CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/24

In the matter between:

BNP PARIBAS Applicant

and

COMPETITION COMMISSION OF SOUTH AFRICA Respondent

Case CCT 27/24

And in the matter between:

CREDIT SUISSE SECURITIES (USA) LLC Applicant

and

COMPETITION COMMISSION OF SOUTH AFRICA Respondent

Case CCT 30/24

And in the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

BANK OF AMERICA EUROPE DESIGNATED ACTIVITY COMPANY First Respondent

BNP PARIBAS	Second Respondent
JPMORGAN CHASE & COMPANY	Third Respondent
JPMORGAN CHASE BANK N.A.	Fourth Respondent
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	Fifth Respondent
STANDARD NEW YORK SECURITIES INCORPORATED	Sixth Respondent
INVESTEC LIMITED	Seventh Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Eighth Respondent
NOMURA INTERNATIONAL PLC	Ninth Respondent
STANDARD CHARTERED BANK	Tenth Respondent
CREDIT SUISSE GROUP	Eleventh Respondent
COMMERZBANK A.G.	Twelfth Respondent
MACQUARIE BANK LIMITED	Thirteenth Respondent
HSBC BANK PLC	Fourteenth Respondent
CITIBANK N.A.	Fifteenth Respondent
ABSA BANK LIMITED	Sixteenth Respondent
BARCLAYS CAPITAL INCORPORATED	Seventeenth Respondent
BARCLAYS BANK PLC	Eighteenth Respondent
HSBC BANK USA, N.A. INCORPORATED	Nineteenth Respondent
MERRILL LYNCH PIERCE FENNER AND SMITH INCORPORATED	Twentieth Respondent
BANK OF AMERICA N.A.	Twenty-First Respondent
INVESTEC BANK LIMITED	Twenty-Second Respondent

CREDIT SUISSE SECURITIES (USA) LLC	Twenty-Third Respondent
NEDBANK GROUP LIMITED	Twenty-Fourth Respondent
NEDBANK LIMITED	Twenty-Fifth Respondent
FIRSTRAND LIMITED	Twenty-Sixth Respondent
FIRSTRAND BANK LIMITED	Twenty-Seventh Respondent
STANDARD AMERICAS INCORPORATED	Twenty-Eighth Respondent

Neutral citation:	*BNP Paribas v Competition Commission of South Africa; Credit Suisse Securities (USA) LLC v Competition Commission of South Africa; Competition Commission of South Africa v Bank of America Europe Designated Activity Company and Others* [2026] ZACC 28
Coram:	Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Rogers J, Savage J, Theron J and Tshiqi J
Judgment:	Rogers J (unanimous)
Heard on:	19 to 21 August 2025
Decided on:	30 June 2026
Summary:	Competition Act 89 of 1998 — Competition Tribunal — standard of pleading — exception procedure *Res judicata* and peremption — overlooking same Referral to Competition Tribunal — whether joinder of firms after referral permissible — whether fresh initiation needed Section 4(1)(b) of Competition Act — single overarching conspiracy — requirements for and pleading of same — personal and subject matter jurisdiction

ORDER

In Case CCT 25/24 *BNP Paribas v Competition Commission of South Africa*:
On application for leave to appeal from the Competition Appeal Court (hearing an appeal from the Competition Tribunal):

Leave to appeal is refused with costs, including the costs of two counsel.

In Case CCT 27/24 *Credit Suisse Securities (USA) LLC v Competition Commission of South Africa*:
On application for leave to appeal from the Competition Appeal Court (hearing an appeal from the Competition Tribunal):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. Paragraph 2 of the order of the Competition Appeal Court, insofar as it relates to the applicant in Case CCT 27/24 (the twenty-third respondent in the Tribunal proceedings), Credit Suisse Securities (USA) LLC, is set aside and replaced with the following order:
   "(a) The appeal against the joinder of Credit Suisse Securities (USA) LLC (CSS), forming part of paragraph A[1] of the Tribunal's order, succeeds.
   (b) The Tribunal's decision in that respect is set aside and replaced with an order dismissing the Competition Commission's application to join CSS."

In Case CCT 30/24 *Competition Commission of South Africa v Bank of America Europe Designated Activity Company and Others*:
On application for leave to appeal from the Competition Appeal Court (hearing an appeal from the Competition Tribunal):

1. The applicant, the Competition Commission (Commission), is granted leave to appeal.
2. The fourteenth respondent, HSBC Bank plc (HBEU), is granted leave to cross-appeal.
3. The Commission's appeal is upheld in relation to the fourth respondent, JPMorgan Chase Bank N.A. (JPM Bank), and the twenty-eighth respondent, Standard Americas Incorporated (SAI).
4. The Competition Appeal Court's decision in respect of JPM Bank and SAI is set aside and replaced with orders dismissing those parties' appeals against the Tribunal's decision.
5. Save as aforesaid, the Commission's appeal is dismissed.
6. HBEU's cross-appeal is dismissed.

JUDGMENT

ROGERS J (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Savage J, Theron J and Tshiqi J concurring):

Introduction

[1] Before us are three applications for leave to appeal and an application for leave to cross-appeal a judgment of the Competition Appeal Court (CAC), handed down on 8 January 2024.[1] The prelude to that appeal was an earlier judgment of the CAC in the same litigation, delivered on 28 February 2020.[2] I shall refer to the earlier and later CAC judgments as *CAC I* and *CAC II*. The appeal proceedings in *CAC I* and *CAC II* were against decisions of the Competition Tribunal (Tribunal) handed down on

[1] *Competition Commission of South Africa v Bank of America Merrill Lynch International* [2024] ZACAC 1; [2024] 1 CPLR 1 (CAC).

[2] *Competition Commission v Bank of America Merrill Lynch International Limited* [2020] ZACAC 1; [2020] 1 CPLR 26 (CAC); 2020 (4) SA 105 (CAC).

12 June 2019[3] and 30 March 2023[4] respectively. I shall refer to them as *TRIB I* and *TRIB II*.

Procedural history

Initiation and the February 2017 referral

[2] The main litigation arises from a complaint initiated[5] by the Competition Commission (Commission) in April 2015, amended in August 2016, and referred to the Tribunal in February 2017. The Commission alleged that a number of banks – 18 were identified in the February 2017 referral – were guilty of conduct prohibited by section 4(1)(b) of the Competition Act[6] (Act). The accusation was that over the period from 2007 until at least September 2013 they colluded to manipulate the exchange rate between the United States Dollar (USD) and the South African Rand (ZAR).

[3] One of the initial respondents, the sixteenth respondent, Absa Bank Limited (Absa), and the seventeenth and eighteenth respondents, Barclays Capital Incorporated

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[3] *Competition Commission of South Africa v Bank of America Merrill Lynch International Limited* ZACT 50; [2020] 1 CPLR 205 (CT).

[4] *Competition Commission of South Africa v Bank of America Merrill Lynch International Designated Activity Company* [2023] ZACT 26.

[5] Initiation is a term of art in the Competition Act 89 of 1998. In terms of section 49B(1) "the Commissioner may 'initiate' a complaint against an alleged prohibited practice". Once there has been an initiation, the Commissioner must direct an inspector to investigate the complaints. After initiating a complaint, the Commissioner may in terms of section 50(1) refer the complaint to the Tribunal. Upon referral, the chairperson of the Tribunal must publish in the *Government Gazette* the name of the respondent and the nature of the conduct that is the subject of the referral – section 51(3).

[6] 89 of 1998. Section 4(1)(b) provides:

> "(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—
>
> . . .
>
> (b) it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading conditions;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
>
> (iii) collusive tendering."

and Barclays Bank plc (collectively Barclays), applied for and were granted leniency[7] on the basis that they would give their cooperation to the Commission in prosecuting the complaint. The fifteenth respondent, Citibank NA[8] (Citibank), reached a settlement with the Commission.

[4] This left 14 of the original 18 respondents as active parties in the referral proceedings: the first respondent, Bank of America Europe DAC,[9] formerly Bank of America Merrill Lynch International DAC (BAMLI); the second respondent, BNP Paribas (BNP); the third and fourth respondents, JPMorgan Chase & Co (JPM Co) and JPMorgan Chase Bank NA (JPM Bank); the fifth respondent, Australia and New Zealand Banking Group Limited (ANZ); the sixth respondent, Standard New York Securities Incorporated (SNY); the seventh respondent, Investec Limited; the eighth respondent, The Standard Bank of South Africa Limited (SBSA); the ninth respondent, Nomura International plc (Nomura); the tenth respondent, Standard Chartered Bank (SCB); the eleventh respondent, Credit Suisse Group (CSG); the twelfth respondent, Commerzbank AG (Commerzbank); the thirteenth respondent, Macquarie Bank Limited (Macquarie); and the fourteenth respondent, HSBC Bank plc (HBEU).

[5] The Commission delivered several supplementary affidavits in an attempt to meet the respondents' criticisms of the February 2017 referral affidavit. This did not satisfy them, and so they filed exceptions. Another development was that in January 2018 the Commission served an application to join another five banks (first joinder application): as the nineteenth respondent, HSBC Bank USA NA (HBUS); as the twentieth respondent, Merrill Lynch Pierce Fenner and Smith Incorporated (MLP); as the twenty-first respondent, Bank of America NA (BANA); as the twenty-second

[7] Although express statutory provision for the granting of leniency, by way of section 49E, was only introduced into the Act in February 2019, the Commission had in February 2004 published and acted upon a corporate leniency policy. The object of such a policy is to encourage a participant in prohibited conduct to "blow the whistle" by being the "first through the door".

[8] NA is an acronym for National Association, a designation for national banks under American law.

[9] DAC is an acronym for Designated Activity Company, a form of corporation under Irish law.

respondent, Investec Bank Limited (IBL); and as the twenty-third respondent, Credit Suisse Securities (USA) LLC[10] (CSS).

[6] BAMLI, MLP and BANA are part of the Bank of America (BoA) group. Since the Commission's allegations against these three entities are in the alternative, I shall refer to them collectively as BoA, save where it is necessary to distinguish between them. The same applies to JPM Co and JPM Bank, and to HBEU and HBUS, to which I shall refer collectively as JPM and HSBC respectively.

[7] In the referral affidavit, the Commission distinguished between foreign respondents that were "pure *peregrini*" (pure foreigners) and those that were "local *peregrini*" (local foreigners). The pure *peregrini* were foreign firms without any branch or representative office in South Africa. The active respondents that fell into that category were BAMLI, JPM Co, ANZ, SNY, Nomura, Macquarie, HBUS, MLP and CSS. The remaining foreign respondents – BNP, JPM Bank, SCB, CSG, Commerzbank, HBEU and BANA – were local *peregrini*. As at February 2017 the only active respondent that was an *incola* (local, i.e. South African) was SBSA. The other South African bank, Absa, was an inactive respondent by virtue of leniency.

[8] One of the issues in the exceptions was whether the Commission had pleaded facts to show that the Tribunal had personal jurisdiction over the *peregrini* respondents. In civil proceedings in this country there is a distinction between a court's subject matter jurisdiction and its personal jurisdiction. For example, if a plaintiff claims damages of R1 million caused by a delict committed in Cape Town, the Western Cape Division of the High Court (but not, for example, the Cape Town Magistrate's Court or the Competition Tribunal) would have subject matter jurisdiction to try the case. It would also have personal jurisdiction if the defendant was an *incola* of South Africa. But if the defendant was a *peregrinus*, something more would be needed to give the High Court personal jurisdiction. There would need to be, for example, an attachment

[10] LLC is an acronym for Limited Liability Company, a form of private limited corporation under American law.

of property belonging to the defendant in South Africa in order to satisfy the requirement of effectiveness.

[9] The Commission's primary position was that, in the case of proceedings under the Act, the common law requirements of personal and subject matter jurisdiction are wholly displaced by section 3(1) of the Act. That subsection states in relevant part: "This Act applies to all economic activity within, or having an effect within, the Republic". The Commission contended that the respondents' conduct had an effect within South Africa, which was enough to subject all of them to the Tribunal's jurisdiction, even those respondents without any presence in this country.

TRIB I

[10] The exceptions and joinder application were argued in the Tribunal in mid-2018. The Tribunal gave its decision in June 2019, *TRIB I*. The Tribunal rejected the Commission's argument that section 3(1) did away with the need for personal jurisdiction. The Tribunal held, further, that the common law had not evolved to the point where personal jurisdiction over the pure *peregrini* could be recognised. Despite this conclusion, the Tribunal considered that it could issue a declaratory order pronouncing upon the conduct of the pure *peregrini*, because this would not compromise the principle of effectiveness. It would also ensure that the declaration of offending conduct would not be under-inclusive in the context of any follow-on civil claims brought against respondents over whom there was personal jurisdiction.[11] As to the local *peregrini*, the Tribunal considered that it had personal jurisdiction on conventional grounds.[12]

[11] As to subject matter jurisdiction, the Tribunal addressed the nature of the effects that needed to be established to satisfy section 3(1). The Tribunal regarded this as relevant to the local *peregrini*. This was presumably for the reason that, because their

[11] *TRIB I* above n 3 at paras 35-66.

[12] Id at paras 67-83.

acts of collusion had not taken place in South Africa, subject matter jurisdiction depended upon their foreign conduct having an "effect" in South Africa. In the case of *incolae* (locally domiciled) banks (such as SBSA), subject matter jurisdiction did not depend on "effect" in South Africa because the alleged conduct was "economic activity" that took place in South Africa.

[12] After referring to antitrust jurisprudence on effects-based jurisdiction in the United States (US),[13] the European Union (EU)[14] and South Africa,[15] the Tribunal held that "effect" in section 3(1) connoted "qualified effects", the test being whether it was foreseeable that the prohibited conduct would have a direct or immediate, and substantial, effect in South Africa (for the sake of brevity, I shall call this the QE test).[16] After analysing the 2017 referral affidavit as supplemented, the Tribunal concluded that the Commission had to make additional allegations to satisfy the QE test.[17]

[13] The Tribunal then considered the alleged deficiencies in the pleading of the alleged conspiracy. It was unclear from the Commission's affidavits, the Tribunal thought, whether the Commission was relying on a single conspiracy or multiple mini-conspiracies. In the Commission's oral argument, however, it became clear that the Commission was relying on a single overarching conspiracy (SOC), with instances of multilateral or bilateral collusion being acts evidencing the implementation of the SOC. The main and supplementary affidavits in the 2017 referral, in the Tribunal's view, were inconsistent and appeared to expose various respondents to alternative cases based on smaller conspiracies. The Tribunal thus took what it called the "unusual approach" of

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[13] US Foreign Trade Antitrust Improvement Act of 1982 and US Department of Justice and Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017 at 21.

[14] *Intel Corporation v European Commission* Case T-286/09; [2014] 5 CMLR 9 (*Intel*) at paras 231-2; *Intel Corporation v European Commission* Case C-413/14 P; [2017] 5 CMLR 18 at para 49; and *Gencor v Commission* Case T-102/96 [1999] ECR II-753 at para 90.

[15] *American Natural Soda Ash Corporation v Competition Commission of South Africa* [2002] ZACAC 5; 2003 (5) SA 663 (CAC); [2005] 1 CPLR 18 (CAC) (*Ansac I*) at para 18 and *American Natural Soda Ash Corporation v Competition Commission of South Africa* [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005] 3 All SA 1 (SCA); 2005 (6) SA 158 (SCA); 2005 (9) BCLR 862 (SCA) at para 29.

[16] *TRIB I* above n 3 at paras 84-100.

[17] Id at paras 101-13.

requiring the Commission, in a superseding referral affidavit (superseding affidavit), to confine its case to the SOC described by its counsel in argument.[18]

[14] In regard to the joinder application, IBL, an *incola*, was joined as the twenty-second respondent without opposition. The Tribunal deferred its decision on the joinder of the other four parties until after the filing of the superseding affidavit. In respect of BANA, a local *peregrinus*, the affidavit would need to allege qualified effects. In relation to HBUS, MLP and CSS, pure *peregrini*, the affidavit would need to confine the claim to a limited declaratory order. The Tribunal considered various other exceptions, upholding some, rejecting others. Its order required the Commission to file its superseding affidavit within 40 days.

CAC I

[15] The Commission did not file a superseding affidavit, because *TRIB I* was appealed to the CAC. The pure *peregrini* appealed the Tribunal's decision that it could grant a declaratory order in respect of their conduct. Three of the respondents appealed the Tribunal's order deferring a decision on the joinder application. The Commission cross-appealed the Tribunal's decision on the meaning of section 3(1), both in relation to personal jurisdiction and subject matter jurisdiction. The outcome of the appeals and cross-appeals was *CAC I*, delivered in February 2020.

[16] The CAC agreed with the Tribunal that section 3(1) did not do away with the requirement of personal jurisdiction. The CAC, though, regarded as illogical the Tribunal's view that it could grant a declaratory order in respect of pure *peregrini* despite the absence of personal jurisdiction.[19] Unlike the Tribunal, however, the CAC considered that an appropriate development of the common law on personal jurisdiction would leave open the possibility that the Commission could, by making further allegations, establish personal jurisdiction over the pure *peregrini*.

[18] Id at paras 113-84.

[19] *CAC I* above n 2 at para 61.

[17] Citing domestic[20] and foreign[21] cases, the CAC said there was overwhelming authority in favour of the extraterritorial application of competition legislation.[22] Support for a limited development of our common law on personal jurisdiction so as to render it congruent with section 3(1) and the purposes of the Act could, in the CAC's view, draw inspiration from *Bid Industrial Holdings*[23] and *Multi-Links*.[24] In a competition case, personal jurisdiction would exist if there were "adequate connecting factors" between the Commission's complaint and the Tribunal as a forum (for the sake of brevity, I shall call this the ACF test). Appropriateness and convenience were relevant considerations. The question was whether the Tribunal had a real and substantial connection with the suit and whether there were relevant connecting factors tying the suit to the Tribunal as a forum.[25]

[18] The CAC said that if the Commission could establish an SOC to manipulate the USD/ZAR exchange rate and that the SOC involved pure *peregrini*, local *peregrini* and *incolae*, this could indicate that there were adequate connecting factors sufficient to found the Tribunal's jurisdiction.[26] From this statement it is apparent that the CAC did not think it sufficient that the alleged conspiracy targeted the USD/ZAR exchange rate. It was required, in addition, that the conspiracy should have South African participants. The CAC also accepted that the test for subject matter jurisdiction was the QE test.[27]

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[20] *Ansac I* above n 15 at paras 16-17.

[21] *United States v Aluminum Company of America* 148 F 2d 416 (2nd Cir 1945); *F Hoffmann-La Roche Ltd v Empagran SA* [2004] USSC 2381; 542 US 155; *A. Ahlström Osakeyhtiö v Commission of the European Communities* [1988] 4 CMLR 901; [1988] EUECJ C-129/85; [1988] ECR 5193 – opinion of the Advocate General at para 57; *Intel* above n 14 – opinion of the Advocate General at para 283-5.

[22] *CAC I* above n 2 at paras 36-44.

[23] *Bid Industrial Holdings (Pty) Ltd v Strang* [2007] ZASCA 144; [2008] 2 All SA 373 (SCA); 2008 (3) SA 355 (SCA) at paras 54-6.

[24] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* [2013] ZAGPPHC 261; [2013] 4 All SA 346 (GNP); 2014 (3) SA 265 (GP) at para 23.

[25] *CAC I* above n 2 at paras 45-57.

[26] Id at para 56.

[27] Id at paras 54 and 58.

Like the Tribunal, the CAC considered it sensible to defer a decision on the joinder application (except for IBL) until after the Commission filed the superseding affidavit.

[19] Overall, the result was that both the banks and the Commission achieved some success. The CAC adapted the Tribunal's order so as to accommodate the CAC's conclusion on personal jurisdiction. In view of some of the arguments, it is necessary to quote the relevant parts of the order (I substitute the banks' abbreviated names for those used in the order; the numbers that appear in brackets were inserted by the CAC to indicate the respondent number of the bank in question):

> "3.1 The applications for the dismissal of the complaint referral brought by the pure *peregrini*, BAMLI (1); JPM Co (3); ANZ (5); SNY (6); Nomura (9), Macquarie (13); HBUS (19); MLP (20) and CSS (23) are dismissed subject to the following.
>
> 3.1.1 The Commission must file a new referral affidavit to substitute for and replace all the complaint referral affidavits. This affidavit must be filed within 40 business days of this order.
>
> 3.1.2 The respondents will only be required to file their answers to the new referral affidavit. The answers must be filed within 20 days of the service of the new referral affidavit.
>
> 3.2 The new referral affidavit applies to the parties referred to in paragraph 1 of the substitute order.[28] It must:
>
> 3.2.1 In the case of all the named respondents set out the facts the Commission relies on to allege that it was foreseeable that the impugned conduct would have a direct or immediate, and substantial effect in the Republic;
>
> 3.2.2 Confine the case to a single overall conspiracy (SOC), provided, subject to 3.4.3 below, that the Commission is not restricted from alleging that this may be founded on an agreement, arrangement or concerted practice;

[28] I understand the CAC to have meant that the new referral affidavit, in addition to applying to the other respondents, was also to apply to the pure *peregrini* listed in paragraph 3.1 of the CAC's order.

3.2.3 Indicate whether the same facts are relied on for proof of the concerted practice or allege any different fact if they are not;

3.2.4 Allege whether its case for an SOC relies on proof of an express agreement or arrangement or whether this is an inference based on facts, if the latter, allege in general terms what those facts are;

3.2.5 Provide each respondent with a date, or period, in which they are alleged to have joined the SOC or deemed to have joined the SOC;

3.2.6 Provide the facts that are relied on to prove that the particular respondent joined or had joined the SOC;

3.2.7 If the SOC ceased;

3.2.7.1 provide what dates the SOC is alleged to have ceased;

3.2.7.2 what facts are relied on for establishing that the conduct had then ceased; and

3.2.7.3 whether all the respondents remained participants in the SOC on that date; and, if not, when the respective respondent/s exited.

3.2.8 If the SOC is still alleged to be ongoing;

3.2.8.1 what facts this is based on; and

3.2.8.2 whether all the respondents are still part of it, if not when the respective respondent/s exited;

3.2.8.3 in relation to the relationship between the respondent banks[29] and their respective traders;

3.2.8.3.1 is it alleged that some traders acted for more than one respondent at the same time? If so, details should be provided;

3.2.8.3.2 if a trader ceased to act for a respondent's bank, did this end the respondent's participation in the SOC or if not, on what basis is it alleged that the respondent's participation continued?

[29] The order reads "bank", but "banks" must have been intended.

3.2.8.3.3 is it alleged that all the traders named as participants in paragraph 40 of the December affidavit were so-called active participants or were some so-called passive participants.

3.3 The new referral affidavit must in addition:

3.3.1 in the case of all of the named respondents set out the facts on which the Commission relies to allege that there are adequate connecting factors between the parties and the jurisdiction of the Competition Tribunal; sufficient to establish personal jurisdiction against all named respondents."

[20] Paragraphs 3.1.1 and 3.1.2 and the whole of paragraph 3.2 of the CAC's order followed the Tribunal's order, with one qualification. Paragraph 3.2.1 of the CAC's order required the Commission to plead qualified effects (for subject matter jurisdiction) in relation to each respondent, whereas the Tribunal's corresponding order had been confined to the local *peregrini*. Paragraph 3.3 of the CAC's order did not have a counterpart in the Tribunal's order; it required the Commission to plead adequate connecting factors (for personal jurisdiction) in relation to each respondent.

The superseding referral affidavit of June 2020

[21] None of the parties appealed *CAC I* to this Court. In June 2020 the Commission served its superseding affidavit in purported compliance with *CAC I*. The Commission added another five respondents to the referral: as twenty-fourth respondent, Nedbank Group Limited (Ned Group); as twenty-fifth respondent, Nedbank Limited (Nedbank); as twenty-sixth respondent, FirstRand Limited (FirstRand); as twenty-seventh respondent, FirstRand Bank Limited (FRB); and as twenty-eighth respondent, Standard Americas Incorporated (SAI). Save for SAI, which is a pure *peregrinus*, these new respondents are South African banks.

[22] It is clear from the superseding affidavit that the Commission was aiming to comply with *CAC I*. On personal jurisdiction and the ACF test, it pleaded that the Tribunal had jurisdiction over the pure *peregrini*, because they participated in an SOC

that involved the exchange rate of the ZAR and which included South African respondents. In the case of the local *peregrini*, the Commission added, as additional connecting factors, that some of them had branches in South Africa, were authorised under our law to deal in foreign currency and carried on business in this country; and that others had representative offices in South Africa and carried on business here.

[23] On subject matter jurisdiction and the QE test, the Commission pleaded in relation to each respondent that, in implementing the SOC, they engaged in conduct that had "direct/immediate, substantial and foreseeable consequences upon the economy of South Africa and the welfare of South African consumers and an effect within South Africa for the purposes of section 3(1) of the Act". Later in the superseding affidavit the Commission devoted many paragraphs to the effect of the conduct, starting with a paragraph alleging that the SOC "had a direct or immediate, and substantial effect in the Republic and it was foreseeable that the impugned conduct would, or had the potential to, have such an effect".

[24] Save for the two Investec entities, the active respondents again filed exceptions, some by way of dismissal or objection applications on motion supported by affidavit. In regard to personal jurisdiction over the pure *peregrini*, the adequacy of the Commission's pleading of personal jurisdiction was closely tied to the adequacy of its pleading of the pure *peregrini*'s participation in an SOC that included South African banks. This was because participation in an SOC that included South African banks was a crucial "connecting factor" alleged by the Commission for purposes of personal jurisdiction. In the case of other respondents, there were also contentions that the superseding affidavit did not adequately plead facts to show that they participated in the SOC. The pleaded facts, they contended, were either benign or, at best for the Commission, showed limited collusion not forming part of the alleged SOC. Some of the respondents also contended that the Commission had not adequately pleaded qualified effects to establish subject matter jurisdiction.

