of this judgment the notice to strike is embodied in the exception in the last paragraph, namely paragraph 25 thereof. The notice is worded as follows:

'STRIKE OUT

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[16] *Naanda v Edward* (I 2097-2014) [2015] NAHCMD 239 (8 October 2015).

[17] At para 3. See also the *prima facie* remarks by the full bench in *Tobacco Exporters and Manufacturers Ltd v Bradbury Road Properties (Pty) Ltd* 1990 (2) SA 420 (C) at 424D-G, with which I am in respectful agreement.

The allegations contained in paragraph 10 to 12 of the particulars of claim including annexure POC1 thereto are not only irrelevant, but also vexations and prejudicial to the fourth defendant and should be struck out'

[125] It is also noted that the strike out procedure was not mentioned or embodied in the case plan when the exception was dealt with. Moreover, not a single ground to support the striking out is set out in the paragraph in question.

[126] An application to strike out is in essence an application incidental to pending proceedings and should therefor be initiated by way of a simple notice of motion such as is generally used in interlocutory proceedings.[18] In *Elher (Pty) Ltd v Silver*[19] it was held[20] that the notice to strike should indicate precisely the passages objected to and state briefly the grounds of the objection.

[127] Notices to strike in our jurisdiction are governed by rule 58, a rule separate to rule 57 dealing with exceptions. Rule 58, which provides as follows:

'Application to strike out

58 (1) Where a pleading contains averments which are scandalous, vexations or irrelevant, the opposing party may make application to strike out the averments within-

(a) the period allowed for the purpose in the case plan order, in case of an action;

. . .

(3) A party who applies for the striking out of averments in terms of this rule must seek the managing judge's directions in terms of rule 32(4) for its adjudication and must set out clearly the words or paragraphs of the pleading or affidavit that he or she intends to have struck out as well as the legal grounds therefor.

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[18] A C Cilliers, C Loots and H C *Nel Herbstein and Van Winsen*: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) vol 1 at 658. This authority is persuasive insofar as the principle stated therein is that applications to strike are interlocutory proceedings.

[19] *Elher (Pty) Ltd v Silver* 1947 (4) SA 173 (W).

[20] *Ibid* at 178.

(4) The managing judge must give directions when an application referred to in subrule (1) maybe heard and he or she may give directions he or she considers suitable or proper.'

[128] None of the provisions of rule 58 were complied with in the strike out contained in the body of the exception, and on this basis alone there is no reason to consider it, given the non-compliance with the rules of court. The application can properly be made at a later stage should the excipients persist with it. To aggravate matters, the strike out is not even brought in the alternative to the exception raised, meaning that on the one hand, the excipients allege that the particulars of claim must be set aside, and on the other, seek to strike out a certain paragraph of the claim when no cause of action is alleged to be disclosed in the first place. It is accordingly struck from the roll.

[129] As regards the question of costs, both parties agreed that the costs should not fall within the purview of the provisions of rule 32(11), and I am in agreement with the stance taken by both counsel on this score. The Commission being successful, is therefore entitled to its costs.

[130] In light of the foregoing the following order is made

1. The exceptions are dismissed with costs, such costs to include the costs of one instructing and two instructed counsel, and not limited to the amount contained in rule 32(11).

2. The 'strike out' is struck from the roll with costs, such costs to include the costs of one instructing and two instructed counsel, and not limited to the amount contained in rule 32(11).

3. The matter is postponed to 26 September 2022 at 15h30 for a case planning conference.

4. The parties are directed to file a joint case plan on or before 21 September 2022.

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EM SCHIMMING-CHASE

Judge

APPEARANCES

PLAINTIFF:	A GOTZ SC (with him A Kessery) Instructed by Metcalfe Beukes Attorneys, Windhoek
1st and 5th DEFENDANTS:	NO APPEARANCE
2nd DEFENDANT:	NO APPEARANCE
3rd and 6th DEFENDANTS:	NO APPEARANCE
4th DEFENDANT:	R HEATHCOTE SC (with him J Jacobs) Instructed by Van der Merwe-Greeff Andimba Inc, Windhoek