[25] In September 2020 the Commission served its second joinder application, this time for the joinder of the twenty-fourth to twenty-eighth respondents. This joinder application was conditional upon it being found that the Commission was not entitled to add additional respondents when delivering the superseding affidavit. The two FirstRand entities did not oppose their joinder, but the two Nedbank entities and SAI did.

TRIB II

[26] The Tribunal heard argument over a number of days in November and December 2021. It delivered its decision, *TRIB II*, in March 2023. The Tribunal's view was that extraneous facts alleged by respondents in dismissal and objection applications should be left out of account, and that such applications should be treated as pure exceptions.[30] The facts alleged in the superseding affidavit were to be assumed, for purposes of the exceptions, to be true. The Commission was entitled to the benefit of the most favourable reading of which the affidavit was reasonably capable. Although in general the Tribunal follows High Court exception principles, its guiding principle, the Tribunal emphasised, is fairness. This is because of the unique nature of referral proceedings: a mix of motion and trial proceedings; subject matter involving the intersection of law and economics; and the fact that the Tribunal has inquisitorial powers.[31]

[27] The Tribunal said that it had a wide discretion in the conduct of its proceedings. Its approach was not overly technical. It had to conduct cases expeditiously and informally. The Commission was accusing the respondents of conduct regarded as the most egregious in competition law, relating to manipulating the ZAR exchange rate which had a central and crucial role in South Africa's economy.[32]

[30] *TRIB II* above n 4 at paras 235-6.

[31] Id at paras 49-60.

[32] Id at paras 106-21 and 229-31.

[28] As to the adequacy of the pleading of the SOC, the Tribunal said that an SOC did not require that all members of the conspiracy meet at the same time or that each member must have met every other member. What was required was contact between firms, directly or through an intermediary, and a common anti-competitive objective by which the participants considered themselves bound.[33] The Tribunal concluded that the superseding affidavit pleaded sufficient facts to make out a prima facie case of an SOC between foreign and local banks.[34] The Tribunal also was satisfied that the affidavit pleaded sufficient facts to meet the QE test for subject matter jurisdiction.[35]

[29] The Tribunal referred to rule 15(2) of the Tribunal Rules (TR), which states that a referral must be supported by an affidavit setting out in numbered paragraphs "a concise statement of the grounds of the complaint" and "the material facts or the points of law relevant to the complaint and relied on by the Commission". This standard, in the Tribunal's view, had been met.[36] The Tribunal undertook a detailed examination of the respondents' exceptions, finding in each case that the superseding affidavit passed muster.[37]

[30] Some of the respondents raised, as a ground of exception, that on the pleaded facts the prohibited conduct had ceased more than three years before the initiation of the complaint in April 2015. For this reason, so they argued, proceedings against them were time-barred under section 67(1) of the Act.[38] The Tribunal rejected this ground. The Commission had pleaded that it did not know the cessation date because this was within the knowledge of the banks. Whether the conduct had ceased more than three

[33] Id at paras 118-19, citing Whish and Bailey *Competition Law* 8 ed (OUP, Oxford 2015) at 107-10.

[34] *TRIB II* id at paras 123-43 and

[35] Id at paras 146-62.

[36] Id at paras 205-9.

[37] Id at paras 281-355.

[38] Section 67(1) reads:

> "A complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal."

years before the initiation had to be pleaded by the respondents and determined after the leading of evidence.[39]

[31] Some of the banks that had not been named in the February 2017 referral contended that there could be no referral in respect of them in the absence of an initiation specifically identifying them. The superseding affidavit did not disclose that this had happened. The banks in question invoked the judgment of the Supreme Court of Appeal (SCA) in *Woodlands*.[40] Some of the banks also argued that it was not permissible to join a respondent once a complaint had been referred to the Tribunal. For this proposition they relied on *Woodlands* and the CAC's judgment in *Loungefoam*.[41]

[32] The Tribunal considered that the SCA's judgment in *Yara*[42] and this Court's judgment in *Pickfords*[43] were a complete answer to these contentions. An initiation did not require formalities, it could even be done tacitly. An initiation had to identify the prohibited practice. An initiation was valid even if the Commission did not then know who all the participants were. A new initiation was not needed just to add further respondents. What *Woodlands* had found impermissible was the initiation of a complaint against a whole industry in the absence of material evidence to support a belief that the conduct was being perpetrated by the whole industry.[44]

[33] Another ground of exception addressed by the Tribunal was a complaint that the superseding affidavit did not in all respects meet the pleading requirements set out in the *CAC I* order. On the interpretation of court orders, the Tribunal took guidance from

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[39] *TRIB II* above n 4 at paras 167-73.

[40] *Woodlands Dairy (Pty) Ltd v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA).

[41] *Loungefoam (Pty) Ltd v Competition Commission South Africa; Feltex Holdings (Pty) Ltd v Competition Commission South Africa* [2011] ZACAC 4; [2011] 1 CPLR 19 (CAC).

[42] *Competition Commission v Yara (SA) (Pty) Ltd* [2013] ZASCA 107; [2013] 2 CPLR 351 (SCA); [2013] 4 All SA 302 (SCA); 2013 (6) SA 404 (SCA).

[43] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* [2020] ZACC 14; [2020] 1 CPLR 1 (CC); 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC).

[44] *TRIB II* above n 4 at paras 174-89.

this Court's decision in *S.O.S.*[45] The context of *TRIB I* and *CAC I*, the Tribunal said, had been a matter of pleading. The *CAC I* order should not be minutely interpreted as if it were a legislative checklist. It was enough that the superseding affidavit demonstrated what the case was about and enabled the banks to answer. That test was met. Even if the superseding affidavit did not contain all the details required by the *CAC I* order, this did not fetter the Tribunal's procedural discretion in terms of sections 55[46] and 58(1)(c)[47] of the Act read with TR 55.[48] Non-compliance with *CAC I* was not, the Tribunal concluded, a self-standing ground of objection.[49]

[34] On the joinder applications, the Tribunal said that its joinder powers under TR 45(1) were discretionary. As a general proposition, it was disinclined to dismiss the joinder applications, since a dismissal at an early stage of the proceedings might result in the unintended consequence of letting an alleged cartelist off the hook.[50] The Tribunal dismissed each of the joinder respondents' grounds of opposition, which included issues of jurisdiction and initiation dealt with earlier in the Tribunal's decision.

[35] The Tribunal made an order granting all the joinders and dismissing all the exceptions. The respondents were ordered to file their answering affidavits within 40 days. If they persisted with any grounds of objection or exception not dealt with in the Tribunal's reasons, they had to do so in their answering affidavits and plead over on the merits.

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[45] *SOS Support Public Broadcasting Coalition v South African Broadcasting Corporation (Soc) Ltd* [2018] ZACC 37; [2018] 2 CPLR 411 (CC); 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC).

[46] Section 55 confers on the presiding Tribunal member the power to determine any matter of procedure, with due regard to the circumstances of the case. In terms of the same section, the Tribunal is granted the power to condone technical irregularities.

[47] The Tribunal referred to section 59, but that seems to have been an error. Section 58(1)(c) gives the Tribunal the power to condone non-compliance on good cause shown.

[48] TR 55 gives effect to sections 55 and 58(1)(c).

[49] *TRIB II* above n 4 at paras 190-204.

[50] Id at paras 234-5.

CAC II

[36] All the banks that lost in the Tribunal appealed to the CAC. Some of the banks also launched review applications to set aside *TRIB II*. The appeals and reviews were argued over four days in November 2023. During the hearing SCB reached a settlement with the Commission and thus ceased to be an active respondent. The CAC delivered judgment, *CAC II*, in January 2024.

[37] The CAC rejected a preliminary argument by the Commission that *TRIB II* was not appealable. It did so on the basis that the dismissal of an exception is appealable where the exception contests the jurisdiction of the forum.[51]

[38] The CAC accepted the Commission's argument on the three requirements for an SOC, derived from EU case law,[52] namely (1) a common anti-competitive objective, being the existence of an overall plan pursuing a common economic objective; (2) participation, being each firm's intentional contribution by its own conduct to the common objective pursued by all the participants; and (3) that the firm was either aware of the actual conduct planned or put into effect by other firms in pursuit of the same objective or could reasonably have foreseen it and was prepared to take the risk.[53] (As to the third requirement, I shall henceforth refer to knowledge which a firm had or could reasonably have had as actual or constructive knowledge.)

[39] The CAC pointed out that, according to *Team Relocations*,[54] a series of acts or continuous conduct may constitute an infringement even where one or several elements of that series of acts or continuous conduct could in themselves and in isolation constitute an infringement. The responsibility of a firm that participates in a "single and continuous infringement" (i.e. an SOC) is—

[51] *CAC II* above n 1 at paras 52-60.

[52] *Commission v Anic Partecipazioni* [1999] ECR I-4125; [1999] EUECJ C-49/92 and *Team Relocations NV v European Commission* [2013] EUECJ C-444/11 (*Team Relocations*).

[53] *CAC II* above n 1 at para 28.

[54] Above n 52.

> "limited, with regard to the conduct planned or put into effect by the other participants and of which it was or should have been aware, to the actions which occurred during the period of participation of that undertaking in that infringement."[55]

This formulation acknowledged that a firm "may be held responsible for a single and continuous infringement even if it does not participate in all of the offending conduct of which it is made up". Also, the firm need not have begun its intentional contribution at the very start of the infringement nor need it have pursued the common objective in ways identical to those put into effect when the infringement began.[56]

[40] The CAC said that pleading an SOC is an "onerous exercise" which required, in this case, that the Commission provide—

> "plausible evidence that, even if not a participant in all of the events which made up the SOC, a respondent bank's conduct, based essentially on that of its traders, constitutes sufficient evidence to justify that there was an intentional contribution to the common objectives of the conspiracy and that the respondent bank was aware or should have been aware of the offending conduct of the initial participants and hence was party to the infringement by way of an SOC."[57]

[41] The CAC reminded itself that in *CAC I*, it had rejected the Commission's argument concerning section 3(1). In regard to personal jurisdiction, *CAC I* had laid down the ACF test. *CAC I* had foreshadowed the possibility that an SOC targeting the USD/ZAR exchange rate and that had local banks as participants could satisfy the ACF test in regard to pure *peregrini*. But it was then necessary, the Court emphasised in *CAC II*, that the pleaded case should show that all of the banks were connected to the SOC, having regard to the principles set out in *Team Relocations*.[58]

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[55] *CAC II* id at para 33.

[56] Id at paras 29-34, quoting *Team Relocations* above n 52 at paras 49, 52, 55 and 56.

[57] *CAC II* id at para 36.

[58] Id at paras 38-9.

[42] An enquiry, therefore, into whether *TRIB II* was right to find that the Commission had sufficiently pleaded personal jurisdiction in respect of the pure *peregrini* required, said the Court in *CAC II*—

> "an examination as to whether there was an SOC between the respondent banks of a kind that reveals not simply that the Rand was the subject of the trades but that the conspiracy was sufficiently connected to South Africa because, by virtue of it being an overall conspiracy, foreign banks had effectively entered into 'business with South African banks'. This provided sufficient connection between these respondent banks and South African jurisdiction to sustain a finding of personal jurisdiction in the circumstances of the case. This concept of personal jurisdiction as developed by this Court was predicated on an economy where business is no longer based on bricks and mortar but rather on modern technology, which has created the conditions for a global economy where national borders are transcended by virtue of technological development. It follows that to sustain an argument that there were sufficient connecting factors, the need is to provide clear evidence of linkages to the South African banks as part of an overall conspiracy and which thus linked the *incolae* banks with the *peregrini* banks."[59]

[43] The Court then embarked on a bank-by-bank analysis to determine whether the superseding affidavit contained sufficient allegations to sustain the conclusion that the bank in question had participated in the alleged SOC. This analysis was done for all the banks, not only the pure *peregrini*. In part, therefore, it was an assessment as to whether the Commission had made out a cause of action against each bank in respect of the subject matter of the case, namely an SOC. But because the alleged existence of an SOC with South African participants was an important connecting factor for personal jurisdiction over the pure *peregrini*, the analysis was also aimed at establishing whether the Commission had sufficiently pleaded personal jurisdiction over the pure *peregrini*.

[44] The CAC's detailed analysis[60] led it to conclude that the Commission had made sufficient allegations in respect of BNP and HBEU (local *peregrini*) and JPM Co and

[59] Id at para 85.

[60] Id at paras 87-173.

CSS (pure *peregrini*). In respect of all the other active respondents, the CAC concluded that the superseding affidavit was excipiable and that those banks' appeals should succeed. Earlier in its judgment, the CAC had also concluded that the Commission could not properly include a company as a respondent merely because it was the holding company of an implicated bank. On this basis, so the CAC concluded, the case had to fail against BAMLI, BANA, Ned Group and FirstRand.[61]

[45] Although the CAC repeatedly used the expression "subject matter jurisdiction" in assessing the case pleaded against the various banks, it was plainly not using that expression in the technical sense of conduct having effects in South Africa meeting the QE test. It seems to have used that expression loosely as a synonym for a "cause of action", more particularly whether there were sufficient allegations to show that the bank in question was a participant in the alleged SOC.[62] In regard to subject matter jurisdiction in the sense of effects meeting the QE test, the CAC dealt with this in only three paragraphs in the concluding part of its judgment,[63] the last of which reads:

> "It may well be that the effect that various trades documented by the Commission had on the Rand was so insignificant as to have had no material effect thereon. But that is a matter which is better dealt with at trial where the respondent banks, which have a case to answer, can provide evidence to gainsay the case made out by the Commission."

[46] In regard to the second joinder application, the CAC held that *CAC I* had required the Commission to "revisit its significantly imperfect referral affidavit" and to "reconfigure" it so that it passed the test laid down in *CAC I*. The Court had not intended that banks that were not part of the initial referral could be added. What had been intended was the redrafting of the initial referral affidavit, not the generation of a new one.[64] The CAC rejected the Commission's reliance on *Pickfords*[65] to justify the

[61] Id at paras 64-6.

[62] See, for example, *CAC II* above n 1 at paras 126-8 (JPM Co), 135 (HBEU), 139 (CSS) and 173 (SBSA).

[63] Id at paras 180-2.

[64] Id at paras 37 and 184.

[65] Above n 43.

addition of further respondents post-referral. What *Pickfords* made clear, according to the CAC, was that a complaint is initiated against a practice, not specific parties. The Commission can thus add further parties after the initiation. This did not contradict *CAC I* with regard to the "cut off" point for the addition of further parties, "that is, after the referral".[66]

[47] On the strength of this reasoning, the CAC held that the case for the joinder of SAI was fatally flawed. The CAC also rejected the notion that there had been a tacit initiation against SAI. That bank had at no stage been the subject of an investigation prior to the referral of the complaint to the Tribunal.[67] In the case of FRB, to which the same reasoning would also have applied, the CAC instead examined whether the superseding affidavit sufficiently alleged its participation in the SOC and found that it did not. The CAC did not do the same for Nedbank.

[48] In the concluding part of its judgment, the CAC returned to the question of the second joinder application. It stated that because *CAC I* had not permitted the joinder of further respondents, the granting of the application to join Nedbank, FRB and SAI had to be set aside.[68]

[49] The CAC thus made an order upholding the appeals of BAMLI, JPM Bank, ANZ, SNY, SBSA, Nomura, CSG, Commerzbank, Macquarie, HBUS, MLP, BANA,

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[66] *CAC II* above n 1 at para 67. In *CAC II*, the Court referred at this point to para 67 of *CAC I* on the "cut off" date. The latter paragraph in *CAC I* above n 2 reads:

> "While it is correct that the judgment in [*Power Construction (West Cape) (Pty) Ltd v Competition Commission of South Africa* [2017] ZACAC 6; [2017] 2 CPLR 589 (CAC)] makes it clear that it is necessary for a complaint to be initiated against each firm that is alleged to be a party to the cartel before that complaint is referred to the Tribunal, there is nothing in this judgment which deals with the facts of this present case; namely, in the event that this Court does not disturb the relevant component of the Tribunal's order, namely that the Commission has been granted permission to file a new referral affidavit to substitute for and replace all the complaint referral affidavits so long as the complaint referral deals with the individual parties and shows their connection to the alleged overall conspiracy to form a cartel. In short, the existing jurisprudence presents no fatal obstacle to the granting of a similar order against the pure *peregrini* and thus deferring the joinder application until such time as that referral affidavit has been filed and can appropriately be considered."

[67] *CAC II* id at paras 143-6.

[68] Id at para 184.

the Nedbank respondents, the FirstRand respondents and SAI. It dismissed the appeals of BNP, JPM Co, HBEU and CSS. The effect of this was to leave those four banks as active respondents together with the two Investec entities which had played no part in the second round of appeals.

The applications for leave to appeal to this Court

[50] In CCT 30/24 the Commission has applied for leave to appeal *CAC II* in respect of the banks who succeeded in that Court, save for SNY, CSG, Ned Group and FirstRand. HBEU has applied for leave to cross-appeal its failure in *CAC II*. BNP and CSS have applied for leave to appeal their failures in *CAC II* (in CCT 25/24 and CCT 27/24 respectively). JPM Co, the remaining unsuccessful bank in *CAC II*, has not sought leave to appeal.

[51] In its founding affidavit in CCT 30/24, the Commission pleads eight grounds of appeal:

(a) First, as to personal and subject matter jurisdiction, the CAC erred by not following the interpretation of section 3(1) which the Commission had advanced in the first round of exceptions.

(b) Second, as to exception procedure, the CAC erred by taking into account facts alleged by the respondents in their affidavits in support of their exception applications. This was contrary to well-established principles governing the adjudication of exceptions.

(c) Third, as to the standard of pleading, the CAC ignored the provisions of TR 15, instead imposing a higher standard.

(d) Fourth, the CAC erred in holding that the superseding affidavit was excipiable in relation to the banks that succeeded in *CAC II*.

(e) Fifth, the CAC erred in holding that the order in *CAC I* precluded the joinder of further banks. In so doing, it misconstrued *Pickfords*.

(f) Sixth, the CAC erred in finding that the Commission needed to issue a fresh complaint initiation in respect of banks not identified as respondents at the time of the complaint referral in February 2017.

(g) Seventh, the CAC failed to address the Commission's contention that the simultaneous reviews brought by some of the banks should be dismissed. Parallel reviews are open to abuse and impose a significant burden on the Commission.

(h) Eighth, and finally, the Commission contends that the order in *CAC II* is incomplete and confusing in various respects.

[52] In its application for leave to cross-appeal in CCT 30/24, HBEU pleads that the CAC erred in not having regard to affidavits stating that the traders identified in the superseding affidavit as acting for HBEU were in fact employed by and representing HBUS – the so-called "wrong guy" point. In so doing, the CAC treated HBEU differently from other banks that succeeded in the CAC on the basis of not having employed or been represented by the implicated traders.

[53] In CCT 25/24, BNP pleads that the CAC erred in failing to uphold its exception. The exception contended that the superseding affidavit contained contradictory averments as to the duration of the SOC and as to the continued participation of the various respondents, and in these respects failed to comply with the pleading requirements of *CAC I*.

[54] In CCT 27/24, CSS pleads two grounds of appeal:

(a) Although the CAC found against CSS on its exception application, the CAC failed to deal with CSS' appeal against the Tribunal's joinder decision. The joinder appeal should have succeeded, because the Commission failed to establish that it had initiated a complaint against CSS. This was necessary in view of the fact that CSS had not been named in the initiation statements of April 2015 and August 2016, and that the Commission only sought to join CSS after the referral to the Tribunal in February 2017.

(b) The CAC erred in finding against CSS on its exception application. In so doing, the CAC wrongly treated CSS as a local *peregrinus* for purposes

> of personal jurisdiction, whereas it was common cause between the parties that CSS was a pure *peregrinus*. The allegations in the superseding affidavit against CSS as a pure *peregrinus* stood on the same footing as the affidavit's allegations against MLP and HBUS. The latter respondents succeeded in the CAC on the basis that the affidavit failed to establish that they were implicated in a conspiracy with South African banks.

Jurisdiction and leave to appeal

[55] This Court's jurisdiction is set out in section 167(3)(b) of the Constitution.[69] These applications raise several arguable points of law of general public importance which this Court ought to consider. These include (a) questions relating to joinder and complaint initiation, particularly when the Commission wishes to add further firms after a complaint has already been referred to the Tribunal; (b) alleged legal errors committed by the CAC in relation to the requirements for and pleading of an SOC; and (c) the proper interpretation of section 3(1), though this last question may not be reached if we are against the Commission on *res judicata* (a case finally decided) and peremption. We thus have general jurisdiction in terms of section 167(3)(b)(ii).

[56] *Res judicata* and peremption implicate the rule of law and the right of access to courts guaranteed in section 34 of the Bill of Rights,[70] so our constitutional jurisdiction is also engaged. The questions of joinder and initiation concern the powers and jurisdiction of two statutory bodies, the Commission and Tribunal. The proper delineation of the powers and jurisdiction of such statutory bodies is a constitutional question. The same is true in relation to section 3(1), since its proper interpretation affects the jurisdiction of the Tribunal, both as to persons and subject matter. The

[69] Section 167(3)(b) provides that the Constitutional Court may decide—

> "(i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[70] See the authorities discussed later in this judgment at [101] to [126].

interpretation of section 3(1) must also, argues the Commission, be interpreted in accordance with the injunction in section 39(2) of the Constitution, namely in a way that best promotes the spirit, purport and objects of the Bill of Rights. In that regard, the Commission invokes the right of access to courts in section 34 of the Bill of Rights as an important interpretive influence. We thus also have constitutional jurisdiction.

[57] This does not necessarily mean that what will remain for decision after the above issues have been determined will be matters engaging our jurisdiction. Most of the banks contend that, unless we find that the CAC went awry on the law, what will remain are mundane questions as to whether, in the particular circumstances of this case, the superseding affidavit pleaded sufficient facts to withstand the objections taken against it. These latter questions, they submit, are not within our jurisdiction.

[58] As shall appear in due course, the Commission enjoys prospects of success on at least some of the questions which we have jurisdiction to decide. Quite apart from prospects of success, however, the importance and magnitude of the case make it desirable to pronounce on the questions I have identified. Although some of those questions are more prominent in relation to some banks than others, it would not be profitable to draw distinctions. With one exception, the parties seeking leave to appeal should be granted leave, and the various appeals should be considered on their merits. The exception is BNP's application for leave to appeal, for reasons I shall explain later.

The issues and further structure of this judgment

[59] I shall deal with the issues that arise in this case in the following order:

(a) First, I shall address the issues relating to the standard of pleading and exception procedure in Tribunal proceedings.

(b) I shall then turn to the Commission's argument on the interpretation of section 3(1) and the important related questions of *res judicata* and peremption.

(c) Thereafter I shall address issues concerning joinder procedure in the Tribunal, and the related questions whether it is permissible to join

respondents after a complaint has been referred to the Tribunal, whether further initiations were needed against the joinder respondents and whether *CAC I* precluded the joinder of further parties. That part of the judgment will be concerned with and will determine the issues raised in this respect by CSS, Nedbank and SAI.

(d) Then I shall deal with the requisites for pleading an SOC and various related questions. In that part of the judgment I shall, by way of introduction, summarise how the Commission went about pleading the SOC, before dealing, under separate subheadings, with 13 alleged legal errors which, according to the Commission, the CAC made in its assessment of the pleaded case against the various banks. Those alleged errors were identified by the Commission in a note submitted at the Court's request during the course of the hearing and to which the banks were given an opportunity to respond.

(e) With a view to analysing the 13 alleged errors, it will be convenient in that part of the judgment to summarise the Commission's pleaded case against various banks and the CAC's reasoning in favour of those banks: JPM Bank (third error); Nomura and Macquarie (sixth error); FRB (seventh error); HSBC (eighth error); BoA (ninth error); ANZ (ninth and twelfth errors); and Commerzbank and SBSA (eleventh error).

(f) I shall then draw the threads together in a part of the judgment dealing separately with each of the banks. I shall there address any additional matters not covered in earlier parts of the judgment.

(g) In the concluding section, I shall summarise the overall result and deal with costs.

Pleadings and exceptions in Tribunal proceedings

[60] Although the Tribunal Rules do not explicitly provide for exceptions, the Tribunal has over many years held that it can entertain exceptions. In terms of section 52(2) of the Act, the Tribunal must conduct its hearings in public, expeditiously and in accordance with the principles of natural justice; and it may do so informally or

in an inquisitorial way. In terms of section 55(1), the member presiding at a hearing may determine any matter of procedure with due regard to section 52(2). In terms of TR 55(1), the presiding member may give directions on procedure and may, for that purpose, have regard to the High Court Rules.

[61] As to the form for exceptions, the Tribunal has often permitted this to be done on notice of motion supported by an affidavit setting out the litigant's objections. This does not mean that the objecting litigant may, without more, rely on additional facts contained in its affidavit. In terms of High Court procedure, an excipient must confine its attack to the terms of the impugned pleading and may not introduce additional facts. The allegations in the impugned pleading must, moreover, be assumed to be true.

[62] The Tribunal has emphasised, however, that although it may consider High Court procedure, it has a wide discretion in the conduct of its proceedings. Although its proceedings are adversarial in form, it has inquisitorial powers to arrive at the truth. The Tribunal must conduct its proceedings with fairness and guard against elevating form over substance. Fairness is context-driven, having regard to the circumstances of each case. Fairness is not a one-way street – all parties have the right to fairness in conducting their cases.[71]

[63] The Tribunal has also said that, unlike the approach in the High Court, its general approach to exception applications has been to decide each one on its own merits and circumstances, and not to adopt an overly technical approach. Its approach, the Tribunal has stated, is informed by three considerations. First, complaint proceedings are *sui generis* (unique), consisting of elements of both motion and trial procedure. Second, the subject of the Tribunal's proceedings involves the intersection of law and economics. What may appear to be a pure point of law may in truth require an entire

[71] *Rooibos Ltd v South African Competition Commission* [2009] ZACT 58; [2009] 2 CPLR 572 (CT) at paras 5 and 8; *BMW South Africa (Pty) Ltd t/a BMW Motorrad v Fourier Holdings (Pty) Ltd t/a Bryanston Motocycles* [2011] ZACT 3; [2011] 1 CPLR 181 (CT) at para 22; and *South African Medical Association v Council for Medical Schemes* [2016] ZACT 71; [2016] 2 CPLR 1027 (CT) at para 52 and fn 35.

factual matrix. Third, the Tribunal has inquisitorial powers and a wide discretion in the conduct of its proceedings. The guiding principle is fairness.[72]

[64] TR 15(2), as previously noted, provides that a complaint referral must be supported by an affidavit setting out in numbered paragraphs "a concise statement of the grounds of the complaint" and "the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant". The language of TR 15(2) is similar but not identical to rule 18(4) of the Uniform Rules of Court (URC). In the case of URC 18(4), the pleading must contain "a clear and concise statement of the material facts". In the case of TR 15(2), it is the "grounds of the complaint" that must be the subject of a "concise statement". Additionally, the supporting affidavit must then set out the "material facts or the points of law" relevant to the complaint. The rule does not state that the "material facts" must merely be the subject of a "concise statement". In High Court motion proceedings, URC 6(1) requires the notice of motion to be supported by an affidavit "as to the facts upon which the applicant relies for relief".

[65] Because referral proceedings are a blend of motion and trial proceedings, and because the referral affidavit must set out the "material facts" on which the Commission relies, a skeletal statement of the cause of action, such as might suffice for a High Court pleading, is unlikely to meet the standards set by TR 15(2). As Wallis JA stated in *Loungefoam*:[73]

> "[12] Assuming this reflects the general stance of the Commission it is labouring under a fundamental misconception as to the nature of the affidavit required by rule 15(2). It treats it as if it is a type of pleading, subject to amendment from time to time as the case develops. That is incorrect. An affidavit in competition proceedings has precisely the same character as it has in any other circumstances. It is a sworn statement on oath by a witness that is required by rule 15(2) to set out a concise statement of the grounds of the complaint and the material facts and points of law

[72] *Invensys plc v Protea Automation Solutions (Pty) Limited; In re: Protea Automation Solutions (Pty) Limited v Invensys plc* [2014] 2 CPLR 505 (CT) at paras 13-16.

[73] Above n 41.

> relevant to the complaint and relied on by the Commission. It serves the same purpose as an affidavit in application proceedings, which contains both the allegations necessary in a pleading, including any relevant propositions of law, and the essential evidence in support of those allegations.
>
> [13] It was suggested in argument before us that the affidavit delivered in support of a referral to the Tribunal is *sui generis* and does not stand on the same footing as a conventional affidavit. Counsel made the point that the deponent to the affidavit is usually an investigator in the employ of the Commission and much of the contents thereof constitute hearsay. It is unusual for the investigator to be a witness in the proceedings before the Tribunal and in practice the Tribunal determines the cases that come before it on the basis of oral and documentary evidence.
>
> [14] Whilst this may accurately describe what happens in practice it is unclear why it is thought to alter the fundamental nature of an affidavit. There is no legal prohibition against an affidavit containing hearsay evidence. In certain circumstances and before certain tribunals such evidence is inadmissible, but that does not mean that an affidavit in support of a referral to the Tribunal cannot contain hearsay. It may be convenient for the Commission to cause the affidavit to be deposed to by the investigator who investigated the complaint. That is likely to be a sensible course, as the investigator will have the relevant facts and documents at her or his fingertips. However, it is inevitable in those circumstances that the affidavit will largely be an affidavit of information and belief rather than direct evidence. That is immaterial bearing in mind the practice of the Tribunal to conduct a hearing at which witnesses with direct knowledge of the facts testify under oath and are cross-examined. No doubt if it sought to rely only on the investigator's affidavit that would provoke protest from other parties but that is a different matter."

[66] In practice, the Commission includes a substantial body of evidence in its referral affidavits, albeit through the mouth of an investigator, and that was done here. How then should one adjudicate a complaint that the referral affidavit fails to disclose a cause of action? The mere presence of formal assertions constituting the bare bones of a cause of action are unlikely to suffice, bearing in mind that the referral affidavit is meant also to contain evidence.

[67] I do not wish to cast doubt on the general principles which the Tribunal has laid down for itself in dealing with exceptions or to fetter its procedural discretion, but I think the following would generally be the appropriate test. Assuming that all the facts alleged in the referral affidavit are proved and that no other facts are proved, could the Tribunal, acting reasonably, conclude that the Commission has made out a case for the relief claimed? Where the case depends on inferences, this would include asking whether the Tribunal, acting reasonably, could draw the inferences which the Commission seeks to draw from the primary facts alleged in the referral affidavit. This is not dissimilar to the test which has been applied by our civil courts when a respondent takes a preliminary objection that the founding affidavit does not make out a case for the relief claimed. The question is whether the founding affidavit makes out a "prima facie case".[74]

[68] Ordinarily a respondent raising such an objection is confined to the facts stated in the founding affidavit,[75] just as an excipient is confined to the facts alleged in the impugned pleading. However, the principles which the Tribunal has laid down do not warrant a rigid rule that under no circumstances may additional facts be taken into account. Considerations of fairness may, in some circumstances, justify regard being had to limited additional facts. It is relevant to bear in mind, in this regard, that in a complex case the trial of a complaint referral may run for many weeks or months. That would seem to be true of the present case. Moreover, the Tribunal does not have the power to order the Commission to pay a respondent's costs if the Commission fails against that respondent.[76]

[69] Additional evidence adduced by the respondents may be relevant in the case of BAMLI, SBSA and HBEU. This evidence relates mainly to matters such as who

[74] *Taylor v Welkom Theatres (Pty) Ltd* 1954 (3) SA 339 (O) at 344G-345A; *Bader v Weston* 1967 (1) SA 134 (C) at 136B-E; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 465E-G and 469B-F; and *Pearson v Magrep Investments (Pty) Ltd* 1975 (1) SA 186 (D) at 187B-188A.

[75] See the cases cited in the preceding footnote.

[76] Section 57(1) states that in Tribunal proceedings each party must bear its own costs. Where the referring party is a complainant (i.e. a private entity), the Tribunal may grant costs for or against a respondent, depending on the outcome, but there is no equivalent power where the referring party is the Commission.

employed the person named as a trader and whether that person was a trader. There was also evidence from JPM and SBSA about the workings of currency trading. As respondents in the referral as at February 2017, these firms were, in principle, confined to raising exceptions.

[70] In *TRIB II*, the Tribunal set out its guiding principles on exceptions in the way I have summarised above, but it did not specifically mention the High Court principle that an excipient may not rely on additional evidence.[77] When dealing with BAMLI, SBSA and HBEU, the Tribunal did not say that it was precluded from having regard to the evidence in question, instead observing that it would be reluctant at the exception stage to reject the Commission's version or that the matters in question were more properly a matter for defence on the merits.[78] There was no detailed engagement with the facts, and this is particularly true for SBSA. The CAC, by contrast, relied freely on the additional facts, without explicitly considering whether, in the particular circumstances, it was fair to depart in this respect from usual exception principles.

[71] I shall need to return to these failings by the Tribunal and the CAC in regard to the additional evidence when considering the Commission's appeals in respect of BAMLI and SBSA, and HBEU's cross-appeal.

[72] The Tribunal's modified exception principles apply in principle to the dismissal applications brought by banks from the initial group of 18 respondents cited in the February 2017 referral. In the case of further respondents whom the Commission sought to join, those respondents were entitled to file answering affidavits on the facts. There can be no question that the Tribunal was bound to have regard to those facts. If, however, the facts were properly contested by the Commission, the Tribunal could justifiably have adopted the position that the bank in question should be joined and that the contested facts be resolved at trial.

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[77] *TRIB II* above n 4 at paras 49-60.

[78] Id at para 286 (BAMLI) and para 313 (SBSA). The additional facts of potential relevance to HBEU were not mentioned (see paras 345-7).

[73] Although the CAC did not explicitly formulate the test it intended to apply in assessing the adequacy of the superseding affidavit, its various formulations do not show it to have been guilty of any material misdirection. The CAC, correctly in light of *Loungefoam*, did not hold against the Commission that the investigator who made its affidavits did not have personal knowledge of the facts. The pleaded facts were accepted as facts. On several occasions the CAC spoke of the Commission's need to establish a "prima facie case".[79] Elsewhere it spoke of a "sufficient case",[80] "sufficient facts",[81] "sufficient evidence"[82] and "plausible evidence".[83] In exonerating some of the banks, the CAC said that certain allegations were "hardly evidence"[84] of participation in the SOC or that there was "simply insufficient evidence"[85] or an absence of "plausible evidence"[86] or, in some instances, "no evidence".[87]

[74] Bearing in mind that the Commission's case rested on inferences, these various formulations are all consistent with testing whether the Commission's facts, if proved, made out a prima facie case. In those instances where the CAC found for the banks, the CAC did not consider a reasonable inference of participation in the SOC could be drawn from the primary facts.

Section 3(1), res judicata and peremption

[75] The Commission submits that the interpretation of section 3(1) in *CAC I* was wrong and that we should accept the argument advanced by the Commission in the first round of exceptions, namely that section 3(1) is an all-encompassing jurisdictional

[79] *CAC II* above n 1 at paras 61, 89, 118, 128, 135 and 139.

[80] Id at paras 79 and 151.

[81] Id at 61.

[82] Id at para 36.

[83] Id.

[84] Id at paras 104 and 114.

[85] Id at paras 115 and 123.

[86] Id at para 170.

[87] Id at paras 89, 93, 142 and 153.

provision that wholly displaces the ordinary requirements for personal jurisdiction and subject matter jurisdiction. If this argument were open to the Commission, it would be an arguable point of law of general public importance engaging this Court's jurisdiction. But is the argument open to the Commission?

[76] At the hearing, the questions of *res judicata* and peremption were raised. Since these matters were not addressed as fully as perhaps they should have been, post-hearing directions were issued for the parties to file written submissions. The submissions were required to address these four questions:

(a) To the extent that the doctrine of *res judicata* finds application in this matter, is it procedurally open to this Court to consider relaxing the doctrine of *res judicata*?

(b) If it is, what factors weigh in favour of or militate against the relaxation of the doctrine of *res judicata* in this case?

(c) Does the doctrine of peremption render moot any relaxation of the doctrine of *res judicata*?

(d) If neither the doctrine of *res judicata* nor the doctrine of peremption precludes this Court from interfering in the holding in *CAC I*, on what basis, if any, may this Court interfere with such holding?

[77] The questions of *res judicata* and peremption are mainly of relevance to personal jurisdiction over pure *peregrini*. Of the pure *peregrini*, personal jurisdiction was not argued by SAI, which defended the CAC's decision in its favour on other grounds.

Was res judicata sufficiently pleaded?

[78] In its submissions, the Commission has contended, preliminarily, that none of the banks pleaded *res judicata* in their opposing affidavits in this Court. I should immediately make the point that the question of *res judicata* did not arise during the hearing of *TRIB II* and *CAC II* because it was not argued in those fora that *CAC I* was not binding. Indeed, the proceedings in *TRIB II* and *CAC II* were premised on *CAC I* being binding. What served before the fora in *TRIB II* and *CAC II* were exceptions and

objections to the superseding affidavit in which the banks contended that the affidavit failed to meet the requirements laid down in *CAC I* on various matters, including personal and subject matter jurisdiction. *CAC I* was in essence the standard by which the exceptions and objections in *TRIB II* and *CAC II* were adjudicated.

[79] I accept that usually *res judicata* should be pleaded. If it is not, the other party may not know the previous judgment on which its opponent relies and how that judgment bears on the issues in the later proceedings. A failure to plead *res judicata* may, in such circumstances, cause the other party to be taken by surprise if it is first raised in argument. That concern is absent in a case such as the present, where the previous judgment was front and centre in the later proceedings. The entire second round of proceedings in *TRIB II* and *CAC II* was concerned with the extent to which the superseding affidavit complied with *CAC I*. The banks expressly invoked *CAC I* as the basis for their exceptions and objections. The Commission did not, in opposing the exceptions and objections, contend that *CAC I* did not apply.

[80] In these circumstances, where *res judicata* only became relevant because of the Commission's belated shift of stance in this Court, there would be no unfairness to the Commission if the banks were permitted to invoke *res judicata* for the first time in argument. This said, *res judicata*, or at least the facts to sustain that defence in law, were sufficiently raised in the opposing affidavits of those foreign banks that have made submissions in response to the Court's directions:

(a) The three BoA entities in their answering affidavit in this Court did not use the label "*res judicata*". They did, however, allege that the Commission was impermissibly seeking to reopen issues finally decided in *CAC I*. This was a defence of *res judicata* expressed in English rather than Latin. They also alleged that the Commission had not appealed *CAC I*, and had on the contrary accepted that it was bound by *CAC I*. In their main written submissions, the BoA entities relied upon *res judicata* in terms.

(b) JPM Bank, although not a pure *peregrinus*, expressly pleaded *res judicata* in its answering affidavit in this Court in the context of subject matter jurisdiction. JPM Co, which is a pure *peregrinus*, had no opportunity to plead *res judicata* because it is not a party to the proceedings in this Court. In the main joint written submissions by JPM Bank and JPM Co, they spoke of peremption in relation to *CAC I*.

(c) ANZ, which saw the Commission's resurrected argument on section 3(1) as a disguised attempt to appeal against *CAC I*, expressly pleaded peremption, alleging that the Commission had not sought to challenge *CAC I*, had been content to abide by it and had demonstrated its acceptance of *CAC I* when delivering the superseding affidavit. In substance, therefore, the Commission knew that ANZ was contending that it could not reopen the issues decided in *CAC I*. ANZ also relied on peremption in its main written submissions.

(d) Like ANZ, Nomura expressly alleged peremption, which in context suffices. In its main written submissions, Nomura submitted that the Commission's resurrected argument on section 3(1) was impermissible because *CAC I*, having gone unchallenged, bound the Commission when drafting the superseding affidavit.

(e) Macquarie, in its answering affidavit in this Court, did not use the expressions "*res judicata*" or "peremption", but pleaded the facts for peremption. It alleged that the Commission had not applied to this Court to appeal *CAC I* and had instead accepted that it was required to comply with it and had attempted to do so in the superseding affidavit. In its main written submissions, Macquarie contended that the Commission was precluded from resurrecting its previous arguments on personal jurisdiction and subject matter jurisdiction, because it did not seek leave to appeal *CAC I* and had sought to comply with it through the superseding affidavit, thereby waiving or abandoning those arguments and accepting the findings in *CAC I*.

(f) HBUS' answering affidavit in this Court is similar to Macquarie's in this respect. In its main written submissions, HBUS invoked peremption.

(g) CSS did not file an answering affidavit in the Commission's application for leave to appeal, since CSS lost in the CAC. When CSS filed its own application for leave to appeal, the Commission had not yet communicated its decision to resurrect the section 3(1) argument. CSS thus had no reason to anticipate *res judicata* or peremption in its founding affidavit. The founding affidavit did, though, refer to the procedural background, including *CAC I* and the superseding affidavit filed pursuant to it. When the Commission raised the section 3(1) argument in its answering affidavit, CSS did not seek leave to file a replying affidavit. In its main written submissions, however, it did rely on both *res judicata* and peremption. CSS submits that this was the first opportunity it had to raise these matters subsequent to the filing of the Commission's answering affidavit.

[81] All these banks, therefore, expressly put up *CAC I* and the fact that it had not been appealed as a basis for the Commission being bound by that judgment. One can understand why some of the banks saw the Commission's application in this Court as a disguised attempt to appeal *CAC I*, hence the language of peremption. *Res judicata* was quite plainly an available defence on the alleged facts if the Commission should clarify, as it later did in oral argument, that it was *not* seeking to appeal *CAC I*.

Two preliminary obstacles for the Commission

[82] As I shall explain presently, both *res judicata* and peremption should be applied to bar reconsideration of the section 3(1) arguments if those arguments are otherwise properly before us. However, there are, in my view, two fundamental obstacles in the Commission's way, the effect of which is that we do not even need to reach *res judicata* and peremption. Nevertheless, and after dealing with these two obstacles, I shall address *res judicata* and peremption to the extent that they may remain relevant.

No appeal against the CAC I orders

[83] The first is the absence of an appeal against *CAC I*. In oral argument, the Commission's counsel confirmed that the Commission was not seeking leave to appeal *CAC I*, and that position has been repeated in its latest submissions filed in response to this Court's directions. This means that the orders made in *CAC I* stand. Paragraph 3.2.1 of the *CAC I* order required the Commission to file a superseding affidavit setting out facts to support an allegation that it was foreseeable that the impugned conduct would have a direct or immediate and substantial effect in South Africa (the QE test for subject matter jurisdiction); and paragraph 3.3.1 of the *CAC I* order required the superseding affidavit to allege adequate connecting factors between the parties and the Tribunal's jurisdiction, sufficient to establish personal jurisdiction (the ACF test for personal jurisdiction). Those orders would in turn need to be interpreted with reference to the reasoning contained in *CAC I*. A decision of this Court on the Commission's resurrected section 3(1) arguments would thus hang in the air and be without practical effect, since our decision would not change the Commission's obligation to comply with *CAC I*. This Court should not embark on an academic exercise.[88]

This Court's appellate jurisdiction

[84] The second obstacle goes to this Court's jurisdiction. The Commission invokes our appellate jurisdiction. This means that we only have jurisdiction to decide matters arising from the decision under appeal, in this case *CAC II*. *TRIB II* and *CAC II* were concerned with exceptions and objections in which the banks contended that the superseding affidavit failed to comply with the requirements laid down in *CAC I*. The correctness of *CAC I* was not an issue in *TRIB II* and *CAC II*. On the contrary, *CAC I* was the very standard that formed the basis of the exceptions and objections, and the litigation was conducted in *TRIB II* and *CAC II* on that basis. This being so, the

[88] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 165.

resurrected section 3(1) arguments, which the CAC rejected in *CAC I*, are simply not issues properly arising on an appeal against *CAC II*.

[85] One can test this by asking what would have happened if, prior to the adjudication of the second round of exceptions and objections in the Tribunal or the CAC, the Commission had said that it wished belatedly to apply for leave to appeal against *CAC I*. The exceptions and objections would have been held in abeyance pending the outcome of the belated application for leave to appeal, since a successful appeal against *CAC I* would have rendered the premise on which the exceptions and objections were based largely moot. Yet it is those very exceptions and objections that are essentially before us in the current application for leave to appeal.

Peremption

[86] Subject to these preliminary obstacles, *res judicata* and peremption are both applicable in this case. Peremption can sometimes be overlooked and *res judicata* can sometimes be relaxed. I shall first consider whether peremption and *res judicata* are in principle applicable. I shall then, under a separate heading, consider whether peremption should be overlooked or *res judicata* relaxed.

[87] Peremption occurs most often when a litigant who has initially accepted a judgment changes course and seeks to appeal it. In that situation, if peremption bars the appeal, the judgment will stand and become *res judicata*. The purpose of the appeal would be to prevent the judgment from standing as *res judicata*. Where there is no attempt to appeal a judgment, *res judicata* would suffice to prevent a litigant from reopening the case. However, the circumstances may show not only that there was no appeal but also that the litigant by its conduct accepted the judgment, thereby waiving its right to impeach it. Peremption, being a species of waiver, can then operate as an additional basis for barring a challenge to matters decided in the judgment.

[88] In regard to peremption, it is clear beyond doubt that the Commission decided not to challenge *CAC I*. This is shown not only by the fact that it at no stage sought to

appeal *CAC I*, but also by the terms of the superseding affidavit which the Commission filed in purported compliance with the orders in *CAC I*. Personal jurisdiction and subject matter jurisdiction were pleaded with reference to the ACF and QE tests laid down in *CAC I*. As to personal jurisdiction over the pure *peregrini*, the superseding affidavit alleged that there was such jurisdiction by virtue of two "connecting factors", namely participation in a conspiracy involving the ZAR exchange rate and such conspiracy being with South African respondents. Section 3(1) was mentioned only in relation to subject matter jurisdiction, and in that context the "effect" was formulated with reference to the QE test.[89]

[89] A number of the foreign banks expressly allege in their answering affidavits in this Court that the Commission had chosen not to appeal and had instead accepted *CAC I* and tried to comply with it. Although the Commission sought leave to file two replying affidavits on other matters, there has been no response on oath to the banks' allegation of a deliberate choice not to appeal *CAC I*. Factually, therefore, it is uncontested that peremption occurred. Indeed, we now have it from the Commission's own mouth that it still does not intend to appeal *CAC I*.

[90] In its latest submissions, the Commission contends that its oral argument in *CAC II* reflects that it raised the section 3(1) argument, which tells against a finding of peremption. A transcript of a passage from the oral argument was annexed to one of the Commission's replying affidavits to demonstrate this. This replying affidavit was filed in response to a different point made by some of the banks in their answering

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[89] In paragraph 51 of the superseding affidavit, the Commission pleaded that the pure *peregrini* were participants in an SOC to implement the conspiracy—

> "all of which constitute economic activity having a direct/immediate, substantial and foreseeable consequence upon the economy of South Africa and the welfare of South African consumers and an effect within South Africa for the purposes of section 3(1) of the Act."

The same allegation was made in respect of the local *peregrini* – see paras 45 and 48 of the affidavit. In the section of the affidavit headed "The Effect of the Conduct" (paras 259 ff), the very first allegation was formulated with reference to the QE test: "The Conspiracy had a direct or immediate, and substantial effect in the Republic and it was foreseeable that the impugned conduct would, or had the potential to, have such an effect". This section of the affidavit contained subheadings referencing the QE test: "The direct and/or immediate effect of the conduct" (paras 268 ff); "The effect of the conduct was cumulatively substantial" (paras 271 ff); and "It was foreseeable to the cartelists that the conduct would have a direct or immediate and substantial effect" (paras 275 ff).

affidavits, namely that the section 3(1) arguments that the Commission advanced in its founding affidavit in this Court had not been raised in *CAC II*.

[91] This extract cannot bear the weight the Commission places on it. The section 3(1) arguments were not resurrected in *TRIB II* nor in the heads of argument filed in *CAC II*. The subject arose tangentially in the course of the Commission's oral submissions on subject matter jurisdiction. Counsel was arguing that a manipulation of the ZAR among foreign banks could be regarded as "economic activity" within South Africa for purposes of section 3(1). This argument was raised in case the Commission could not come home on showing sufficient "effects" in South Africa to meet the QE test.

[92] One of the Judges in *CAC II* at one point asked counsel whether, for purposes of jurisdiction, the economic activity that conferred jurisdiction was the participation of the banks in an SOC. Counsel replied that what conferred jurisdiction was not the SOC as such but the effects of the underlying conduct, the manipulation of the ZAR:

> "I know, Justice Davis, that I made the point three years ago without success . . . [b]ut I'm repeating the point today. I've already made the first point about foreign banks engaging with our currency in circumstances where the only institutions that can protect that currency are local institutions. I think there's something fundamental about that question which if it's time to revisit, it should be revisited. It may be that it's the wrong case to revisit it now."

[93] Counsel then resumed his submissions on subject matter jurisdiction. It is unclear precisely what point counsel was referring to in the above extract, given that the context of the debate at this juncture was subject matter jurisdiction. There was no clear articulation of any argument that, contrary to *CAC I*, section 3(1) dispensed with the need for personal jurisdiction or that the effects need not be effects meeting the QE test. Counsel appears to have been pressing a different contention, namely that foreign conduct involving manipulation of the ZAR could be regarded as "economic activity" within South Africa for purposes of subject matter jurisdiction, thus rendering it

unnecessary to determine whether the resultant effects satisfied the QE test. Moreover, the fact that the Commission or its counsel might not have agreed with some of the legal conclusions in *CAC I* does not show that the Commission did not accept *CAC I*, for better or for worse, and it is the latter question rather than the former that is germane to peremption.

Res judicata

[94] In regard to *res judicata*, *CAC I* is a final judgment on the interpretation of section 3(1) in relation to personal jurisdiction and subject matter jurisdiction. Just as *TRIB I*, being a decision on jurisdiction, could be (and was) appealed to the CAC, so the Commission, and for that matter the banks, could have sought leave to appeal *CAC I* to this Court. None of them did.

[95] The Commission maintains that it was wholly successful in the order in *CAC I* and could not merely challenge the reasoning in that case, since there is no procedural mechanism for doing so. I reject that argument. The Commission had partial success in its cross-appeal against *TRIB I,* but it lost its primary arguments, namely that section 3(1) did away with the need for personal jurisdiction and that any effect within South Africa sufficed for subject matter jurisdiction. It was not only the CAC's reasoning that was against the Commission on these matters. The reasoning was reflected in paragraphs 3.2.1 and 3.3.1 of the CAC's orders, as noted earlier. The Commission would have been entitled to seek leave to appeal these orders if it was not content to accept the rejection of its section 3(1) arguments.

[96] The requirements for personal and subject matter jurisdiction as laid down in *CAC I* are thus *res judicata*. All the elements of *res judicata* are satisfied.[90] It is not merely a case of issue estoppel. The parties involved in the first round of litigation that culminated in *CAC I* are the same as those involved in the second round of litigation

[90] For these requirements, see *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* [1994] ZASCA 144; [1995] 1 All SA 517; 1995 (1) SA 653 (A) at 664C-E.

culminating in the present proceedings in this Court. The Commission is pursuing the same cause of action and seeking the same relief. *CAC I* decided preliminary issues in the very same case.

[97] It is true that there are three additional parties whom the Commission wishes to join – Nedbank, FRB and SAI.[91] This does not detract from the operation of *res judicata* as between the Commission and all the other parties. Moreover, the section 3(1) issues that are rendered *res judicata* by *CAC I* are not germane to Nedbank and FRB as *incolae*, and SAI does not rely on the section 3(1) issues in resisting the Commission's appeal. No doubt for that reason, SAI's attorneys notified the Court that their client would not be filing written submissions in response to the directions, although they did say they aligned themselves with the supplementary submissions filed by HSBC.

[98] More to the point, perhaps, is that JPM Co, a pure *peregrinus*, is not a party to the proceedings in this Court. If we were to reverse *CAC I* on the questions of personal and subject matter jurisdiction, JPM Co could be prejudiced in its absence. I recognise that JPM Co and JPM Bank, in their joint main submissions, dealt with the question of peremption. However, the Commission specifically objected to any submissions on behalf of JPM Co and requested that it be removed from the submissions in question. This Court directed that counsel for JPM Bank should not advance oral argument on any issues relating only to JPM Co. Because JPM Bank is a local *peregrinus*, and because the focus of its opposition to the appeal is narrow, its counsel's oral argument did not touch on personal and subject matter jurisdiction. The supplementary submissions in response to our latest directions are in the name of JPM Bank alone.

[99] In *Zuma*,[92] this Court said that "the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and

[91] I omit Ned Group and FirstRand, because the Commission has not sought to appeal its failure in respect of those two entities.

[92] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC).

perishes".[93] A core doctrine giving effect to these principles is *res judicata*. The doctrine is a facet of the rule of law. It also draws force from section 34 of the Bill of Rights.[94] That section guarantees access to the courts, and does so for the purpose of having disputes "resolved" and "decided". That purpose is frustrated if a final judgment can be reopened, because then the proceedings that gave rise to the judgment will not have resolved and decided the dispute.

[100] It has also been held by the United Kingdom's Supreme Court, and I agree, that the public interest in finality is "reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole".[95]

Overlooking res judicata and peremption – relevant principles

[101] This Court recognised in *Molaudzi*[96] that the Court could relax the doctrine of *res judicata* if the interests of justice demand.[97] The Court emphasised, however, that there were dangers in eroding the doctrine: "The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way".[98] Nevertheless, where "significant or manifest injustice" would result from allowing an order to stand, the doctrine ought to be relaxed so as to allow the Court to revisit a past decision: "This requires rare and exceptional circumstances, where there is no alternative effective remedy."[99]

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[93] Id at para 1.

[94] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[95] *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47; [2021] 1 All ER 1001; [2022] AC 1 (*Test Claimants*) at para 59, quoting Lord Bingham's statement to this effect in *Johnson v Gore Wood & Co* [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72; [2002] 2 AC 1 at 31D.

[96] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC).

[97] Id at para 32.

[98] Id at para 37.

[99] Id at para 45.

[102] The relaxation allowed in *Molaudzi* occurred in the context of a criminal case. What was rare and exceptional about it was this. Mr Molaudzi, together with several others, had been convicted of serious crimes and sentenced to life imprisonment. He brought an application to this Court for leave to appeal without the benefit of legal representation. This Court dismissed the application in a short judgment without a hearing, holding in essence that Mr Molaudzi was merely attacking the factual findings of the trial court. Afterwards, two of Mr Molaudzi's co-accused, who raised constitutional issues about the admissibility of evidence, succeeded in this Court following a hearing. Since Mr Molaudzi was identically placed, this Court issued directions inviting him to bring a second application for leave to appeal. It was that application which this Court granted, thereby relaxing *res judicata*. There was no other remedy open to Mr Molaudzi, because no appeal lay from this Court's earlier decision.

[103] More recently, in *Mothulwe*,[100] this Court granted a second rescission application where it had previously dismissed the applicant's application for leave to appeal and his first rescission application. Such dismissals had occurred without a hearing and without a substantive judgment. The applicant was not legally represented. In the second rescission application, this Court was satisfied that it had failed, when making its first and second orders, to discern the true justice of the applicant's case: there had been no adjudication on the counter-application which the applicant had brought in the Labour Court to challenge a serious finding of corruption against him. Since he had exhausted his usual legal remedies of appeal and rescission, and was faced with prior orders from the apex court, his only recourse was to ask this Court to revisit its own previous orders. This Court was satisfied that the circumstances of the case were "truly exceptional".[101]

[100] *Mothulwe v Labour Court, Johannesburg* [2025] ZACC 10; [2025] 8 BLLR 761 (CC); 2025 (8) BCLR 899 (CC); (2025) 46 ILJ 1853 (CC).

[101] Id at paras 35, 38 and 48.

[104] This Court, in *Molaudzi*, considered comparative law on the question of a court's discretion not to apply *res judicata*. I wish simply to note, in that regard, that the latest authoritative judgments from the United Kingdom hold that *res judicata* in its fullest sense – cause of action estoppel – is an absolute defence in respect of points that were raised and decided in the previous case. Some relaxation is, however, possible, in respect of points that could have been raised in the previous proceedings but were not and in respect of issue estoppel.[102]

[105] In the leading judgment of the Supreme Court of Canada, *Danyluk*,[103] the Court drew a distinction between cases where the previous adjudication was judicial on the one hand and administrative on the other. The discretion not to apply *res judicata* in court-to-court cases was said to be narrower than in tribunal-to-court cases.[104] *Danyluk* itself was a tribunal-to-court case, as indeed are most of the subsequent Canadian cases dealing with the discretion not to apply *res judicata*. So much is this the case that some Canadian courts have doubted whether there is truly a discretion not to enforce *res*

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[102] *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46; [2013] 4 All ER 715; [2014] 1 AC 160 at para 22, where Lord Sumption drew the following conclusions from his analysis of *Arnold v National Westminster Bank plc* [1991] 2 AC 93; [1991] 3 All ER 41 (this part of Lord Sumption's speech was concurred in by the other members of the Court – see at para 42):

> "*Arnold* is accordingly authority for the following propositions:
>
> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

See also *Test Claimants* above n 95 at para 62.

[103] *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44 (CanLII); [2001] 2 SCR 460.

[104] Id at para 62. See also Lange *The Doctrine of Res Judicata in Canada* 3 ed (LexisNexis, Ontario 2010) at 225:

> "Courts in Canada have regularly maintained that, in a court-to-court context, issue estoppel and cause of action estoppel should apply. The basic principle is that only in the rarest of cases should these doctrines be rendered inoperative in a court-to-court context."

judicata in court-to-court cases.[105] Australian courts have yet to recognise the existence of a discretion to depart from *res judicata*.[106]

[106] I mention this not to cast doubt on what was held in *Molaudzi* and applied in *Mothulwe*, but to emphasise that this Court should be extremely wary of departing from *res judicata* in a court-to-court case. To what extent *res judicata* applies in this country to administrative adjudications is not something I need consider.

[107] A court may also overlook peremption in the interests of justice. The most recent authority on the subject in this Court, where earlier decisions were reviewed, is *United Manganese*.[107] Generally speaking, there seems to be greater latitude to overlook peremption than to disapply *res judicata*.

Factors for and against overlooking res judicata and peremption

[108] The differences between *Molaudzi* and this case are obvious. Apart from the fact that Mr Molaudzi was at risk of having to serve a life sentence despite a wrongful conviction, he was initially unrepresented and had exhausted his ordinary remedies. The question was whether this Court should revisit its own earlier judgment, where substantively it had already done so in the context of Mr Molaudzi's co-accused. In the present case, by contrast, the Commission is a well-resourced regulator which was legally represented at all relevant times. There was a remedy open to the Commission if it disagreed with *CAC I*, namely seeking leave to appeal to this Court. Instead the Commission chose to abide by *CAC I*, and delivered a superseding affidavit that manifestly sought to give effect to the requirements laid down in *CAC I* for personal jurisdiction and subject matter jurisdiction.

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[105] See *Avalon Bookkeeping Services Ltd v Furlong* 2004 NLCA 46 (CanLII); 243 DLR (4th) 153 at paras 41-4 and *Patrick Street Holdings Ltd v 11368 NL Inc* 2024 NLCA 11 (CanLII) (*Patrick Street*) at para 370.

[106] See *Charafeddine v Morgan* [2014] NSWCA 74 at paras 22-7 and *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd (No 4)* [2024] FCA 538 at para 112.

[107] *United Manganese of Kalahari v Commissioner, South African Revenue Service and Four Similar Cases* [2025] ZACC 2; 2025 (5) BCLR 530 (CC); 2026 (2) SA 227 (CC) at paras 288-300.

[109] There is nothing rare or exceptional about the circumstances in which the Commission now finds itself. It is in exactly the same position as any other litigant who decides not to pursue an appeal. The fact that this matter concerns the extraterritorial reach of section 3(1) and the prosecutorial scope of competition authorities, as submitted by the Commission, is not a sufficient consideration to relax *res judicata*. This Court is not being asked to revisit its own earlier judgment. It is being asked to revisit a substantive judgment of the CAC that could have been appealed but wasn't. This Court is, moreover, being asked to interfere with *CAC I* in circumstances where there is no formal process to set aside or alter the orders in *CAC I*, such as an application for leave to appeal or to rescind *CAC I*. This stands in contrast with *Molaudzi* and *Mothulwe*. And this Court is being asked to do so in circumstances where neither the Tribunal nor the CAC was invited to reconsider the questions now raised.

[110] The only remarkable feature is that the Commission sought to argue the section 3(1) issue in this Court as if *CAC I* did not stand in its way. In their answering affidavits in this Court, the respondents emphasised that the Commission was bound by *CAC I*, variously invoking *res judicata* and peremption. Although the Commission sought leave to file two replying affidavits on other aspects, it did not do so in relation to the finality of *CAC I*. Nor did it respond to the repeated allegation by the respondents that the Commission deliberately chose not to appeal *CAC I* but instead to comply with it.

[111] We do not have before us an application or request by the Commission to relax *res judicata* or overlook peremption. The question of rare and exceptional circumstances for relaxing *res judicata* or the existence of sound reasons for overlooking peremption in the interests of justice have not been ventilated in affidavits. Departing from *res judicata* or overlooking peremption is not for this Court to do of its own accord. When faced with an objection of *res judicata* or peremption, a litigant who would otherwise be bound by a judgment or its litigation choices must seek the aid of this Court and set out on affidavit the circumstances which justify a relaxation.

[112] The importance of the legal question – the correct interpretation of section 3(1) – is not an exceptional circumstance for purposes of overlooking *res judicata* and peremption. If the Commission thought that the question required this Court's attention, an appeal against *CAC I* was the time-honoured way in which to do it. The Commission chose not to pursue that option. Many cases come before the courts that involve important legal questions of statutory interpretation, and cases heard by this Court are almost invariably of that character. This cannot possibly be a reason for declining to apply *res judicata* or for overlooking peremption. The fact that a court applies *res judicata* or peremption does not mean that the legal question cannot be raised in another suitable case. These doctrines do not foreclose future consideration of the legal question; they simply bring finality as between the particular litigants.

[113] It is not unknown for a litigant who seeks to challenge a binding precedent to raise the point in the lower fora, acknowledging that it must fail there but reserving the right to pursue the point on appeal. If in a future case the Commission or a pure *peregrinus* wished to contend that *CAC I* was wrongly decided (either because it imposed too stringent or too lax a standard for personal jurisdiction), I have no doubt that the matter could without undue delay be presented to the CAC and ultimately to this Court for determination.

[114] The Commission has submitted that the banks would suffer no prejudice if the section 3(1) issue were reopened. However, as some of the banks have pointed out in their responding submissions, they have not had the opportunity of canvassing this in affidavits. Moreover, there is some self-evident prejudice. The first round of exceptions and objections, culminating in *CAC I*, was intended to establish the principles with which the Commission had to comply to plead a proper case against the banks. *CAC I* gave the Commission a final opportunity to do so in line with the principles laid down in that judgment.

[115] A great deal of time and irrecoverable costs were expended since February 2020 in determining whether the superseding affidavit complied with *CAC I*. There were

multiple exceptions and objection applications as well as exchanges of affidavits in the two joinder applications. The issues were argued over six days in the Tribunal by legal teams that included 33 advocates and many attorneys. The three members of the Tribunal wrestled with the issues for 15 months before issuing their decision. Then followed the appeal to the CAC, which was argued over five days with a similarly large cast of lawyers. A number of the banks also brought review proceedings to challenge *TRIB II*. It was in February 2024, four years after *CAC I* was decided, that the Commission in its application in this Court for the first time signalled that it wanted this Court to reverse certain key legal conclusions underpinning the orders in *CAC I*. To allow it to do so would bring the administration of justice into disrepute.

[116] Another factor militating against overlooking *res judicata* and peremption is that this Court is being asked to decide issues in the absence of the full ventilation they deserve. In regard to personal jurisdiction, the question on the merits is not only whether section 3(1) dispenses with this requirement. The Commission in this Court has an alternative contention if its main argument on section 3(1) fails. The alternative argument is that the common law should be developed so that, in competition cases, a connection to South Africa by virtue of participation in a scheme where the central instrument was the South African currency is sufficient for personal jurisdiction. This argument was not raised in the first or second rounds in the fora below, so we would have to address it at first instance.

[117] Moreover, if we were to hold that *CAC I* is not binding in relation to personal and subject matter jurisdiction, it is not only the Commission that should be entitled to argue for an outcome more favourable to it than *CAC I*. In *CAC I*, the banks argued that the Tribunal had been right in *TRIB I* to hold that there was no basis on which the common law could accommodate personal jurisdiction over the pure *peregrini*. The banks have not resurrected that argument and have been willing to abide by *CAC I*. But if we hold that *CAC I* should not be treated as binding, we would, in fairness, have to reopen all the jurisdictional arguments to both sides. And regardless of what the parties

chose to argue, this Court would need to be satisfied that it has come to the right conclusion on all the possibilities.

[118] I thus conclude that *res judicata* should not be disapplied and peremption should not be overlooked. The parties to this litigation are therefore bound by *CAC I* insofar as section 3(1) is concerned. This involves no expression of opinion by this Court as to whether the CAC's interpretation of section 3(1) in *CAC I* is right. The whole point of *res judicata* and peremption is that the later court cannot revisit the earlier judgment, even though it might have been wrong.[108] An allegation that the earlier court reached a wrong decision is not an exceptional circumstance justifying the non-application of *res judicata*.[109]

[119] Of course, whether *CAC I* was wrong in its interpretation of section 3(1) is hotly contested. Although the Commission's section 3(1) contentions have previously failed in the Tribunal and CAC, its case in that respect is at least arguable. Given the important

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[108] See, for example, *Mulkerrins v Pricewaterhouse Coopers* [2003] UKHL 41; [2003] 4 All ER 1 (HL) at para 41 per Lord Millett:

> "As I observed in *Crown Estates Commissioners v Dorset County Council* [1990] Ch 297, 305 *res judicata* (or to give it its full name estoppel *per rem judicatam*) is a form of estoppel which gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong. If it is wrong, it must be challenged by appeal or not at all. As between themselves, the parties are bound by the decision, and may neither re-litigate the same cause of action nor re-open any issue which was an essential part of the decision. The doctrine comes into its own only when the decision is wrong; if it is right, it merely serves to save time and costs."

[109] *MacDougall v Lake Country (District)* 2012 BCCA 408 (CanLII) at paras 35-6:

> "[35] The appellants, in my view have failed to raise any reasonable basis upon which a court could refuse to apply the doctrine of issue estoppel in the case before us. The 1963 decision was taken by a court of competent jurisdiction after full argument by the appellants' predecessor in title. The issue decided by the Court was not tangential to the arguments presented; rather it was the very question that was argued before the Court. The applicant in the 1963 case had a right to appeal, but did not exercise it.
>
> [36] As I analyse the appellants' argument, it is simply that the 1963 decision was wrong, and that it would therefore be unjust to follow it. To accept that as a basis for refusing to apply the doctrine of *res judicata* would be to eliminate the doctrine entirely. The doctrine of *res judicata* exists precisely to obviate the re-litigation of issues. At least where a previous decision is not patently perverse, the question of whether the court, in the end, reached the right conclusion is not one which should be addressed in exercising discretion to apply or not apply the doctrine."

See also *Amgen Inc. v Pfizer Canada ULC* 2020 FC 522 (CanLII) at para 160 and *Patrick Street* above n 105 at paras 393-8.

nature of the Commission's complaint against the banks, it is regrettable that it did not bring an appeal against *CAC I*. I do not express any view as to whether such an appeal, if pursued, would have succeeded; that would entail a detailed analysis of a kind foreclosed by *res judicata* and peremption. An appeal would, however, have allowed an important issue to be finally resolved. Its absence is an opportunity missed.

[120] What I have just said should not be confused with the doctrine of precedent. If in a future case the jurisdictional effect of section 3(1) should be an issue properly before it, this Court as the highest court in the land could, as a matter of precedent, overrule *CAC I*, just as it could, as a matter of precedent, overrule any other decision of a court beneath it in the judicial hierarchy. In overruling such a precedent, this Court does not reopen the case as between the litigants in the overruled precedent.[110] The Commission could in another case ask the CAC itself to depart from its previous decision by seeking to persuade that Court that *CAC I* was clearly wrong.

[121] It will thus be necessary to consider whether the superseding affidavit adequately pleaded personal jurisdiction and subject matter jurisdiction in accordance with the ACF test and QE test respectively, as well as the anterior question of whether this is a matter engaging the Court's jurisdiction.

[122] As I mentioned earlier, the fact that pure *peregrini* conspired among themselves to manipulate the USD/ZAR exchange rate was rejected in *CAC I* for not being a sufficient connecting factor to South Africa. The Commission has argued, however, that a sufficient additional connecting factor would be if pure *peregrini* conspired together with local *peregrini*, even if no link between the pure *peregrini* and South African banks was properly alleged.

[123] If the superseding affidavit sufficiently alleged that the interactions between the pure *peregrini* and the local *peregrini* involved the business activities of the local

[110] See also Handley *Spencer Bower and Handley Res Judicata* 4 ed (LexisNexis, London 2009) at para 1.15.

peregrini's South African branches and offices, the argument might well be sustainable. However, the affidavit does not allege that any of the traders for the local *peregrini* worked at the South African branches or offices of those banks. Moreover, in pleading jurisdiction, the Commission did not allege, as a relevant connecting factor, that the pure *peregrini* were part of an SOC with local *peregrini*. The affidavit pleaded, as the relevant connecting factor, that the pure *peregrini* were part of an SOC "together with the South African respondents". The "South African respondents" were earlier defined as the *incolae* banks: SBSA, Investec, Absa, Nedbank and FRB.

[124] The ACF test, as formulated by the CAC, is concerned with real connections between the suit and the local forum. If a pure *peregrinus* and a local *peregrinus* conspire to manipulate the USD/ZAR exchange rate, with all relevant activity taking place abroad through the banks' foreign offices and traders, without any involvement of the local *peregrinus*' South African branch and South African-based traders, it would seem to be an irrelevant coincidence that the local *peregrinus* has a South African branch or office. On the other hand, there would arguably be a real connection between South Africa and the suit if the pure *peregrinus* conspired with the South African-based traders of the local *peregrinus*, since some of the conduct involving the formation and implementation of the SOC would then have occurred in this country. In *Bid Industrial Holdings*, for example, the Court said that appropriateness and convenience, for purposes of adequate connection, were "elastic concepts which can be developed case by case", but that the "strongest connection would be provided by the cause of action arising within that jurisdiction".[111] It is considerations of this kind that might have caused the Commission not to plead a conspiracy with local *peregrini* as an adequate connecting factor.

[125] I must emphasise that what I have just said concerns personal jurisdiction in respect of pure *peregrini*, more particularly the adequacy of the connection between the suit and South Africa for purposes of satisfying the ACF test. It is a different question

[111] *Bid Industrial Holdings* above n 23 at para 56.

whether the Tribunal has personal jurisdiction over the local *peregrini* themselves purely by virtue of the existence of a South African branch or office, even though the impugned conduct is not alleged to have been perpetrated by or through the South African branch or office.

[126] In regard to personal jurisdiction over local *peregrini*, there is authority that, in ordinary civil proceedings, our courts have jurisdiction over a local *peregrinus* company in respect of any cause of action arising out of the business carried on by that company at its South African branch. Such a company is regarded, for purposes of ordinary civil jurisdiction over that particular suit, as residing in two places, namely in the foreign country and at the location of the South African branch.[112] In the present case, however, the Tribunal held that it had personal jurisdiction over the local *peregrini* merely by virtue of the fact that they had local branches and offices, without any insistence that the impugned conduct was associated with those branches and offices. None of the local *peregrini* appealed that holding of personal jurisdiction to the CAC. The point was not argued in this Court and I express no view on it. But as I shall presently explain, the Tribunal's reasoning has given rise to some confusion in relation to JPM Bank, where a similar issue has been raised in relation to subject matter jurisdiction.

Joinder and initiation

[127] CSS, as the applicant for leave to appeal in CCT 27/24, and Nedbank and SAI, as respondents in CCT 30/24, have raised various legal arguments as to why they could not be joined.

[112] *Appleby (Pty) Ltd v Dundas Ltd* 1948 (2) SA 905 (E); [1948] 3 All SA 37 (E) (*Appleby*) at 909-11, relying inter alia on *TW Beckett & Co Ltd v H Kroomer Ltd* 1912 AD 324 at 338-9; *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* [1982] 1 All SA 1 (W); 1982 (2) SA 739 (W) at 743D-744H; *ISM Inter Ltd v Maraldo* 1983 (4) SA 112 (T) at 117A-H; and *Lin v Minister of Home Affairs* 2015 (4) SA 197 (GJ) (*Lin*) at para 88.

Did CAC I preclude the addition of further respondents?

[128] The first argument, applicable to Nedbank and SAI,[113] is that the *CAC I* order did not permit the Commission to add further respondents, i.e., beyond the 18 initial respondents and the five further respondents who were the subject of the first joinder application. This argument, which was accepted in *CAC II*, involves the interpretation of the *CAC I* order. Because the interpretation affects the Commission's right to pursue its cartel case against Nedbank and SAI, section 34 of the Bill of Rights is implicated and it is a constitutional matter.

[129] At the time *CAC I* was argued, the question of the possible addition of further parties was not before the Court. Unsurprisingly, therefore, *CAC I* did not deal with that question. The order was intended to regulate what the Commission had to plead in respect of the existing respondents. The expression "named respondents" in the *CAC I* order merely emphasised that the requisite particularity had to be pleaded in respect of each of the named respondents rather than in broad brushstrokes.

[130] It is so that *CAC I* did not grant the Commission leave to add further respondents. No such leave was sought, and the CAC's attention was thus not directed to that question. I thus accept that the Commission was not entitled simply to name the twenty-fourth to twenty-eighth respondents as additional respondents in the superseding affidavit. However, if the Commission was otherwise entitled to bring an application to join them, *CAC I* did not prohibit this from being done. The Court in *CAC II* thus erred in holding that *CAC I* was a bar to joinder.

Was a fresh initiation needed?

[131] The next question is whether the Commission was entitled to join further respondents, subsequent to the referral of February 2017, without a separate complaint

[113] The argument would also apply to FRB, though it did not raise this as an objection.

initiation against them. This argument is applicable to CSS, Nedbank and SAI.[114] It raises an arguable point of law of general public importance which this Court should consider. Our jurisdiction is thus engaged.

[132] In *Pickfords*, the Commission had initiated a complaint in November 2010 alleging collusive tendering in the furniture removal business and naming various firms. Pickfords Removals SA (Pty) Limited (Pickfords) was not named.[115] In June 2011 the Commission issued a further initiation which named Pickfords and several others.[116] After the complaint was referred to the Tribunal, Pickfords filed an exception in which it contended, among other things, that some of the complaints against it were time-barred under section 67(1). This turned on whether the relevant initiation date, for purposes of the three-year period in that section, was November 2010 or June 2011.[117]

[133] This Court held that the relevant initiation was the complaint initiated in November 2010. The Court emphasised that an initiation is against an alleged prohibited practice. Self-evidently, this Court said, the Commission would have in mind some of the firms potentially involved in the practice:

> "But this does not mean that the names of all the firms or parties must be included. The section emphasises 'prohibited practices' over firms or parties. There are no formalities required, save for a decision by the Commissioner to cause the commencement of an investigation into the alleged prohibited practice. The initial omission of a firm or party at the stage when the complaint is first initiated by the Commission and its subsequent addition to the complaint are not fatal, given the wording of section 49B(1) and the informality of the procedure."[118] (Footnotes omitted.)

[114] It would also be applicable to HBUS, MLP, BANA, IBL and FRB, but none of those parties raise this as an objection.

[115] *Pickfords* above n 43 at para 5.

[116] Id at para 6.

[117] Id at para 8.

[118] Id at para 21.

[134] The Court stated that on the facts the Commission had expressly left open, in the first initiation, the possible addition of further firms. This was the inference to be drawn from the fact that the named firms in the first initiation were described as the "main companies" implicated in the alleged conduct.[119] Regarding the second initiation, the Court said that there was no legal impediment to the Commission amending a complaint initiation. The question was whether in that particular case the second initiation was an amendment of the first one or a separate initiation. This Court held that it was an amendment.[120]

[135] Although in *Pickfords* there was an amending initiation that named Pickfords, I do not read this Court's judgment as holding that such an amendment was essential. The Court said only that it was permissible. The statement I have quoted from *Pickfords* appears to me to convey that an initiation in respect of particular conduct and naming certain firms is a valid initiation in respect of all firms whom the Commission's investigation thereafter identifies as having been guilty of the practice, even though they were not initially named. If, as held in *Pickfords*, the relevant initiation date was November 2010, even though Pickfords was not yet named, it follows that even without an amendment to the initiation, Pickfords could not have complained if it was included as a respondent in the referral to the Tribunal.

[136] It is important to bear in mind the manifest purpose of requiring an initiation in respect of alleged prohibited conduct. Section 49B(3) provides that, upon initiating a complaint, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable. An inspector has wide powers for purposes of conducting an investigation. The complaint initiation circumscribes what the inspector may investigate. The complaint initiation is not a process that commences legal proceedings against a firm. If a firm is named in the complaint initiation, it may not know that fact until the case is referred to the Tribunal.

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[119] Id at para 23.

[120] Id at para 27.

[137] In the present case, the Commission's first complaint initiation in April 2015 named 11 firms, not all of whom remained part of the complaint referral in February 2017. The April 2015 initiation identified the prohibited conduct as price-fixing of the exchange rate between the ZAR and several other currencies including the USD. In August 2016 the Commission issued a further complaint initiation. The accompanying initiation statement was styled an "amended" initiation statement. It named another 12 banks. A further type of prohibited conduct was also added, namely market division by allocating customers.

[138] The first and amended initiation statements did not expressly say that there might be further firms implicated in the prohibited practices. They did not expressly exclude that possibility either. Given the nature of the alleged practices, that 11 banks were already identified in April 2015 and that by August 2016 another 12 had come to light, the initiation statements should not be viewed as excluding the possibility that investigation might yield yet further names. On my reading of *Pickfords*, the August 2016 amendment would not have been necessary if its only purpose was to identify 12 further banks. However, the amendment may well have been necessary in order to allege additional prohibited conduct.

[139] In principle, therefore, it was not necessary, after August 2016, for there to be a further initiation statement identifying CSS, Nedbank and SAI. The conduct of which they are alleged to be guilty is the same conduct identified in the April 2015 and August 2016 initiation statements. They could be added to the referral without the need for yet another initiation.

Was the post-referral joinder of CSS, Nedbank and SAI permissible?

[140] What must now be considered, however, is whether what I have just said holds true even though the Commission sought to add CSS, Nedbank and SAI only after the complaint was referred to the Tribunal in February 2017. There are two strands to the argument on this issue: first, that such a joinder is absolutely precluded by the Act;

second, if such joinder is not absolutely precluded, that a fresh initiation against the new parties is required. *Pickfords* does not directly address this issue, because there the addition of the new parties took place before the referral to the Tribunal.

Is there a bar to post-referral joinder?

[141] SAI is the proponent of the argument that the Act prohibits joinder post-referral. It emphasises the three stages in complaint proceedings: initiation, investigation and referral. By the time the Commission decides to refer the complaint to the Tribunal, it will have concluded its investigation and decided on the respondents it intends prosecuting. The door cannot be left open indefinitely for the addition of further respondents.

[142] SAI bolsters its argument with reference to the definition of "respondent" in section 1 of the Act, namely "a firm against whom a complaint of a prohibited practice has been initiated in terms of this Act". SAI also relies on section 51(4), in terms of which, upon referral of a complaint to the Tribunal, its chairperson must publish in the Government Gazette a notice of the referral that includes "the name of the respondent" and the "nature of the conduct" that is the subject of the referral.

[143] I am willing to assume, without so deciding, that upon referral to the Tribunal, the Commission's statutory powers of investigation in respect of the complaint come to an end. But the fact that the Commission can no longer use its investigative powers does not preclude the possibility that it may, during the referral phase, come into possession of information indicating that yet further firms were involved in the prohibited practice. Information may be revealed by the respondents' answering affidavits, through the process of discovery and further particulars, in consultation with witnesses and in consequence of information volunteered by firms that have obtained leniency or settled.

[144] Having regard to what I have said about *Pickfords*, the definition of "respondent" must be understood as including a firm whose conduct falls within the scope of the

initiated complaint and which has been identified as such, even though it was not named in the initiation statement. The definition is neutral as to the point in time at which the firm is so identified. As to section 51(4), the chairperson will naturally only be able to include the names of those firms that are already respondents, but there is no necessary implication that the addition of further respondents is precluded. The purpose of the notice in the *Gazette* seems merely to give information to the public about the referral as it then stands.

[145] In my view, the architecture of the Act does not compel the conclusion that the addition of parties after the referral is prohibited. As I have said, the processes that occur after referral are of a kind that might reveal further implicated parties. In terms of *Pickfords*, these further parties would have fallen within the scope of the complaint initiation up to the time of referral, and there is no reason why that should not continue to be so after the referral. To interpret the Act in the way SAI argues is to reward firms whose involvement in the prohibited conduct remains hidden the longest. Such an intention cannot be imputed to the lawmaker.

Must there be a fresh initiation in the case of post-referral joinder?

[146] The argument that there must be a fresh initiation for a post-referral joinder is based on the following propositions. A firm cannot be the subject of a referral to the Tribunal unless its conduct has been investigated. If there has already been a referral to the Tribunal, and the firm in question has not yet been identified as a respondent, that firm's conduct will not have yet been investigated. In order for there to be an investigation, there would need to be a preceding complaint initiation.

[147] This argument is unsound. In the circumstances posited, the additional firm's conduct falls within the scope of the complaint that was initiated before the referral to the Tribunal. What is investigated is the prohibited conduct. If, post-referral, the Commission comes into possession of information indicating that an additional firm was also part of the prohibited conduct, it will be adding the firm to a complaint that has already been investigated. In the circumstances supposed by the argument, the

Commission does not need to conduct a further investigation, because the information will have come into its hands without the need for further investigation.

[148] The respondents' argument rests on a high degree of formalism. Although the Commission does not need to exercise its investigative powers to know that the additional firm should be added, the argument insists that there should be a fresh initiation followed by a notional investigation phase, even though such phase may exist for only a brief moment in time. If these formal steps were taken, the case against the additional firm could itself then be referred to the Tribunal, and the hearing of that case could be consolidated with the hearing of the existing referral.

[149] Why should this roundabout procedure be needed? The only purpose served by this formalism is to improve the additional firm's chance of raising a successful time-bar defence in terms of section 67(1): for the additional firm, the three-year period would be reckoned from the date of the later initiation, not the earlier one. In this way, the additional firm would be rewarded for the fact that its conduct remained hidden the longest. It is an interpretation that would tend to frustrate rather than promote the purposes of the Act. Those purposes include to detect and address behaviour within a market that tends to impede, restrict or distort competition.[121] As I have said, the scheme of the Act can comfortably accommodate the post-referral joinder of parties.

The section 67(1) time-bar

[150] The above conclusions mean that, in the present case, the respondents whose joinder was sought after the February 2017 referral do not gain any advantage with regard to section 67(1), which bars referrals in respect of prohibited practices that ceased more than three years before the complaint was initiated.[122] For them, as for all the other respondents, the April 2015 and August 2016 initiations are the relevant trigger dates for price-fixing and market allocation respectively.

[121] Section 2(g) of the Act.

[122] Section 67(1) is quoted in n 38 above.

Joinder procedure

[151] The fact that additional firms can be added post-referral does not mean that the Commission is at liberty to do so unilaterally. Once the complaint has been referred to the Tribunal, it is the Tribunal that regulates the further conduct of the proceedings. The Act gives the Tribunal wide powers in that regard.[123] TR 45 deals with the joinder and substitution of parties. It was suggested in argument that TR 45 did not comfortably cover the joinder of further respondents post-referral. Even if that were so, TR 55(1) states that in cases of uncertainty as to practice and procedure, the presiding member of the Tribunal may "give directions on how to proceed" and may for that purpose "have regard to the High Court Rules". In the High Court, it is a common occurrence for parties to be joined as respondents or defendants subsequent to the institution of an application or action.

The prerequisites for pleading an SOC and related questions

[152] None of the parties takes issue with the SOC test derived from EU competition law and summarised in paragraph 28 of *CAC II*. The Commission contends, however, that the CAC committed errors of law when it applied the tests for an SOC and jurisdiction to the pleaded case, thereby departing from or adding unwarranted glosses to the correct tests. The contention conveys that the CAC applied the wrong legal tests in assessing the adequacy of the superseding affidavit, not merely that it misapplied the right tests. If this is what the CAC did, it might raise arguable points of law of general public importance that this Court should consider, since the CAC's tests would bind the Tribunal in future cases.

[123] See section 27(1)(d), in terms of which the Tribunal may "make any ruling or order necessary or incidental to the performance of its functions in terms of this Act"; section 31(5), in terms of which the Chairperson or an assigned member of the Tribunal may make orders of an interlocutory nature that do not warrant a hearing before a panel of three members; and section 55(1), in terms of which the presiding member "may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2)". Section 52(2) provides that the Tribunal must conduct its proceedings in public, as expeditiously as possible, and in accordance with the principles of natural justice, and provides further that the Tribunal may conduct its hearings informally or in an inquisitorial manner.

[153] To address the Commission's contention about legal errors, it is necessary to give a brief overview of how the Commission went about pleading the SOC:

(a) The "single anti-competitive economic objective" of the SOC was the manipulation and distortion of normal competitive conditions in the trading of the USD/ZAR currency pair through price-fixing and division of markets.

(b) The "general and consistent terms" of the SOC were that the respondents' traders would be in frequent and regular communication with each other when trading in the currency pair. The purpose of such communication was to coordinate trading activities, provide information and reach understandings on trading strategies.

(c) The SOC involved (i) the fixing of prices in the currency pair in relation to bid and offer prices, bid-offer spreads, the spot exchange rate and the terms and margins for executing client orders at the FIX;[124] and (ii) the division of markets through the allocation of customers in the currency pair.

(d) The existence of the SOC, and its terms and objective, could be inferred from conduct that implemented the SOC. The conduct entailed extensive communication between traders over a lengthy period, continuity in the mode of communication and the existence of permanent chatrooms on the Bloomberg messaging platform in which the traders frequently participated. The conduct also included unusual market behaviour marked by the absence of random fluctuations, the use of round figures for quotes and a consistent spread of 0.05 and 0.10 charged by the South African banks.

(e) The chatrooms were pleaded to have been the primary mode of communication between the traders. The Commission defined (i) a "member" of a chatroom as a person who created or administered the chatroom and anyone else who accepted an invitation to join it; and (ii) a

[124] The FIX is the specified time each day at which large currency trades are usually transacted.

"participant" in a chatroom as somebody who logged onto or opened the platform, entered the chatroom and remained present as an active or passive participant (an active participant being one who posted an instant message or received a message in response to a message they previously posted). Instant messages posted in a chatroom were visible to all participants, whether or not they actively engaged in the communication.

(f) The Commission identified two chatrooms by name, the Old Gits chatroom and the ZAR chatroom. Other chatrooms were simply referred to as "implicated chatrooms".

(g) The traders representing the various respondents were named. The Commission alleged that there were other representatives of the respondents who were authorised to trade in the currency pair and who implemented the SOC, but whose details were unknown to the Commission.

(h) Each respondent was alleged to have joined the SOC at the time its representatives engaged in any conduct implementing the SOC. In the alternative, certain dates were pleaded in relation to the various respondents. The Commission pleaded that it did not know the date on which each respondent ceased to participate in the SOC.

(i) The Commission pleaded numerous specific incidents of communication over the period 2007 to 2013 (some 162 incidents), organised under the headings "Sharing of information and understandings on bid-offer spreads", "Sharing information and arrangements to coordinate trading", "Sharing information and arrangements to consolidate and offset trades at FIX", "Manipulation of USD/ZAR FX rate" and "Sharing competitively sensitive information". Each incident specified the date, sometimes the time (expressed as Universal Time Coordinated (UTC) time, i.e. two hours behind South Africa), and the implicated traders. If the incident involved communication in a chatroom, the chatroom was identified. Some of the incidents involved market behaviour observed on the

"Reuters trading platform".[125] The Commission pleaded that these specific instances were not the only conduct undertaken by the traders to implement the SOC.

(j) The alleged direct or immediate and substantial effects of the conduct were also pleaded at length.

[154] At the request of this Court, the Commission's counsel prepared a note identifying the errors of law allegedly committed by the CAC. This request was made because it was unclear from the Commission's argument whether the true import of its criticisms was merely that the CAC had misapplied the accepted test and reached factual conclusions with which the Commission disagreed. Criticisms of that kind would on the face of it not engage this Court's jurisdiction.[126] The Commission's note identified 13 alleged errors of law (the numbering is my own), and I propose to deal with each one in turn. The first two errors were said to relate to personal jurisdiction, the third and fourth to subject matter jurisdiction, and the remaining errors to attribution in respect of the SOC.

[155] The respondents were granted leave to file notes in response to the Commission's note. Some of them complain that certain supposed legal errors were not pleaded as grounds of appeal, either at all or in respect of the bank concerned. ANZ does so in relation to the ninth error, Commerzbank in respect of the eleventh and thirteenth errors, Macquarie in respect of the fifth error and Nedbank in respect of the thirteenth error. I shall nevertheless deal with all the alleged errors on their merits.

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[125] Here and elsewhere, I place this term in quotation marks in the light of evidence contained in SBSA's dismissal applications. SBSA explained that there are two relevant Reuters systems: an anonymous trading platform, FX Trading, used by most market-makers to transact peer-to-peer trades, with bids and offers being anonymous; and the Reuters information platform, primarily a news outlet akin to Bloomberg, where trades are not executed but where many institutions post indicative rates, usually by way of an automated feed that may update many times in an hour. SBSA states that, in the light of the particularity provided by the Commission in the superseding affidavit, the only reasonable inference is that what the Commission refers to as the Reuters trading platform was in truth the Reuters information platform. Whether regard may be had to this evidence is a question I defer for later consideration.

[126] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC) at paras 37-9.

First error – conflating SOC and personal jurisdiction requirements

[156] The Commission complains that the CAC erred by conflating the requirements for pleading an SOC and for establishing adequate connecting factors for purposes of personal jurisdiction. Paragraph 39 of *CAC II* is said to reflect this error. In that paragraph, the CAC said the following:

> "It is important to emphasise that care must be taken not to conflate subject matter and personal jurisdiction. The point of [*CAC I*] was that, if the jurisprudence regarding personal jurisdiction was developed beyond that of the constraints of the common law, it was important in this case that, at the very least, the overarching conspiracy pleaded by the Commission should show that all of the banks were connected to that overarching conspiracy; that all were participants in an overarching conspiracy designed to have a detrimental effect on the South African economy by virtue of their joint conduct. To plead an SOC meant having careful regard to the principles set out in *Team Relocations*, thereby ensuring a clear showing that the available evidence fell within these principles. This was key to establishing personal jurisdiction over the *peregrini* respondents."[127]

[157] I reject this criticism. In accordance with *CAC I*, personal jurisdiction over pure *peregrini* required the Commission to plead more than that the SOC involved the ZAR. In *CAC I* it was foreshadowed that an allegation that the pure *peregrini* were involved in an SOC with South African banks might meet the ACF test. The Commission in the superseding affidavit expressly pleaded this as a connecting factor for purposes of personal jurisdiction. Accordingly, in the case of pure *peregrini*, the question was not merely whether those banks were part of an SOC. The Commission had to plead that the SOC in question also included South African banks. This was the point that the CAC was making.

[127] *CAC II* above n 1 at para 39.

Second error – requiring South African linkages

[158] The Commission contends that the CAC erred in requiring an SOC in which foreign banks had effectively "entered into business with South African banks" and where there were linkages to South African banks as part of the SOC. The phrase "entered into business" comes from paragraph 85 of *CAC II*.

[159] The impugned phrase does not point to a legal error. The CAC, which itself placed the phrase in quotation marks, was merely expressing in vivid language that, in order for there to be personal jurisdiction over the pure *peregrini*, it had to be shown that the pure *peregrini* were part of an SOC that included South African banks. If that were properly alleged, all the members of the SOC would have been in the "business" of advancing the alleged anti-competitive objective pleaded by the Commission. *CAC II* as a whole demonstrates that the Court was concerned with linking the pure *peregrini* in an SOC to which South African banks also belonged. This was the key connecting factor which the Commission had alleged, in line with *CAC I*.

Third error – subject matter jurisdiction and local branches (JPM Bank)

[160] The third alleged error relates only to JPM Bank. In the superseding affidavit, the Commission pleaded that JPM Bank conducted the business of a bank in South Africa through a branch in Johannesburg as defined and authorised by sections 1 and 18A of the Banks Act,[128] and that the Johannesburg branch was authorised to deal in foreign exchange in South Africa in accordance with the Exchange Control Regulations.[129] The affidavit further alleged that the Tribunal had jurisdiction over JPM Bank because of the foregoing and also because it participated in an SOC involving the ZAR, which included South African banks.

[161] The Commission contends that the CAC erred in holding that, to establish subject matter jurisdiction over JPM Bank, the Commission had to plead facts to show that its

[128] 94 of 1990.

[129] Exchange Control Regulations, GN R1111 *GG* 123, 1 December 1961.

cause of action arose out of business carried on at JPM Bank's Johannesburg branch or was attributable to its authorised dealers in South Africa. This is indeed what the CAC held:

> [124] "Significantly, these parties [JPM Co and JPM Bank] did not appeal the finding that the Tribunal had personal jurisdiction over this case. The case [of] these respondents was therefore based on the failure to establish subject matter jurisdiction on the part of the Commission. The case of [JPM Bank] was that the Commission was required to plead facts to establish that the cause of action, being a participant in the SOC, was based on business carried on by [JPM Bank's] Johannesburg branch or that the collusive conduct was attributable to its appointment as an authorised dealer in South Africa.
>
> [125] In relation to [JPM Bank], the Commission pleaded that Mr Akshay Aiyer and Mr Paul Simister were the two individuals whose conduct was evidence of participation by [JPM Bank] in the SOC. However, at no point is there any allegation that either Mr Aiyer or Mr Simister worked for [JPM Bank's] South African branch and exercised the powers of an authorised dealer within South Africa. Nor is there any evidence which attributes their conduct to [JPM Bank] in respect of participation in the SOC. In summary, the Commission did not plead facts to establish that the cause of action arose out of business carried on with [JPM Bank's] Johannesburg branch or that the collusive conduct was attributable to its appointments [as authorised dealers][130] in South Africa."

[162] I have difficulty understanding why this point was thought to relate to subject matter jurisdiction, rather than personal jurisdiction. The difficulty can be traced back to *TRIB I*. The Tribunal found that there was personal jurisdiction over JPM Bank and similarly-placed local *peregrini* by virtue of their South African branches. When it turned to subject matter jurisdiction, the Tribunal considered effects-based antitrust jurisdiction in foreign law and adopted the QE test. It concluded that, as against the local *peregrini* (including JPM Bank), the referral affidavit did not adequately plead that the foreign conduct of these banks had qualified effects in South Africa.

[130] The CAC wrote "and authorised deal" at this point, which is plainly a typographical error.

[163] *TRIB I* did not require the Commission to plead that the SOC cause of action against JPM Bank was based on business conducted through its Johannesburg branch. What *TRIB I* required was that the Commission plead that JPM Bank's foreign conduct in pursuance of the SOC had qualified effects in South Africa. This is clear from the hypothetical case sketched by the Tribunal in paragraph 111 of its reasons. The Tribunal referred to two local *peregrini* who engaged in price-fixing of the USD/ZAR exchange rate "through an offshore office". A particular price-fixing transaction might only affect an offshore customer, in which case the QE test would not be met. But if the price-fixing transaction affected the price paid by South African consumers, the QE test would be met, so reasoned the Tribunal.

[164] JPM Bank presumably made a similar argument in *CAC II* to the one it has made in this Court. JPM Bank refers to a statement in *TRIB I* that, under the common law, a court has jurisdiction over a *peregrinus* that conducts business in South Africa "in respect of any cause of action which arose out of its activities here". This is indeed what the Tribunal said,[131] and in a footnote it referenced three South African cases in support of that view: *Appleby*,[132] *Bisonboard*[133] and *Lin*.[134] However, the Tribunal said this in relation to personal jurisdiction, not subject matter jurisdiction.

[165] If the Tribunal was intending to apply this principle, it should have held that, for purposes of personal jurisdiction, the Commission could only rely on the existence of a local *peregrinus*' South African branch if the relevant SOC conduct of that bank was committed through its South African branch. Inconsistently, however, this was not the Tribunal's decision. It found that it had personal jurisdiction over JPM Bank and other local *peregrini* merely by virtue of the existence of the South African branches, without any requirement that the SOC conduct of those banks was attributable to the South African branches.

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[131] *TRIB I* above n 3 at paras 71 and 80.

[132] Above n 112 at 910 and 912.

[133] *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 496-7.

[134] Above n 112 at paras 88-96.

[166] One may question whether the Tribunal was wrong or right in this respect, but the fact is that JPM Bank did not appeal the decision in *TRIB I* that the Tribunal had personal jurisdiction over it. Because *CAC I* endorsed the QE test in relation to subject matter jurisdiction, all that the Commission needed to plead, in respect of JPM Bank, was that its SOC conduct had qualified effects in South Africa. The Commission did not need to plead that the qualified effects were brought about by the conduct of JPM Bank's South African branch. No such ruling had been made in *TRIB I* or *CAC I*. On the contrary, *TRIB I* clearly envisaged that it was JPM Bank's offshore conduct that would need to have had qualified effects in South Africa. If the conduct in question had been the conduct of JPM Bank's Johannesburg branch, qualified effects would have been irrelevant, because one would then have been dealing, for purposes of section 3(1), with "economic activity" in South Africa, and JPM Bank would then have been in the same position as the South African banks.

[167] I am therefore satisfied that the CAC erred in law in holding that, for purposes of subject matter jurisdiction, the Commission needed to plead that the SOC cause of action against JPM Bank was based on business carried on by its Johannesburg branch. It is important that we correct this error, otherwise in future the Commission may be hamstrung in prosecuting anti-competitive conduct by foreign entities with South African branches.

[168] This correction pertains only to subject matter jurisdiction. The effect of this judgment will be to restore the proposition in *TRIB I* that, in the case of a *peregrinus* (whether pure or local), subject matter jurisdiction requires that the anti-competitive offshore conduct of such a firm needs to have had qualified effects in South Africa.

[169] Whether the mere existence of a South African branch, unconnected to the anti-competitive conduct, is sufficient for purposes of personal jurisdiction, as was held in *TRIB I*, is not a question that is before us. In this particular case it might be academic. The superseding affidavit alleged that JPM Bank was party to an SOC that targeted the

ZAR and included South African banks. On the approach adopted in *CAC I* and *CAC II*, this would satisfy the ACF test for a local *peregrinus*, just as it would for a pure *peregrinus*. If the allegations in respect of JPM Co, a pure *peregrinus*, satisfied the ACF test (which JPM Co has evidently accepted, since it has not pursued an appeal), the same would apply to JPM Bank, since the Commission's allegations were made against the JPM entities in the alternative.

Fourth error – subject matter jurisdiction in respect of local banks

[170] The Commission contends that the CAC erred in holding that, for purposes of subject matter jurisdiction over *incolae*, it was insufficient for the Commission to show that the *incolae* engaged in economic activity in South Africa. The Commission points to paragraph 173 of *CAC II*, where the Court said this when concluding its discussion of the case against SBSA:

> "In the case against [SBSA] the skeletal nature of [the] allegations reveals that there is no basis by which its activity fell within the scope of subject matter jurisdiction. To find, as the Tribunal did, that there are disputes that only can be determined after the benefit of a full hearing bears little relationship to that which is contained in the referral affidavit. The case does not get out of the legal starting blocks."

[171] The CAC's use of the expression "subject matter jurisdiction" in this passage is unfortunate. It is clear from the preceding paragraphs of the CAC's judgment[135] that what the CAC was assessing was whether the superseding affidavit made out a cause of action against SBSA, namely a case that SBSA was a participant in the alleged SOC. SBSA's dismissal application did not include, as a ground, that the affidavit did not sufficiently plead subject matter jurisdiction. Its central objection was that the affidavit did not sustain an inference that SBSA participated in the SOC, and it was this point that the CAC was addressing. The CAC did not mention section 3(1) or qualified effects or consider the allegations in the affidavit concerning qualified effects, as it would have done were it addressing subject matter jurisdiction properly so called.

[135] *CAC II* above n 1 at paras 163-72.

[172] The CAC was thus using "subject matter jurisdiction" in a very loose sense, as the equivalent of "cause of action". It did the same thing when discussing the cases against HBEU[136] and CSS.[137] In their cases, too, the CAC analysed the allegations in the superseding affidavit and concluded that they had a "case to answer". There was no discussion of qualified effects as pleaded in the affidavit. In fact, in none of the instances where the CAC found for the respondents did it do so on the basis that the affidavit failed to plead qualified effects sufficiently. If the CAC, in the cases of SBSA, HBEU and CSS, had been using "subject matter jurisdiction" in its technical sense, it could not have found in favour of SBSA but against HBEU and CSS. This is so because the qualified effects pleaded in the affidavit in support of subject matter jurisdiction properly so called did not differentiate between the banks. The Commission pleaded the qualified effects that the SOC as a whole had in South Africa.

[173] There was thus no legal error by the CAC, only an inaccurate use of the expression "subject matter jurisdiction".

Fifth error – failure to keep SOC requirements distinct

[174] The Commission argues that the CAC conflated two separate questions: (a) a firm's contribution to the overall objective of the SOC; and (b) the attribution of the SOC to that firm. According to the Commission, the CAC ought to have engaged in two separate enquiries. The first enquiry was to establish whether the pleaded conduct of a firm fell within the scope of the SOC. The second was to establish the question of attribution, namely whether the firm had actual or constructive knowledge of the scope and general characteristics of the SOC. This error is said to permeate the entire judgment.

[136] Id at para 135.

[137] Id at para 139.

[175] I reject this criticism. In *Team Relocations*, the Court of Justice for the European Union (CJEU) outlined three discrete but related requirements in relation to an SOC: first, the existence of an overall plan pursuing a common objective; second, the intentional contribution of a firm to the overarching plan; and third, actual or constructive knowledge of the conduct of the other participants.[138] The European authorities do not require a court to consider these three basic requirements for an SOC in hermetically-sealed compartments. Moreover, the second SOC requirement is not that a firm's pleaded conduct "fell within the scope of the SOC". The requirement is that the firm participated in the SOC through an intentional contribution by its own conduct to the SOC's common objective.

[176] For example, there might be evidence that two firms conspired to fix the USD/ZAR exchange rate on a particular date. Viewing that conduct in a purely objective way, one might say that the conduct is the same as conduct carried out by participants of the alleged SOC. This, however, says nothing about whether the two firms were participants in the SOC, since their conduct is equally consistent with purely bilateral collusion. There must be evidence that, in acting as they did, the firms were intentionally contributing to the common objectives of the participants in the SOC. Intentional contribution requires knowledge of the SOC.

[177] Intentional contribution, in accordance with the second SOC requirement, is not the same as the actual or constructive knowledge that features in the third requirement. The third requirement is that the firm was aware of the actual conduct planned or put into effect by the other firms in pursuit of the same objectives, or that it could reasonably have foreseen such conduct and was prepared to take the risk as to whether it happened or not.[139] This third requirement concerns the extent of one firm's liability for the conduct of other participants in the SOC. A firm (X) may intend to contribute to an SOC in accordance with the second requirement without having actual or constructive

[138] *Team Relocations* above n 52 at para 51.

[139] See *Fresh Del Monte Produce v Commission* [2015] EUECJ C-293/13; EU:C:2015:416; ECLI:EU:C:2015:416 at para 157.

knowledge of everything else that the other firms were doing in pursuit of the same objectives. X may, for example, be aware that A, B and C are participants in the SOC but be unaware that A, B and C have co-opted a fifth firm, D, into the SOC. If X could not reasonably have foreseen this, it will not be liable for D's conduct in pursuit of the common objectives. Similarly, if X did not know and could not reasonably have foreseen that A would perpetrate conduct of a particular kind in pursuit of the common objectives, it would not be liable for that conduct.

[178] The EU doctrine of the SOC is ultimately a tool for holding each firm liable for the conduct of all the conspirators, and the third requirement is the element which moderates the extent of each firm's liability for the conduct of its co-conspirators. Before, however, one reaches the question of the extent of each firm's liability for the conduct of the others, it must be shown that the firm knowingly joined the conspiracy. This is the second requirement for an SOC, an intentional contribution to the objectives of a known SOC.

[179] The CJEU has noted that the mere fact that there is identity of object between an agreement in which a firm participated and a global cartel does not suffice for a finding that the firm participated in the global cartel.[140] Article 101(1)[141] of the Treaty on the Functioning of the European Union[142] (TFEU) does not apply unless there is a "concurrence of wills between the parties concerned".[143]

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[140] *Sigma Tecnologie di rivestimento Srl v Commission of the European Communities* [2002] EUECJ T-28/99 at para 45.

[141] It reads:

> "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."

[142] Treaty on the Functioning of the European Union, 13 December 2007.

[143] *Toshiba v Commission* [2015] EUECJ T-104/13; EU:T:2015:610; ECLI:EU:T:2015:610; [2015] 5 CMLR 21 at paras 52-6.

[180] In *UBS*[144] the CJEU said this:

> "[I]t is settled case-law that an undertaking which has participated in a single and continuous infringement through its own conduct, which meets the definition of 'agreements' or 'concerted practices' for purposes of Article 101(1) [of the] TFEU and was intended to help bring about the infringement as a whole, may also be liable in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk."[145]

[181] The distinction between the second and third SOC requirements can be illustrated with reference to the *UBS* case. The European Commission (EC) found that there was an SOC implemented through interactions in two chatrooms called the Cods & Chips chatroom and the DBAC chatroom. One of the firms, Bank of America, actively and intentionally contributed to the SOC's objective through its participation in the Cods & Chips chatroom. Some of the firms that participated through that chatroom also participated in the DBAC chatroom. The EC found, however, that Bank of America could not be held liable for the conduct perpetrated through the DBAC chatroom. This was because it could not be found with sufficient certainty that Bank of America was aware or ought reasonably to have foreseen and was willing to take the risk of the existence and functioning of the DBAC chatroom.[146]

[182] Furthermore, the CJEU observed:

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[144] *UBS Group and UBS v Commission* [2025] EUECJ T-441/21; ECLI:EU:T:2025:337; EU:T:2025:337. This was the case in which various firms sought the annulment of the European Commission's decision in Case AT.40324 – European Government Bonds (20 May 2021) (*EG Bonds*). The *EG Bonds* case was the subject of much discussion in the written submissions in this Court. The *UBS* case featured only in oral argument.

[145] *UBS* id at para 126.

[146] Id at paras 1045-97 and 1131-7.

> "[T]he fact that collusive practices relate to the same product and the same activity, the fact that the same means of communication are used, and the fact that the same individuals are involved are not, taken in isolation, sufficient to demonstrate the existence of a common plan in pursuit of a single anti-competitive aim and, therefore, of a single infringement.
>
> However, assuming that they are established, those objective elements are relevant to assessing the existence of a single infringement and, taken as a whole, are capable of confirming that the Cods & Chips and DBAC chatrooms were linked and complementary in nature and sought to achieve the aims pursued by the common plan found by the [EC]."[147]

[183] In analysing the sufficiency of the case pleaded against each bank, the CAC's focus was the second SOC requirement, namely an intentional contribution to the SOC. In regard to the banks it exonerated, the CAC did not reach the third requirement, because it found in each case that the superseding affidavit failed adequately to plead that the bank in question had intentionally contributed to a known SOC or, in the case of the pure *peregrini* and for purposes of personal jurisdiction, that the bank had contributed to a known SOC that included South African banks.

[184] It needs to be clearly understood that the acceptance by the CAC of European SOC principles does not mean that the CAC has created a new form of anti-competitive conduct outside the framework of the Act. The SOC concept is a particular way of applying section 4(1)(b) of the Act. This means that it must still be found that the restrictive horizontal practices (here, the fixing of prices and the dividing of markets) were the subject of an "agreement" or "concerted practice" by the firms concerned, as is required by that section.

Sixth error – insistence on regularity (Nomura and Macquarie)

[185] The Commission contends that the CAC erred in applying the requirement of regularity as a decisive factor in determining whether a respondent's conduct fell within

[147] Id at paras 1099-100.

the scope of the SOC. This legal error was said to have manifested itself in the CAC's reasoning in respect of Nomura,[148] Macquarie[149] and JPM.[150] This is a convenient juncture at which to consider the Commission's pleaded case against these three banks.

[186] The superseding affidavit contains the following Nomura-specific allegations:

(a) Nomura's traders were Messrs Guido Arlan and Darren Dempsey.

(b) Nomura joined the SOC "by at least 18 October 2012", when Mr Dempsey was a participant in an implicated chatroom.

(c) On 27 May 2010, between 16h30 and 16h49 and on the Reuters trading platform, SBSA and Absa, together with Barclays, Nomura and other banks, "held" the USD/ZAR exchange rate around the "focal point of 7.5760". SBSA and Absa, together with HSBC and other banks, "pushed" the rate to 7.5600. SBSA and Absa, together with Barclays, HSBC and other banks, then "returned" the rate to a focal point of 7.5600. The "whole shift" was 0.0160.

(d) In regard to this event of 27 May 2010, it can be inferred (alleges the Commission) that in this period the banks held ZAR in their accounts, while collecting orders to buy the ZAR from customers: "[w]hen the time came, they simultaneously bought the ZAR, strengthening it to the focal point. At this point, they offloaded the ZAR to gain USD profits. The reverse process was then coordinated, weakening the ZAR, from which they gained ZAR profits".

(e) On 2 March 2012 Mr Jason Katz (then with BNP) and Messrs Akshay Aiyer (JPM), Christopher Cummins (Citibank), Nicholas Williams (Barclays) and Arlan (Nomura) were participants in an implicated chatroom in which the following communication took place: "Williams informed the traders that [a customer] was asking three people for a price and the traders should be aware of this."

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[148] *CAC II* above n 1 at para 185 read with para 102.

[149] Id at paras 121-2.

[150] Id at para 128.

(f) Also on 2 March 2012 the same traders were participants in an implicated chatroom in which Mr Aiyer "shared information about customer quotes".

(g) On 18 October 2012 Messrs Dempsey (Nomura) and Duncan Howes (Absa) were participants in an implicated chatroom "in which they discussed the bid-offer spread for USD/ZAR".

[187] In upholding Nomura's appeal, the CAC reasoned thus:[151]

(a) The difficulty for the Commission was that its entire case for Nomura's alleged participation in the SOC rested on three unrelated chats over a six-year period.

(b) Two of the chats, both on 2 March 2012, happened before the date on which Nomura was alleged to have joined the SOC. It was "regrettable" that the Tribunal had overlooked this.

(c) The allegation in respect of the chat on 17 October 2012 was "so skeletal and vague" that it was hardly the evidence needed to sustain a case of personal jurisdiction (by which the CAC plainly meant evidence to sustain the conclusion that Nomura was party to an SOC with one or more South African banks).

(d) This was particularly so in view of the fact that Mr Dempsey's interaction was with an Absa trader. If there was evidence linking Nomura to a South African-based SOC, this would have found its way into the superseding affidavit, since Absa had been granted leniency and was cooperating with the Commission. The silence was "instructive".

(e) The case against Nomura "luminously reveal[ed]" the difficulty of the Commission's ambitious case. The Commission had to establish that Nomura knew or ought to have known that it was participating in conduct forming part of an SOC, that it knew or ought to have known the essential

[151] Id 1 at paras 100-8.

features of the SOC and that it intended to contribute to achieving the SOC's overall objective.

(f) The CAC quoted a passage from the CJEU's decision in *HSBC*[152] where the latter Court emphasised that a firm that participated in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but which was aware or should have been aware of all the other conduct planned or put into effect in pursuit of the same objectives, could be held liable for all the conduct.[153]

(g) The CAC concluded that the three instances alleged were insufficient to meet the requirements for Nomura's participation in the SOC.

[188] The superseding affidavit contains the following Macquarie-specific allegations:

(a) Macquarie's traders were Messrs Mark Chia, Chris Harkins, Jason Atkins, Bevan Murray, Luke Fryday and Tim Donnelly.

(b) Macquarie joined the conspiracy "by at least 11 September 2013", when its traders were participants in an implicated chatroom.

(c) On 11 September 2013, these traders, together with Mr Thulani Kunene (Absa) and "Bhana and Naidoo" (their genders, full names and the banks they represented are not pleaded), were participants in an implicated chatroom "in which Chia and Kunene discussed bid-offer spread for USD/ZAR" and "Murray shared competitively sensitive information". (This is the last date of the specific incidents catalogued in the superseding affidavit and evidently forms the basis of the Commission's allegation that the SOC endured until at least September 2013.)

[189] In upholding Macquarie's appeal, the CAC reasoned as follows:[154]

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[152] *HSBC Holdings plc v European Commission* [2019] EUECJ T-105/17; ECLI:EU:T:2019:675; EU:T:2019:675; [2019] 5 CMLR 21.

[153] Id at para 199.

[154] *CAC II* above n 1 at paras 119-23.

(a) The sole Macquarie-specific allegation in the superseding affidavit was the chat of 11 September 2013.

(b) On its own, and at best for the Commission, this would establish a prohibited practice between Macquarie and Absa involving a single instance of information-sharing on a single day.

(c) The Commission had sought to "salvage" its case against Macquarie by arguing that anyone who became a participant in a chatroom "somehow would know or should reasonably have known [that] the chatroom was used as a primary mode of communication to implement the terms and further the objectives of the SOC". The difficulty, however, was that there was nothing in the affidavit from which those conclusions could be inferred.

(d) Moreover, the affidavit failed to distinguish between information in relation to currency trading that was in the public domain and information to which only participants in the SOC were privy.

(e) It was difficult to see how the case could be made that a bank participated in the SOC as pleaded on the basis of a single chat with an Absa trader. Once again, there was the absence of information that Absa as a leniency applicant would have provided, if it had existed.

(f) In pleading the effects of the SOC, the affidavit contained no reference to Macquarie. But even leaving aside subject matter jurisdiction, there was "simply insufficient evidence to connect Macquarie to the overall SOC, which was an essential requirement of [*CAC I*] to establish personal jurisdiction".

[190] The superseding affidavit contains the following JPM-specific allegations:

(a) Its traders were Messrs Aiyer and Paul Simister.

(b) JPM joined the SOC "by at least 19 July 2011" when Mr Aiyer participated in the ZAR chatroom. (The affidavit does not in fact refer to any incident of 19 July 2011. Mr Aiyer is alleged to have participated in

an incident on 19 July 2012, but this is not the first instance allegedly implicating JPM.)

(c) Of the 162 specific incidents catalogued in the affidavit, JPM through one or other of its traders is alleged to have participated in 71 of them, spanning the period 26 April 2011 to 26 April 2013. These were all incidents involving chatrooms, of which eight took place in the ZAR chatroom.

[191] It is unnecessary to deal with the CAC's reasoning in respect of the JPM entities. The CAC found against JPM Co, which has not appealed that decision to this Court. The CAC found in favour of JPM Bank, but on a basis which, in an earlier part of this judgment, I have found to be legally unsound. The Commission seems to have referred to JPM in the context of the sixth error only in order to contrast the CAC's approach to JPM on the one hand and to Nomura and Macquarie on the other. In respect of JPM Co, the CAC said that the "regularity" with which Mr Aiyer participated in implicated chatrooms was a prima facie basis for concluding that JPM Co participated in the alleged SOC and had a case to answer.[155]

[192] In respect of the supposed sixth error, the Commission has also referred to paragraph 185 of *CAC II*, which was part of the CAC's summation after dealing with all the individual banks. There, the CAC said:

> "This Court has emphasised that there are clear separate requirements to establish personal and subject matter jurisdiction. In the case of the pure *peregrini* both requirements must be established in order for the referral to meet the requisite legal standards. It was made clear in [*CAC I*] that the Commission was required to allege that there were adequate connecting facts between the parties and the jurisdiction of the Tribunal sufficient to establish personal jurisdiction against all of the named respondents. As repeatedly emphasised that is an onerous requirement. *The reference to occasional participation in a chatroom without any additional evidence and where there was no link to any South African bank is inadequate to meet the test as set out in*

[155] Id at para 128.

> *the* [*CAC I*] *order*. Accordingly, the Commission has failed to show the requisite personal jurisdiction in the case of the fifth respondent (ANZ), ninth respondent (Nomura), twelfth respondent (Commerzbank), thirteenth respondent (Macquarie) and nineteenth respondent (HBUS)." (Emphasis added.)

[193] To come back to the supposed error, there is nothing in the CAC's reasoning to show that it held, as a matter of law, that a particular bank had to have engaged in frequent interactions in order to justify an inference that it participated in the SOC. The CAC was concerned only with the inferences that could be drawn from the facts alleged in respect of Nomura and Macquarie. The fact that a particular bank was alleged to have participated in an implicated chatroom on only one, two or three occasions is plainly relevant in the process of inferential reasoning. The more numerous the chats, and the wider the array of traders with which a particular bank engaged in those chats (as with JPM Co), the greater would be the likelihood of drawing an inference against the bank. The Commission itself pleaded that frequent and regular communication was the hallmark of this particular SOC.

[194] The sentence I have emphasised from paragraph 185 of *CAC II* makes it clear that the CAC did not reject the possibility that a bank could be found to have participated in the SOC even though it was only directly implicated in a few chats. But then there needed to be some additional evidence to justify the inference. This evidence was lacking in the case of both Nomura and Macquarie.

Seventh error – insistence on chatroom participation (FRB)

[195] The Commission contends that the CAC erred in law by finding that the superseding affidavit needed to contain allegations that a firm's employee or representative was a member of the chatroom in order to justify a finding that the pleaded conduct fell within the SOC. The CAC's reasoning in respect of FRB is said to manifest this error.

[196] The superseding affidavit contains the following FRB-specific allegations:[156]

(a) No FRB traders are named.

(b) FRB joined the SOC "by at least 28 May 2010", when it and other South African banks "affirmed a focal point" of 7.5750.

(c) The affidavit alleges eight incidents (or six, if one includes incidents that occurred on the same day and in close time proximity) over the period January 2009 to September 2012, in which conduct by various banks that included FRB was observed on the "Reuters trading platform".

(d) On 11 January 2009, between 20h59 and 21h48, various banks "engaged in a pattern of price formation". SNY/SAI and UBS quoted the same ask and bid prices of 9.8100 and 9.7800, respectively, resulting in an identical spot exchange rate and spread of 0.03. FRB and Nedbank thereafter also quoted identical bid prices, the ask price only differing "by a pip", leading to identical spot exchange rates and spreads. FRB matched SNY/SAI at the bid price of 9.7600 and ask price of 9.8599. (I note that UBS is not alleged to have been a party to the SOC.)

(e) On 28 May 2010, between 07h23 and 07h24, FRB, SBSA, Absa and Investec "colluded in posting quotes in succession which had the effect of reducing volatility in the exchange rate". They "maintained" a spot exchange rate of between 7.5750 and 7.5765.

(f) On the same date, between 07h41 and 07h44, banks that included the same group of four South African banks "affirmed a focal point" of 7.5750.

(g) On 7 March 2012, at around 10h13, "banks engaged in 'flat-lining', and [FRB] was allowed to dominate the market with its quotations while other traders withheld bids and offers". (The affidavit does not identify the other "banks".)

[156] The allegations in the superseding affidavit referring to "RMB" (RMB Holdings Limited), the entity later identified as FirstRand (the twenty-sixth respondent), were made applicable also to FRB (the twenty-seventh respondent).

(h) On the same day, between 10h12 and 10h16 (that is, over a period that included the immediately preceding incident), "local banks withheld quotes and enabled [FRB] to dominate the market". FRB thereafter dropped the price from 7.6425 to 7.6390, thereby creating a new lower focal point above which the other banks quote[d]".

(i) On 19 September 2012, between 00h26 and 00h34, banks that included Investec, FRB, Absa and HBEU/HBUS "alternated in posting quotations in a manner that enabled them to set the exchange rate at various levels for nearly eight minutes".

(j) On 20 September 2012, between 06h45 and 06h47, FRB "paired its bid and ask prices with various banks in succession". This occurred at least 24 times, and included pairings with HBEU/HBUS, Commerzbank, Barclays, Investec and Nedbank.

(k) On 28 September 2012, between 18h32 and 18h39, FRB, Absa, Investec and Nedbank "through a pattern [of] consecutive quotes coordinated their bid and ask prices generat[ing] a sequence of the same spot exchange rates".

[197] In upholding FRB's appeal, the CAC reasoned thus:[157]

(a) In contrast to the case brought against many of the other banks, the Commission did not provide any examples of FRB traders engaging in contact in chatrooms. Indeed, the Commission accepted that it did not even know who the FRB traders were and thus had no evidence that they participated in chatrooms.

(b) The case against FRB was based on "trading data on the Reuters platform", the allegation being that the posting of quotations on the platform was coordinated to manipulate the currency.

(c) The CAC summarised the incident of 11 January 2009 and identified the dates of the other incidents.

[157] *CAC II* above n 1 at paras 152-61.

(d) It was "regrettable" that the Tribunal's decision against FRB "was justified on hopelessly incorrect information". The Tribunal had stated that FRB traded through the chatrooms, despite the fact that no such allegation was made in the superseding affidavit. The Tribunal had supported its statement with reference to named traders, none of whom were ever employed by FRB.

(e) The Commission's counsel had made much of "consistent prices being observed across time and banks". A "fundamental problem" with that submission, one that "percolate[d]" throughout the affidavit, was the "inability to distinguish between information which is in the public domain; that is, information available to all banks who simply have access to Reuters or a similar screen … and information that could only be the product of some form of nefarious cartel activity". The superseding affidavit should at least have made this distinction clear, thus locating its case within the latter as opposed to the former category.

(f) There was thus no case made out implicating FRB.

[198] The very way in which the Commission frames the seventh error shows that it is not an error of law, or at any rate not one of general public importance. It is a supposed error in a particular case where collusion in chatrooms was an important feature of the Commission's pleaded case. It hardly needs to be said that it is not an inherent feature of cartels that they involve currency traders and chatrooms. The supposed error is case- and fact-specific.

[199] In any event, the CAC did not make the alleged error. It correctly identified the absence of an allegation against FRB that its traders communicated with other traders through implicated chatrooms. This was a relevant factual circumstance to be taken into account in deciding whether the superseding affidavit adequately alleged FRB's participation in the SOC. The Commission itself pleaded that the SOC could be inferred from, among other things, frequent communication through permanent chatrooms, this constituting the "primary mode" of communication between the respondents' traders

for purposes of implementing the SOC. Moreover, the Tribunal had, albeit mistakenly, found that FRB had participated in chatrooms.

[200] The CAC went on to state that the Commission's case against FRB was based on "trading data on the Reuters platform". The CAC did not state that such information on its own could not in law justify an inference of participation in the SOC. What the CAC found was that the allegations in regard to the trading data did not in this case justify the inference.

Eighth error – insistence that traders be named (HBUS)

[201] The Commission contends that the CAC erred in law by holding that the superseding affidavit needed to identify a bank's employee or representative by name in order to justify a finding that the bank's conduct fell within the SOC. The Commission submits that this error was made in relation to HBUS[158] and Nedbank.[159]

[202] The superseding affidavit contains the following HSBC-specific allegations:

(a) Its traders were Messrs Christopher Hatton (until 30 October 2010) and Mijo Mirkovic.

(b) HSBC joined the SOC "by at least 1 October 2007".

(c) Mr Hatton features in 27 alleged chatroom incidents over the period September 2007 to June 2010. All these interactions were with other foreign banks.

(d) The affidavit mentions Mr Mirkovic only twice. On 29 October 2007, so the Commission pleads, Mr Hatton and traders from Citibank, BoA and SCB were participants in the Old Gits chatroom. Mr Mullaney (SCB) and Mr Cook "informed each other of [the] intended trading directions". The traders agreed to meet for drinks. Mr Cummins (Citibank) asked the other traders "to preserve the agreed spreads as he has to support his family".

[158] Id at paras 131-2.

[159] Id at para 164.

The Commission continues: "Hatton makes reference to his conversations with [Mirkovic]. The traders all share information on their trading positions".

(e) On 25 and 26 July 2012, traders from BNP, JPM Co, Citibank and Barclays are alleged to have been participants in an implicated chatroom. Mr Katz shared information about customer inquiries. Mr Aiyer said he "needs to sell 25 million and requires everyone to post offers so as to drive the price down". Mr Katz indicated that he is "skewing lower on his ecom [platform] and if he gets paid Aiyer can have". Mr Aiyer said "that 'Mijo' [Mr Mirkovic] has taken 15".

(f) HSBC is also alleged to have been part of three incidents of market conduct observed on the "Reuters trading platform". These occurred on 27 May 2010, 19 September 2012 and 20 September 2012.

(g) The Reuters incident on 27 May 2010 is also alleged to have involved Absa, SBSA, Barclays, Nomura and other banks. Various banks held the exchange rate "around the focal point" of 7.5760. SBSA and Absa together with HSBC and other banks then "pushed the exchange rate" to 7.5600, before returning the exchange rate to a "focal point" of 7.5600.

(h) The second Reuters incident, on 19 September 2012, occurred between 00h26 and 00h34. Banks, alleged to include Investec, FRB, Absa and HSBC, "alternated in posting quotations in a manner that enabled them to set the exchange rate at various levels for nearly eight minutes".

(i) The third Reuters incident took place on 20 September 2012 between 06h45 and 06h47. FRB allegedly "paired its bid and ask prices with various banks in succession". This occurred 24 times, and included two pairings with HSBC.

[203] In relation to HSBC, the CAC reasoned thus:[160]

[160] Id at paras 129-34.

(a) The Commission's case mainly centred on HBUS' trader, Mr Hatton. He was implicated for HBUS in 28[161] of the incidents catalogued in the superseding affidavit. These interactions were all with other foreign banks.

(b) There were only three instances where HBUS was alleged to have engaged with a South African bank, but in none of those did the affidavit name HBUS' representative or the representatives of the local banks.

(c) The affidavit also identified Mr Mirkovic as an HBUS representative, but he was not alleged to have been an active or passive participant in any of the conduct implementing the SOC. In the only incident in which he was mentioned, his involvement was "peripheral" and hardly took the Commission's case further.[162]

(d) The CAC emphasised that, to show personal jurisdiction over the pure *peregrini* such as HBUS, the Commission had to show "sufficient South African involvement".

(e) The position was different, said the CAC, in relation to HBEU. Because it was a local *peregrinus*, only subject matter jurisdiction had to be established. The allegations in respect of Mr Hatton were "clear prima facie evidence" of participation in the SOC. Although HBUS admitted that Mr Hatton had been its employee (i.e. not HBEU's employee), the allegations of participation in trading justified drawing an inference that HBEU was "correctly connected to the SOC". There was "no clear denial" that Mr Hatton had nothing to do with HBEU's activities.

[204] As noted, the CAC mentioned three instances where HBUS was alleged to have engaged with South African banks, these being the instances where no traders were identified. These were the three Reuters incidents. It is relevant to note, in this regard,

[161] By my count it was 27 incidents, but nothing turns on this. The CAC may have included an incident that took place after 30 October 2010, by which time Mr Hatton had moved from HSBC to CSS.

[162] There were two references in the superseding affidavit to Mr Mirkovic, but the CAC's observation is equally applicable to both.

that in opposing its joinder, HBUS stated that Mr Hatton was employed by it between September 2005 and October 2010, a fact not denied by the Commission in its replying affidavit. It follows that Mr Hatton could not have been the unnamed trader involved in the two incidents in September 2012, which took place more than 27 months after the last chatroom incident involving HSBC.

[205] Fairly read, the CAC's judgment cannot be understood as laying down, as a legal proposition, that a firm's representative has to be named in order for that firm to be susceptible to prosecution for cartel conduct. It would be absurd to suppose that the CAC held such a view. The CAC, in my view, was merely making the point that in this particular case the alleged facts were insufficient to justify a conclusion that HBUS was, in these three instances, colluding with the South African banks as part of the SOC.

[206] As I have previously mentioned, *CAC II* contains no separate analysis of Nedbank's position, seemingly an oversight. In the context of the alleged error which I am now addressing, the Commission refers to a paragraph forming part of the CAC's discussion of SBSA's appeal. Although the CAC said in that paragraph that the superseding affidavit did not name any trader who represented Nedbank, this observation, made in passing, appears to have played no part in the CAC's decision in favour of SBSA.[163]

Ninth error – insistence on "active" chatroom participation (BAMLI and ANZ)

[207] The Commission contends that the CAC erred in law in finding that the superseding affidavit needed to allege that a trader "actively participated" in chatroom

[163] *CAC II* above n 1 at para 164. That paragraph reads:

> "Turning to the allegation that [SBSA] entered the SOC on 1 January 2008 (a public holiday in South Africa, but presumably on the Commission's case South African traders were still hard at work), the Commission was not able to refer to a single contact between Absa, [SBSA] and/or Nedbank, whether before or after that date. No trader was named who was employed by or who represented Nedbank."

conduct in order for such conduct to be within the scope of the SOC. This error, submits the Commission, was made in respect of BAMLI[164] and ANZ.[165]

[208] The superseding affidavit contains the following BoA-specific allegations (the BoA entities are BAMLI, MLP and BANA):

(a) BoA's traders were Messrs Gavin Cook and Mark Sheppard, who were employed by or representing "[MLP], alternatively [BAMLI], alternatively [BANA]".

(b) Mr Cook is alleged to have been involved in 40 of the 162 incidents listed in the affidavit, spanning the period September 2007 to March 2011. These were all chatroom interactions, many of them in the Old Gits chatroom. The only other alleged participants in these incidents were other foreign banks: Citibank, HSBC, SCB and SAI are the recurring names; CSS features once.

(c) Curiously, the affidavit does not allege that Mr Sheppard participated in any of the incidents.

[209] In respect of the BoA entities, the CAC reasoned as follows:

(a) In relation to BAMLI,[166] the Commission had been told under oath in BAMLI's exception application that Mr Cook was at all times employed by MLP, not BAMLI, a fact never denied by the Commission. This might have explained why the Commission sought to join MLP. Mr Sheppard was not alleged to have participated in a single instance of discussion in an implicated chatroom, which was the Commission's key evidence for the prima facie case justifying the inference that there was an SOC.

(b) The superseding affidavit thus did not contain facts necessary to justify a conclusion that BAMLI, a pure *peregrinus*, was connected in a conspiracy with South African banks.

[164] Id at para 89.

[165] Id at paras 94 and 96-7.

[166] Id at paras 87-93.

(c) Moreover, *CAC I* had required the Commission to specify the bank on behalf of which any particular trader had acted and whether the trader was alleged to have acted for more than one respondent at a time. The allegation that Messrs Cook and Sheppard were acting for "[MLP], alternatively [BAMLI], alternatively [BANA]" was "devoid of the kind of specificity which was required by [*CAC I*] or by a referral that could pass legal muster".

(d) In relation to BANA,[167] a local *peregrinus*, the affidavit purported to justify linking Mr Cook to this entity by virtue of email addresses containing his name together with the domains @[…] and @[…]. This did not provide a basis to join BANA.

(e) In relation to MLP,[168] a pure *peregrinus*, Mr Cook's impugned interactions involved only other foreign banks. Mr Sheppard was not implicated at all. On balance, therefore, there were insufficient connecting factors to South Africa to justify personal jurisdiction over MLP.

[210] The superseding affidavit makes the following ANZ-specific allegations:

(a) ANZ's traders were Mr Murat Tezel and, as from 2013, Mr Katz.

(b) Mr Tezel features once in the affidavit. The Commission alleges that on 18 October 2012 Mr Katz (a BNP trader at the time) and Messrs Aiyer, Williams and Cummins (JPM, Barclays and Citibank respectively) were participants in an implicated chatroom. Messrs Katz and Aiyer "matched each other's opposite FIX positions in order to offset their respective exposure at the upcoming FIX", and "Aiyer 'copied and pasted' a portion of a communication between Madaras and Tezel from another chatroom". (Mr Dave Madaras is identified elsewhere in the affidavit as a Citibank trader.)

[167] Id at paras 91-2.

[168] Id at para 93.

(c) Although the affidavit alleges that Mr Katz was an ANZ trader as from 2013, the last pleaded incident involving Mr Katz is the one just mentioned, when he was still with BNP. In other words, the affidavit does not allege any implicated conduct by Mr Katz in his capacity as an ANZ trader.

[211] The CAC reasoned thus in respect of ANZ:[169]

(a) Although Mr Katz was a central player in the case brought by the Commission, every instance of his participation preceded the year in which he joined ANZ.

(b) Regarding the single reference to Mr Tezel, the CAC said that it was unclear precisely what was meant by "copied and pasted". There was no suggestion that Mr Tezel had participated in a chatroom or any similar discussion with other traders.

(c) The CAC concluded that no sufficient case had been made out to find that ANZ was a participant in the SOC.

(d) The CAC added[170] that Mr Katz had been criminally charged in the US and had entered into a plea agreement there relating to a conspiracy among foreign traders targeting emerging markets' currency prices, including the ZAR. (These facts were pleaded in the superseding affidavit.) Since the Commission would, said the CAC, have had access to the case brought against Mr Katz, the Court would have expected the affidavit to include allegations that Mr Katz had exploited his knowledge when he moved to ANZ in 2013 if this had been the case.

[212] As with the seventh error, the formulation of the ninth error is case- and fact-specific. It is not by its nature an error of law, or at any rate not one of general public importance. In relation to the BoA entities, the CAC did not hold that, as a matter

[169] Id at paras 94-7.

[170] Id at paras 98-9.

of law, Mr Sheppard's conduct could not have implicated them in the SOC unless he participated in chatrooms. The CAC was nevertheless justified in pointing out that collusion in chatrooms was the hallmark of the SOC as pleaded by the Commission. The important point, insofar as Mr Sheppard is concerned, is that the superseding affidavit did not identify any conduct by him, in chatrooms or elsewhere.

[213] In regard to ANZ, the CAC was emphasising the obscure nature (in the CAC's view) of the Commission's single reference to Mr Tezel. In the context of an SOC where chatrooms were said to be the primary means of communication, it was not out of place for the CAC to observe that the single reference to Mr Tezel did not suggest that he had participated in a chatroom or had "any similar discussion with other traders".

[214] Insofar as Mr Katz is concerned, the superseding affidavit did not identify any conduct by him, whether in chatrooms or otherwise, from the time he became employed by ANZ. The CAC considered that, in the circumstances, the affidavit did not contain facts that could support an inference of ANZ's participation in the alleged SOC.

[215] ANZ's position in relation to Mr Katz is analogous to that of UniCredit in *UBS*.[171] A certain trader, actively implicated in the SOC during his former employment with other implicated banks, switched employment from Portigon to UniCredit with effect from 1 September 2011. In regard to liability for penalties, it was relevant to fix the date from which UniCredit became implicated in the SOC. The EC had set the starting date of participation as 9 September 2011, because the trader had logged into the Cods & Chips chatroom on that date, albeit under his former employer's account. However, there was no evidence of anti-competitive conduct in the chatroom on that date. The first implicated conduct by the trader took place on 26 September 2011, and the CJEU held that this was the relevant starting date. UniCredit could not have been required to distance itself from conduct that had not yet taken place. The CJEU said:

[171] Above n 144.

> "1250. If the [EC's] line of reasoning were to be followed, it would result in allowing it to find that UniCredit participated in a single and continuous infringement even if, thereafter, that undertaking's trader had not participated in any anticompetitive discussions or the infringement had ceased before any fresh anticompetitive discussions took place.
>
> 1251. It follows that, in the absence of anticompetitive exchanges that took place on the day on which the access of the trader concerned to the Cods & Chips chatroom was renewed on behalf of his new employer, namely UniCredit, that renewed access is not, per se, sufficient to set the starting point of that bank's participation in the infringement at issue at 9 September 2011, even though, owing to his previous employment relationships with RBS, Natixis and Portigon, that trader had knowledge of the fact that the exchanges that took place in that chatroom could be anticompetitive in nature."

Tenth error – test for determining a firm's knowledge of the SOC

[216] The Commission submits that, in determining whether a bank had actual or constructive knowledge of the scope and general characteristics of the SOC and was prepared to take the risk, the CAC erred in applying, as the only relevant factors, regularity of pleaded conduct, membership of and active participation in chatrooms and whether the superseding affidavit named the bank's trader. The CAC ought to have considered all the factual allegations about the bank's conduct, together with surrounding factual allegations, to determine whether the affidavit contained allegations "from which to draw a reasonable possible inference of knowledge or assumed knowledge".

[217] The Commission identifies the other relevant circumstances as including: a common instrument (the USD/ZAR currency pair); common strategies or forms of conduct; common platforms; the same geographies (the US and South Africa); the same period, namely 2007 to 2013; and common individuals. The Commission contends that the CAC should have found that the presence of an individual in the chatroom together with competitors could be sufficient to draw a reasonable possible inference of a contribution to the overall objective of the SOC.

[218] The tenth error is, on analysis and at least in the main, merely an aggregation of the sixth to ninth errors, with which I have already dealt. Furthermore, it does not in truth assert an error of law. It is formulated with reference to the unique factual circumstances of this particular case. It is a complaint about how the CAC assessed the pleaded facts.

[219] Moreover, the CAC did not hold that, as a matter of law, only certain circumstances were relevant in considering whether one could reasonably draw the inference that a bank participated in or had knowledge of the objectives of the SOC. The CAC identified the facts that were alleged in relation to the bank in question, which is unobjectionable. The more general circumstances listed by the Commission formed part of the background that the CAC dealt with earlier in its judgment. There is no reason to think that the CAC ignored them in the context of analysing the bank-specific allegations.

[220] I must confess that I struggle to see how the more general circumstances mentioned by the Commission could add much weight to the bank-specific allegations. In regard to the common instrument (the USD/ZAR currency pair) and common geographies (the US and South Africa), it is perfectly plausible that, if the currency pair were susceptible to manipulation, different groups of traders in the US and South Africa could independently collude to manipulate the price. As to common platforms, the superseding affidavit does not disclose a pattern of all or most of the banks being implicated in the same chatrooms.[172] Regarding a common period of time (2007 to

[172] Of the 162 incidents, 29 took place in the Old Gits chatroom. This was from September 2007 to April 2011. The hard-core members were Citibank, BoA, HSBC, SCB and SAI, later also Barclays and CSS (this followed the moves by Mr Katz to Barclays in July 2010 and Mr Hatton to CSS in November 2010). Nine incidents took place in the ZAR chatroom. This was from March 2012 to October 2012. The only participants were BNP, Citibank, JPM and Barclays. Of the 162 incidents, 104 took place in otherwise unidentified "implicated chatrooms". Since these appear to have been random chatrooms, it is not possible to infer any pattern of participation in any one particular chatroom. What can be said is that Absa and Investec are alleged to have colluded on four occasions between May 2008 and November 2011 in implicated chatrooms, with no other banks alleged to have been present. SBSA and Barclays are alleged to have colluded twice in implicated chatrooms, in January 2012 and October 2012, again with no other banks being present. There are no allegations of participation in chatrooms by Nedbank and FRB. One incident took place via telephone, 18 were matters of observed market conduct on the "Reuters trading platform" and one was of observed market conduct on an unidentified platform. That currency traders should be active on the Reuters trading platform is, of course, unremarkable. These

2013), on the Commission's own version, not all the banks are alleged to have been involved throughout that period. Based on the 162 specific instances catalogued in the affidavit, the periods of the banks' alleged participation vary widely.[173]

Eleventh error – disregarding conduct evidence (SBSA, Nedbank, Nomura, Commerzbank, HBUS and FRB)

[221] The Commission contends that the CAC erred in law by not considering the admissibility and probative value of "conduct evidence in its assessment of attribution". This evidence ought to have been regarded as admissible, relevant and potentially of high probative value. The Commission submits that this error was committed in relation to SBSA,[174] Nedbank, Nomura,[175] Commerzbank,[176] HBUS[177] and FRB.[178]

[222] I have already summarised the bank-specific allegations made in respect of Nomura, FRB and HBUS, and the CAC's reasoning in respect of those banks.[179]

[223] The superseding affidavit contains the following Commerzbank-specific allegations:

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incidents mainly involved South African banks, with foreign banks from time to time alleged also to have been involved in the observed activity.

[173] Citibank – September 2007 to October 2012; BoA entities – September 2007 to March 2011; HSBC – September 2007 to September 2012; SCB – October 2007 to March 2012; SAI – October 2007 to December 2010; Absa – January 2008 to September 2013; SBSA – January 2008 to October 2012; Nedbank – January 2008 to September 2012; Investec – May 2008 to September 2012; FRB – January 2009 to September 2012; Nomura – May 2010 to October 2012; Barclays – May 2010 to April 2013; Commerzbank – July 2010 to September 2012; CSS – November 2010 to May 2011; JPM – April 2011 to April 2013; BNP – November 2011 to October 2012; Macquarie – 11 September 2013 (a single date); ANZ – 18 October 2012 (a single date). I recognise, of course, that if a bank is properly alleged to have joined the SOC, its termination date would not necessarily be the last known date of its participation. A bank might in those circumstances need to show that it disassociated itself from the SOC. However, for present purposes we are concerned with the inferences that could reasonably be drawn from the pleaded facts, and those pleaded facts do not positively show that all the banks were involved throughout the whole period of 2007 to 2013.

[174] *CAC II* above n 1 at paras 165-71.

[175] Id at paras 100-6.

[176] Id at paras 109-18.

[177] Id at para 131.

[178] Id at paras 152-62.

[179] See [186] to [187] (Nomura); [196] to [197] (FRB); and [202] to [203] (HBUS).

(a) Commerzbank's traders were Messrs Nigel Dousie and Kevin Wilson. (However, only Mr Dousie features in subsequent allegations. The affidavit does not implicate Mr Wilson in any specific incidents.)

(b) The specific allegations against Commerzbank involved one chatroom interaction and two instances of observed conduct on the "Reuters trading platform".

(c) The chatroom interaction occurred on 28 July 2010, when Mr Katz (who had just moved from SAI to Barclays) and Mr Dousie were participants in an implicated chatroom in which Mr Dousie "shared information with Katz about a potential customer in the market".

(d) As to observed conduct on the Reuters platform, on 29 March 2012, between 21h33 and 23h18, "a focal point was initiated by Commerzbank at 7.7170". (No other banks are mentioned.)

(e) On 20 September 2012, between 02h46 and 04h17, "a number of foreign banks (not referred to in this present referral) posted the same bid and ask prices". Investec and Tatra Banka both posted the same bid and ask prices of 8.3027 and 8.3527, respectively, each resulting in an average of 8.3277. Commerzbank posted "different bid and ask prices (8.3227 and 8.3327 respectively) [but] these prices nonetheless result[ed] in Commerzbank matching the average of Investec at 8.3277". (Tatra Banka is not cited as a respondent. It is apparently a Slovakian bank.)

(f) About two hours later, between 06h45 and 06h47, there occurred the incident I have already summarised in relation to FRB, which allegedly "paired its bid and ask prices" with various banks. It allegedly did so twice in relation to Commerzbank.

[224] The CAC reasoned thus in relation to Commerzbank:[180]

[180] *CAC II* above n 1 at paras 109-18.

(a) It referred to and summarised the incidents that took place on 28 July 2010, 29 March 2012 (the CAC mistakenly said 29 July 2012) and 20 September 2012.

(b) As to the incident of 28 July 2010, there were no details of the information shared, a significant omission in the CAC's view, given that the Commission would have had access to the information in the case against Mr Katz in the US. The allegation in respect of this incident did not suggest that Commerzbank was acting in concert with any other banks, nor was there an allegation that the information shared was commercially sensitive.

(c) As to the Reuters incidents, the CAC regarded as relevant the evidence given by the deponent to SBSA's dismissal application about the distinction between the Reuters trading platform and the Reuters information platform. The SBSA deponent inferred, from the level of detail given in the superseding affidavit, that the supposed conduct on the "Reuters trading platform" in fact referred to automated indicative exchange rates posted on the Reuters information platform.[181]

(d) Regarding the Reuters incident of 29 March 2012, the fact that no other banks were mentioned stood in contrast to other allegations in the affidavit of focal points involving multiple banks: "[a]n allegation of unilateral conduct without more is hardly evidence of participation in an SOC".

(e) There was thus insufficient evidence to show that Commerzbank was a participant in the alleged SOC.

[225] The superseding affidavit contains the following SBSA-specific allegations:

(a) Two interactions in an implicated chatroom are alleged. First, on 10 January 2012 Messrs Peter Taylor (allegedly a Barclays Capital trader) and Bryan Brownrigg (allegedly an SBSA trader) were participants in an

[181] As to which, see above n 125.

implicated chatroom "in which they discussed [the] bid-offer spread for USD/ZAR".

(b) Second, on 1 October 2012 the same two individuals were participants in an implicated chatroom, on which occasion "Taylor enquired what quote Brownrigg would show a top customer in 25 and 50". Mr Brownrigg responded "by telling '50 100'".

(c) Additionally, conduct involving SBSA together with other banks was observed on eight occasions on the Reuters platform over the period 1 January 2008 to 19 September 2012. On five of these occasions the other banks were South African banks. On the remaining three occasions the banks included foreign banks: SAI (on 12 January 2009); Barclays, Nomura and HSBC (on 27 May 2010); and Barclays (19 September 2012). The alleged conduct included withholding quotes in favour of one of the banks, setting focal points and the posting of identical bid and ask prices.

(d) The first of these Reuters incidents took place on 1 January 2008 between 20h14 and 05h13. Absa and SBSA were said to have withheld quotes to enable Nedbank to fix the exchange rate at 7.5850.

(e) The last of these Reuters incidents took place on 19 September 2012 between 18h57 and 02h37. SBSA, allegedly represented by Mr Brownrigg, provided "an unusually high spread in the market, in line with the conversation he held on the Bloomberg chatroom with Taylor". The unusually high spread of 0.1001 "was in force for quite some time, so that the chat between Brownrigg and Taylor confirmed what was already long agreed between the participants in the conspiracy". The data showed that banks normally did not charge a spread exceeding 0.06. The spread of 0.1000 "is associated with [SBSA], Absa and Nedbank".

[226] In its dismissal application, SBSA stated that: Mr Brownrigg was employed by it as a salesperson, not a trader; that he played no role in determining SBSA's bid-offer spreads and could not bind SBSA to foreign currency transactions; that Mr Taylor had

not worked for Barclays Capital, but for Citigroup until February 2012 and Barclays Investment Bank thereafter, neither of which were cited as respondents; that, unlike SBSA, Barclays Bank was not authorised by the South African Reserve Bank to trade in the ZAR; and that the communications between Mr Brownrigg and Mr Taylor could thus only have been of a vertical nature, between a forex dealer (SBSA) and potential customer (the bank for which Mr Taylor was acting). I shall return to the admissibility of this evidence at a later stage, when I give separate consideration to the Commission's case against SBSA.

[227] The CAC reasoned thus in upholding SBSA's appeal:[182]

(a) Regarding the allegation that SBSA joined the SOC on 1 January 2008 – a public holiday in South Africa – the Commission had not referred to a single contact between SBSA, Absa and Nedbank, the three banks involved on the New Year's Day incident on the Reuters platform, whether before or after that date.

(b) Although on that occasion the banks were said to have withheld quotes to enable Nedbank to fix the exchange rate at 7.5850, no further details had been provided. It was not unreasonable to speculate that the "withholding of quotes" was because the South African forex markets were closed due to the public holiday, rather than because of any "nefarious activity".

(c) The CAC also referred to the Reuters incident on 19 September 2012. With reference to the distinction drawn by SBSA's deponent between the Reuters trading platform and the Reuters information platform, the CAC said that information gleaned from the latter was "hardly indicative of participation in the SOC".

(d) The CAC referred to SBSA's evidence about the roles of Mr Brownrigg and Mr Taylor. The Commission had not explained whether the communication between the two of them was a "normal conversation that took place in the ordinary course of forex dealing" or whether "there was

[182] *CAC II* above n 1 at paras 163-73.

something nefarious in this particular conduct". It was inexplicable that the Commission persisted in claiming plausible evidence to link SBSA to the SOC.

(e) The "skeletal nature" of the allegations in respect of SBSA revealed that there was "no basis by which its activity fell within the scope of subject matter jurisdiction". The case did not get out of the "legal starting blocks". (I have already addressed the CAC's unfortunately inaccurate use of the term "subject matter jurisdiction" in this context.)

[228] As is apparent from my summary of the CAC's reasoning in respect of Commerzbank and SBSA, the CAC did not regard the observed conduct on the Reuters platform as inadmissible. It made no such legal ruling. Nor did the CAC overlook such evidence. The CAC referred to that evidence (both of the Commerzbank incidents and two of the eight SBSA incidents) as examples, and explained why such evidence could not reasonably support a conclusion that Commerzbank and SBSA were implicated in the alleged SOC. I should add that even if the CAC had overlooked the evidence, that would merely have been an alleged error in the assessment of the evidence, not an arguable point of law of general public importance.

[229] It is unclear why the Commission claims that the legal error now under discussion was made in relation to Nomura. There were only four Nomura-specific allegations in the superseding affidavit, three chatroom incidents (of which two occurred on the same date) and one Reuters incident. The CAC referred to all these in its reasoning.

[230] Similarly, in relation to HBUS, the CAC referred to the three Reuters incidents as being the only ones where South African banks were allegedly involved. The CAC was critical of the fact that the Commission had not identified a single employee of any of the South African banks with whom HBUS could have reached an agreement to participate in the SOC. The CAC did not say that these three incidents did not constitute legally admissible evidence. The CAC found that the evidence was lacking in detail

and was insufficient to link HBUS to an SOC involving South African banks. If that assessment of the allegations was erroneous, it was not in consequence of a legal error, let alone one raising an arguable point of law of general public importance.

[231] The same is true of FRB. The only FRB-specific allegations in the superseding affidavit were of conduct observed on the Reuters platform. The CAC referred to this evidence. It regarded the "fundamental problem" with the evidence as being the affidavit's "inability to distinguish between information which is in the public domain; that is, information available to all banks who simply have access to Reuters or a similar screen available to all banks and information that could only be the product of some form of nefarious cartel activity".[183] At least, the affidavit "should have made this distinction patently clear and thus located the case . . . within the latter as opposed to the former category".[184]

Twelfth error – awareness tied to specific acts by employees (ANZ)

[232] The Commission submits that the CAC erred in finding that the actual or constructive knowledge of a bank could not be established or inferred unless the superseding affidavit contained allegations of conduct by its employees during their period of employment. The Commission says that this error was made in relation to ANZ.[185]

[233] It will be recalled that Mr Katz, who had previously been employed by SAI, Barclays and BNP, moved to ANZ in 2013. The CAC pointed out that the superseding affidavit contained no allegations of anti-competitive conduct by Mr Katz after 2012. The Commission submits that the correct legal position is that the knowledge of a trader, acquired before their arrival in the service of a new employer, can be attributed to the new employer where it was made available to such employer. Based on a benevolent

[183] Id at para 159.

[184] Id at para 160.

[185] Id at para 95.

and generous reading of the affidavit, as is required at the exception stage, so argues the Commission, it is a reasonable inference that a trader with a history of collusive participation during prior employment continued the collusive activity with the new employer.

[234] Regarding the attribution of a trader's knowledge to their new employer, the Commission refers to *UBS*[186] at paragraph 1295. There the CJEU was dealing with the liability of UniCredit for the conduct of a trader who had been involved in the conspiracy during his previous employment with other banks. I have already dealt, in an earlier part of this judgment, with the position of ANZ in relation to Mr Katz,[187] inter alia quoting what the CJEU said in paragraphs 1250-1.

[235] In the passage from *UBS* cited by the Commission, the CJEU was not saying that the knowledge of a trader could be imputed to the new employer in the absence of evidence of actual anti-competitive conduct by the trader after entering the service of the new employer. The CJEU had already held that UniCredit could not be held liable for any anti-competitive conduct before 26 September 2011, the first instance of such conduct by the trader after joining UniCredit. It was from that date that the trader, as a UniCredit employee, intended to contribute to the SOC.[188]

[236] In the part of the judgment referenced by the Commission, the CJEU was explaining that, in regard to UniCredit's participation as from 26 September 2011, the EC could properly have found that UniCredit had actual or constructive knowledge of all the infringing conduct put into effect by the other banks. According to settled EU case law, the EC had been entitled to rely on contacts before and after the period of the infringement "in order to construct an overall picture and to show the preparatory stages

[186] Above n 144.

[187] See [214] to [215].

[188] *UBS* above n 144 at paras 1275 and 1288-9.

of the cartel as well as to corroborate the interpretation of certain evidence".[189] Then follows the paragraph to which the Commission has referred us:

> "The [EC] was therefore entitled to use the knowledge acquired by an employee prior to his or her arrival in the service of a new company and which he or she in fact makes available to that new employer when that knowledge corroborates other elements available to the [EC]."[190]

[237] In the absence of any allegation that Mr Katz acted anti-competitively in pursuit of the SOC after joining ANZ, the above reasoning of the CJEU cannot apply. The absence of the required allegation cannot be filled through a generous and benevolent interpretation of the superseding affidavit.

Thirteenth error – unwarranted speculation by the CAC

[238] The final error identified by the Commission in its note is that the CAC engaged in speculation about the knowledge of the Commission flowing from the fact that certain traders had been employed by or represented one or more banks that obtained leniency. The CAC, so contends the Commission, erred in law when relying on these assumptions in its assessment of the sufficiency of the superseding affidavit. The CAC ought to have applied exception principles. This error is said to have been made in relation to ANZ,[191] Nomura,[192] Commerzbank[193] and Macquarie.[194]

[239] I have already dealt with the CAC's reasoning in relation to these four banks. In the cases of ANZ and Commerzbank, the CAC did not refer to information which the Commission would have got from leniency applicants but to information relating to Mr Katz's prosecution in the US. That Mr Katz had been so prosecuted was pleaded in

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[189] Id at paras 310 and 1249.

[190] Id at para 1295.

[191] *CAC II* above n 1 at para 99.

[192] Id at para 108.

[193] Id at para 112.

[194] Id at para 122.

the superseding affidavit. As to information that could be sourced from leniency applicants, the fact that Absa and Barclays had sought leniency was known factual background – it was mentioned in *TRIB I*[195] and *TRIB II*.[196]

[240] The CAC's so-called reliance on assumptions associated with prosecutions and leniency was no more than a minor makeweight point. The CAC's primary conclusion in each case was that the superseding affidavit did not plead sufficient facts from which reasonable inferences could be drawn against the banks in question. It was merely a matter of surprise that, if such facts in truth existed, they would not have been pleaded, having regard to the sources of information available to the Commission, in particular information from banks that had settled or were granted leniency. I should add that the supposed error is really a criticism of the way the CAC assessed the pleaded facts. If it is an error of law at all, it is not one of general public importance.

The Commission's application for leave to appeal in CCT 30/24

[241] Having addressed various issues of principle, I now deal individually with each bank, starting with the Commission's application for leave to appeal in CCT 30/24.

The BoA entities: BAMLI, MLP and BANA (first, twentieth and twenty-first respondents)

[242] I have already dealt with the superseding affidavit's BoA-specific allegations and the CAC's reasoning in the context of the ninth alleged error. There were no legal errors affecting the CAC's assessment of the Commission's case against MLP and BANA. Evidentially, those entities were entitled to plead facts in opposition to their proposed joinder. The Commission in reply raised no plausible dispute about Mr Cook's employer having been MLP, not BANA. The Commission's attack on the CAC's judgment is ultimately that the CAC's factual assessment of the case for joinder was wrong. This does not engage our jurisdiction.

[195] *TRIB I* above n 3 at para 12.

[196] *TRIB II* above n 4 at para 12 and fn 16 and 23.

[243] The CAC's reasoning in respect of BAMLI attached significance to the evidence that Mr Cook was employed by and represented MLP, not BAMLI or BANA. BAMLI, unlike its associated companies, was in principle confined to an exception. However, I have already explained that the Tribunal's approach to exceptions is more flexible than in ordinary civil litigation.

[244] The Tribunal does not appear to have held, in relation to BAMLI, that no regard could be had to the evidence that MLP was Mr Cook's employer. The Tribunal summarised the Commission's argument as being that its case against BAMLI related to its membership of the BoA group, in that BAMLI was, like MLP, a subsidiary of BANA. The Tribunal recorded that the Commission had not abandoned its case against BAMLI just because the attorney who made the affidavit on behalf of the BoA entities stated that Mr Cook had been employed by MLP. The Commission argued that the superseding affidavit contained factual allegations from which a "reasonable possible inference" might be drawn "that BAMLI or one of the BoA entities" participated in the SOC with the requisite knowledge. After referring to one of Mr Cook's email addresses – which ended with the domain @[…] – the Tribunal said it would be reluctant to dismiss the referral against BAMLI without hearing evidence as to whom Mr Cook was representing at the time.[197]

[245] The CAC by contrast did not consider that significance could be attached to the email addresses, and that the version contained in the BoA affidavits had not been disputed. This seems to be a purely factual difference between the Tribunal and the CAC, not raising any issue engaging this Court's jurisdiction.

[246] In any event, it does not ultimately matter. BAMLI, like MLP, is a pure *peregrinus*. The CAC concluded that the superseding affidavit failed to adequately allege that MLP was a party to an SOC that included South African banks. I have found

[197] Id at paras 281-7.

that this conclusion did not involve any legal error. If that is so in relation to MLP, it must also hold true for BAMLI, since the Commission's case against BAMLI does not rely on allegations different from those made against MLP.

[247] It follows that the Commission's appeal in respect of BAMLI, MLP and BANA must fail.

JPM Bank (fourth respondent)

[248] I held earlier, in relation to JPM Bank, that the CAC committed the third legal error alleged by the Commission. Since that disposes of the only basis on which JPM Bank defends the CAC's order, the Commission's appeal in respect of JPM Bank must succeed.

ANZ (fifth respondent)

[249] I have already concluded, in the context of the alleged ninth and twelfth errors, that the CAC's reasoning in respect of ANZ does not suffer from those or any other alleged legal errors. The Commission's criticism essentially involves an attack on the CAC's factual assessment of the superseding affidavit. This does not engage our jurisdiction, from which it follows that the Commission's appeal against ANZ must fail.

SBSA (eighth respondent)

[250] In discussing the eleventh alleged error, I have set out the SBSA-specific allegations contained in the superseding affidavit as well as the CAC's reasoning. Subject to one caveat, the Commission's attack on the CAC's reasoning concerns that Court's factual assessment of the pleaded case, something that does not engage our jurisdiction.

[251] What must be considered, however, is whether the CAC erred in law in having regard to the evidence in SBSA's dismissal application about the roles of Messrs Brownrigg and Taylor and about the two Reuters platforms. The Tribunal did

not say that no regard could be had to the evidence of the roles of Messrs Brownrigg and Taylor. What it said was that the evidence was "more in the nature of a defence and cannot be determined without recourse to a factual enquiry".[198] The CAC, by contrast, relied on this evidence without addressing whether this was permissible in the context of what was, at least according to the Commission, essentially an exception. Counsel for the Commission in this Court assured us that this argument was made in the CAC.

[252] SBSA does not accept that its dismissal application was no more than an exception. It claims to have been entitled to bring a substantive dismissal application because of the circumstances in which it came to be included in the referral and because of the Commission's alleged non-compliance with *CAC I*. As to the former, SBSA stated in its dismissal application that its business reputation had been badly tarnished by the Commission's conduct. At no stage between the initiation of the complaint in April 2015 and the referral in February 2017 did the Commission seek information from SBSA or notify SBSA that its conduct was being investigated. It did not ask to interview Mr Brownrigg or ask him to explain his conduct. SBSA was alarmed to find itself named in the February 2017 referral, an event attended by much publicity. Mr Brownrigg was publicly named without having been given any opportunity to defend himself. SBSA regarded the Commission's conduct as reckless and inconsistent with the obligations of a public regulator.

[253] SBSA immediately sought through its attorneys to engage with the Commission to understand the case against it, because it believed it had been erroneously included in the referral. The Commission refused to engage. If the Commission had conducted a proper investigation, it would, says SBSA, have found out the facts alleged in its dismissal application. In earlier proceedings, the Commission had been told under oath that Mr Brownrigg was never employed by SBSA as a trader or authorised to trade. This was confirmed in an affidavit from Mr Brownrigg himself.

[198] Id at para 313.

[254] Although the CAC did not pertinently address the admissibility of the evidence contained in SBSA's dismissal application, it did not necessarily commit an error of law by having regard to it. I said, earlier in this judgment, that the flexible principles which the Tribunal has adopted in relation to exceptions do not warrant a rigid rule that under no circumstances may additional facts be taken into account; and that considerations of fairness may in some circumstances justify regard being had to limited additional facts.[199] Assuming in favour of the Commission that SBSA's dismissal application was in substance no more than an exception, it would not follow as a matter of law that regard could not be had to the additional facts put up by SBSA.

[255] It would have been better for the CAC to explain why, in fairness, it thought that regard could properly be had to SBSA's allegations. However, and taking into account the circumstances under which SBSA was joined and the nature of the additional evidence, the absence of such an explanation in this particular instance does not point to a legal error. The Commission failed, before adding SBSA to the referral, to direct any enquiries to the bank. SBSA was thus deprived of the opportunity of presenting facts to the Commission to show that its thesis in relation to the bank was factually flawed.

[256] The evidence of Mr Brownrigg's position within SBSA, and for that matter Mr Taylor's position at Barclays, is not evidence of a kind that one would expect to be contentious. It is difficult to imagine that the Commission would have alleged that Mr Brownrigg was an SBSA trader if, before including SBSA in the referral, it had made basic enquiries with SBSA and been told the true position. It is fanciful to imagine that a bank would lie on a matter of this kind (assuming it were inclined to lie at all), since the lie would immediately be exposed by the most rudimentary process of documentary discovery.

[199] See [67] to [68].

[257] If the Commission's case against SBSA hinged on the identification of Mr Brownrigg as a trader and of Mr Taylor as a competing fellow trader, one might well ask why SBSA should sit through a long trial in circumstances where the Commission has not raised any genuine factual dispute about the roles played by these two gentlemen or, for that matter, about the two Reuters platforms. SBSA would not even be able to look forward to the soothing balm of a costs order against the Commission.

[258] I need only add that the two chatroom interactions between Mr Brownrigg and Mr Taylor, as pleaded in the superseding affidavit, appear to lack any self-evident sinister content. For the rest, and as I have said, the attack mounted by the Commission on the CAC's reasoning goes to the factual adequacy of the affidavit, which does not engage our jurisdiction. For these reasons, I conclude that the Commission's appeal in respect of SBSA must fail.

Nomura (ninth respondent)

[259] The Nomura-specific allegations in the superseding affidavit and the CAC's related reasoning have been set out in my analysis of the sixth alleged error. There were no legal errors tainting the CAC's reasoning. What remain are criticisms of a factual nature that do not engage this Court's jurisdiction. The Commission's appeal in respect of Nomura must fail.

Commerzbank (twelfth respondent)

[260] I have dealt with the case against Commerzbank and the CAC's reasoning in the context of the eleventh alleged error. There were no legal errors. There is nothing else that engages this Court's jurisdiction. The Commission's appeal in respect of Commerzbank must fail.

Macquarie (thirteenth respondent)

[261] What I have said in relation to Nomura applies also to Macquarie. The Commission's appeal in respect of Macquarie must fail.

HBUS (nineteenth respondent)

[262] The case in respect of HBUS has been addressed in the context of the eighth alleged error. Once again, in the absence of any relevant legal error, the criticism of the CAC's adjudication of the adequacy of the allegations against HBUS does not engage this Court's jurisdiction. The Commission's appeal in respect of HBUS must fail.

FRB (twenty-seventh respondent)

[263] It is convenient to deal with FRB before Nedbank. I have addressed the pleaded case against FRB and the CAC's related reasoning in the context of the seventh alleged error. Since there were no relevant legal errors, the Commission's appeal in respect of FRB must fail because the attacks on the CAC judgment do not engage our jurisdiction.

Nedbank (twenty-fifth respondent)

[264] Earlier in this judgment I rejected Nedbank's arguments on the question of initiation and whether *CAC I* precluded its joinder. I have already noted that *CAC II* does not contain any separate reasoning on the merits of the case against Nedbank, despite the fact that Nedbank, by way of an exception, asserted the superseding affidavit's failure to make out a cause of action against it.

[265] The superseding affidavit contains the following Nedbank-specific allegations:

(a) No Nedbank traders are named.

(b) Nedbank is alleged to have joined the SOC "by at least 1 January 2008".

(c) There are no allegations of Nedbank's participation in any implicated chatrooms.

(d) Ten incidents are pleaded of observed conduct on the "Reuters trading platform". They occurred on 1 January 2008, 7 July 2008,

11-12 January 2009 (divided into three incidents which occurred over a 10-hour period between 20h59 and 07h07), 28 May 2010, 16 August 2011, 19 September 2012, 20 September 2012 and 28 September 2012.

(e) I have already dealt with the incidents on 1 January 2008 and 19 September 2012 in the context of the case against SBSA. I have also dealt with the first incident of 11 January 2009, and the incidents of 28 May 2010, 20 September 2012 and 28 September 2012 in the context of the case against FRB.

(f) The second incident of 11-12 January 2009, which took place between 23h20 and 00h07, was that Nedbank and SNY/SAI put up "matching bid and ask quotes in succession", resulting in a consistent average of 9.8100. This "pattern of price formation" took place over 47 minutes.

(g) The third incident of 11-12 January 2009, which took place between 00h16 and 07h07 on 12 January (starting about nine minutes after the second incident), was that Absa and SAI/SNY "posted the same ask and bid quotes in succession", starting at 9.9000/9.8000 and rising in four stages to 9.9300/9.8300, "before reducing in turn in matched amounts". In addition, and over the same period, SAI/SNY, Nedbank and Absa "posted the same ask and bid prices" of 9.9100/9.8100 and of 9.9200/9.8200.

(h) The incident of 16 August 2011 took place between 04h10 and 05h54. Nedbank "increased the spot exchange to create a focal point affirmed by Investec, Absa and Nedbank at 7.1100". Another "jump" then occurred "to create a focal point" for SBSA, Absa and Investec at 7.1000. Finally, "Investec and Nedbank join[ed] other banks to create a focal point at 7.1050".

(i) In all, SBSA and FRB together were involved in one of the 10 Nedbank incidents, while separately SBSA was involved in another five and FRB in another three.

[266] In Part A of its decision in *TRIB II*, the Tribunal dealt in only broad strokes with the adequacy of the pleaded case against the various banks. The Tribunal did not give individualised attention to the adequacy of the bank-specific allegations, and this is true also of Nedbank, which is not even named in Part A of the decision. In Part B of its decision, where the Tribunal dealt with the banks under individual headings, the Tribunal said, of the complaint that the superseding affidavit failed to make out a cause of action against Nedbank, that this fell to be dismissed "for the reasons provided in Part A". In short, the Tribunal appears not to have applied its mind to whether the specific allegations against Nedbank made out a cause of action against that bank.

[267] The CAC held, for reasons I have rejected, that Nedbank, FRB and SAI could not permissibly be joined. Despite this finding, the CAC analysed the merits of the case against FRB and found it to be wanting, but it did not do the same for Nedbank. The reason may be that, unlike Nedbank, FRB did not object to its joinder; its appeal in *CAC II* went to the merits of its exception. Having found for Nedbank on its joinder point, the CAC might have thought it unnecessary to consider the merits of the case pleaded against that bank. Another possibility is that, amidst the welter of banks and issues with which the Court had to deal, the CAC simply overlooked that it had not dealt with the merits of the pleaded case against Nedbank.

[268] Whatever the explanation, the absence of a separate analysis by the CAC on the merits of the pleaded case against Nedbank puts this Court at a disadvantage. A non-apex court must always bear in mind that this Court may reverse it on an issue which the other court regards as dispositive. It is for this reason that this Court has stressed that it is in general desirable for non-apex courts to decide all issues.[200] Nevertheless, in this instance it would not be in the interests of justice to remit the matter to the CAC for a decision on the remaining issues against Nedbank. We have the CAC's reasoning in relation to multiple other banks. It is clear enough that the CAC would not

[200] *Spilhaus Property Holdings (Pty) Ltd v Mobile Telephone Networks (Pty) Ltd* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC) at para 45; *Casino Association of South Africa v Member of the Executive Council for Economic Development Environment Conservation and Tourism* [2023] ZACC 39; 2024 (5) BCLR 611 (CC) at para 33; and *United Manganese* above n 107 at para 378.

have found the case against Nedbank to pass muster, bearing in mind that, on substantially the same allegations, the CAC held that the superseding affidavit failed to plead an adequate cause of action against SBSA and FRB. I say so because Nedbank was not alleged to have been involved in any incidents in which SBSA and FRB were not also involved (in saying this, I treat the second and third incidents of 11-12 January 2009 as one continuing incident).

[269] The Commission's application for leave to appeal does not raise, as a ground of appeal, that the CAC failed to address the merits of the case against Nedbank. The Commission's written submissions and Nedbank's counter-submissions squarely address whether the superseding affidavit contains sufficient allegations to justify a conclusion that Nedbank was party to the alleged SOC. However, these arguments are of a kind that do not engage our jurisdiction. In the circumstances, the CAC's decision in respect of Nedbank must be allowed to stand.

SAI (twenty-eighth respondent)

[270] I have already rejected SAI's arguments about initiation and about the impermissibility of its post-referral joinder. What must now be considered is whether there is any other basis on which SAI seeks to defend the CAC's order in its favour.

[271] In its affidavit opposing joinder, SAI criticised the Commission for the delay in bringing the joinder application and claimed that it was prejudiced by the delay. The facts in this regard are as follows:[201]

(a) In the February 2017 referral, the Commission alleged that Messrs Katz and Louis Friedman were traders representing SNY.

(b) In March 2017 SNY's attorneys notified the Commission that SNY was not a forex trader, that it had never employed Messrs Katz and Friedman and that they had been employed by SAI.

[201] This includes material from its affidavit in the dismissal application which was incorporated by reference into its affidavit opposing its joinder.

(c) The Commission ignored this information when supplementing the 2017 referral in March and April 2017.

(d) In May 2017 SNY filed an exception application. Attached to its founding affidavit was the letter its attorneys had written to the Commission in March 2017.

(e) In December 2017 and January 2018 the Commission filed a further supplementary affidavit and its first joinder application. The Commission did not seek to join SAI and made no reference to the information received from SNY's attorneys.

(f) In March 2018 SNY filed a further exception application, reiterating the information previously given.

(g) Yet it was only in June 2020, in the superseding affidavit delivered pursuant to *CAC I*, that the Commission first sought to include SAI in the referral, now alleging that Messrs Katz and Friedman had represented SAI.

(h) Contrary to the Commission's assertion, SAI was prejudiced by the delayed joinder. The first to twenty-third respondents had the opportunity to participate and potentially influence the outcomes in *TRIB I* and *CAC I*. SAI was denied that opportunity. Moreover, Mr Katz left SAI's employ in June 2010, and Mr Friedman in October 2014 when SAI closed its forex desk. SAI was thus prejudiced in its ability to respond to the complaint on its merits.

[272] In its replying affidavit the Commission did not deny the procedural history but disputed that SAI was prejudiced. SAI did not contend that it would have adopted a unique position on any of the issues litigated in *TRIB I* and *CAC I*, and it was unlikely to have done so since it was represented by the same attorneys as SNY and SBSA. The Commission did not address the alleged prejudice arising from Messrs Katz and Friedman's departure from SAI.

[273] In *TRIB II*, the Tribunal correctly rejected SAI's opposition based on the supposed absence of an initiation and the related time-bar defence. It also rejected SAI's opposition based on the supposed lack of personal jurisdiction, a ground that SAI has not pressed in this Court. The Tribunal considered that, in view of SAI's employment of Mr Katz until June 2010 and Mr Friedman until October 2014, it clearly had a case to answer. The Tribunal, however, made no reference to delay.

[274] In *CAC II*, the CAC referred to some of the procedural background, including SNY's attorneys' letter to the Commission in March 2017, which identified SAI as the entity that had employed Messrs Katz and Friedman.[202] After dealing with other grounds which I have found to be legally unsound, the CAC concluded:

> "On the Commission's own version it was only when it prepared its amended referral on 1 June 2020 that the Commission considered including [SAI] in its referral. This was not the kind of case where the Commission could have argued that as the cartel operated in secret it had difficulty in detection because it had obtained clear information as at 1 April 2015 which, had it wished, it could have also included [SAI]. It failed to act prudently. There was, in short, no basis for the Tribunal to have upheld the Commission's application to join [SAI] as the 28th respondent in the complaint referral."[203]

[275] It is unclear what "clear information" the Commission had as at 1 April 2015. The information that SAI had been the employer of Messrs Katz and Friedman was first communicated to the Commission in March 2017, shortly after SNY received the February 2017 referral. Even so, the criticism that the Commission failed to act prudently is not unjust. The Commission has not alleged that it undertook any investigations of its own. It seems to have joined SAI on the strength of the information supplied by SNY, yet it took more than three years to act on it.

[202] *CAC II* above n 1 at paras 140-1.

[203] Id at para 146.

[276] If the paragraph I have quoted from the CAC's judgment was intended to uphold an independent objection by SAI based on prejudicial delay, it would be a decision on an ordinary matter of practice and would not engage our jurisdiction. I am far from satisfied, however, that this is the true import of the paragraph. The CAC did not identify prejudicial delay as an independent ground of objection. If it was intending to address such a ground, I would have expected it to deal with the question of prejudice.

[277] Although SAI's counsel emphasised the Commission's unexplained delay in her oral submissions, SAI's answering affidavit and written submissions in this Court do not advance prejudicial delay as an independent basis for defending the CAC's order or even that SAI understood the CAC to have upheld an independent defence of prejudicial delay. SAI identified the critical questions before the Tribunal and CAC in respect of SAI as being: (a) whether *CAC I* permitted the addition of further respondents; (b) whether the Commission had initiated a complaint in respect of SAI; and (c) if such a complaint was initiated, whether it was timeous, having regard to the time-bar in section 67(1). SAI's written submissions in this Court follow the same pattern.

[278] SAI said in its affidavit in this Court that the CAC found in its favour on the first two questions and thus did not have to deal with the third. SAI continued that, on the undisputed facts, the time-bar would have presented an insurmountable hurdle to the Commission. Although *Pickfords* held that the Commission's failure to comply with the three-year time-limit in section 67(1) could in principle be condoned, the Commission's imprudent delay in the present case would have been fatal to condonation. This perhaps explains the emphasis on delay; it was viewed as being relevant to the time-bar defence.

[279] However, on the assumption that prejudicial delay needs to be addressed as an independent objection to SAI's joinder, the issue was not properly considered either in *TRIB II* or *CAC II*. Since the legal grounds on the strength of which the CAC found for SAI are matters within our jurisdiction, and since we have decided them against SAI, it

is within our power to determine what should happen in respect of the independent and as yet undecided objection based on prejudicial delay.

[280] In my view, we should not find for SAI on this ground. Although the Commission was guilty of unreasonable delay, the case has still not got underway on the merits.[204] Real prejudice has not been shown. It is fanciful to think that a separate argument by SAI would have led to a different outcome in *CAC I*. SAI has not stated that it has any new insights justifying a more favourable outcome on personal jurisdiction than the one laid down in *CAC I*. In regard to the departure of Messrs Katz and Friedman, SAI has not stated that it does not have access to them or that any difficulties that might exist in getting their versions were increased by the delay from March 2017 to June 2020.

[281] It follows that, in respect of SAI, the Commission's appeal must succeed.

HBEU's (fourteenth respondent's) application for leave to cross-appeal in CCT 30/24

[282] I dealt with the Commission's case against HBEU and the CAC's reasoning when discussing the eighth alleged error. HBEU relies inter alia on evidence put up by HBUS, in opposition to its joinder, for the contention that Mr Hatton was employed by HBUS, not HBEU, and that the Commission "has the wrong guy". HBEU complains that the CAC relied on similar "wrong guy" evidence when exonerating BAMLI.

[283] The problem for HBEU, as it has been for the Commission in a number of instances above, is that this Court's jurisdiction is not engaged by a complaint that the CAC should have assessed the facts differently or even that the CAC got the facts plainly wrong. It is contrived for HBEU to argue, as it did, that the supposedly differential treatment implicates its constitutional right to equality. That a factual line of reasoning applied by the CAC in relation to BAMLI could arguably also have been adopted (or adapted) in relation to HBEU does not in itself implicate section 9.

[204] Compare *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 174G-175F.

[284] Different facts were pleaded as against BAMLI on the one hand and HBEU on the other. In BAMLI's case, the CAC said that the Commission had been informed on oath that Mr Cook was at all material times employed by MLP, "a fact never denied by the Commission". In HBEU's case, by contrast, the CAC said that there was "no clear denial" by HBEU that Mr Hatton had nothing to do with its activities. HBEU argues that this statement is wrong and that there was such a denial. The Commission submits that there was no such denial in the record that served before the CAC in relation to HBEU's exception. It is unnecessary to delve into this, because even if the CAC's statement was wrong, it is an error in assessing the pleaded facts. There is nothing in it that engages this Court's jurisdiction.

[285] HBEU's associated company, HBUS, resisted the Commission's appeal inter alia on the basis that the superseding affidavit did not, in relation to subject matter jurisdiction, contain allegations to show that the effects of the SOC's conduct meet the QE test. Because I have found for HBUS on other grounds, I have not needed to address those submissions. HBEU, in its application for leave to cross-appeal, did not raise as a ground of appeal that the CAC should, quite apart from the "wrong guy" point, have found for HBEU because subject matter jurisdiction was not sufficiently pleaded. HBEU's written and oral submissions likewise did not include such a contention.

[286] It follows that HBEU's cross-appeal must fail.

BNP's application for leave to appeal in CCT 25/24

[287] BNP, the second respondent in CCT 30/24, has applied for leave to appeal in CCT 25/24. BNP, a local *peregrinus*, filed a pure exception. BNP complained, in the first place, that the superseding affidavit was vague and embarrassing on the duration of the SOC. BNP's exception pointed to the following allegedly conflicting statements in the affidavit:

(a) that the banks conspired to manipulate the ZAR "between 2007 and 2013";

(b) that "with effect from September 2007 and until at least September 2013" the respondents reached an agreement to participate in the SOC;

(c) that the Commission "does not know the date on which the [SOC] between the respondent banks ceased to operate, or if it has indeed ceased to operate";

(d) that the SOC "continued to operate using different modes of communication after September 2013, alternatively after the implicated chatrooms were closed, alternatively after the respondents' traders no longer had access to the Bloomberg electronic messaging system"; and

(e) that the Commission "invites" the respondents to explain "if and when the [SOC] ceased to operate" and "the date on which the respondents' participation in the conspiracy ceased".

[288] BNP contended that these allegations were contradictory and could not all be correct. The period of BNP's participation in the SOC was important, because it was "one of the determinants of the quantum of the penalty" and BNP was "entitled to be in a position to assess its potential liability". BNP also complained that it was unable to assess the application of the time-bar in section 67(1).

[289] BNP's exception contended, in the second place, that the superseding affidavit was vague and embarrassing as to the individual banks' continued participation in the SOC. In that regard, the exception pointed to the following further allegations in the affidavit:

(a) that the Commission "does not know the date on which each respondent ceased to participate in the conspiracy, or if they have ceased to participate in the conspiracy"; and

(b) that "the respondents continued as participants in the conspiracy, alternatively are deemed to have continued as participants in the conspiracy, until such time as they expressly dissociated themselves with the conduct, terms and objective of the conspiracy".

[290] BNP complained that these allegations, pertaining to each bank's participation in the SOC, contradicted the allegations about the duration of the SOC itself. The allegations could not all be correct. BNP was thus embarrassed in pleading.

[291] The Tribunal gave no individualised attention to BNP's complaints. The CAC's reasoning is not quite clear. The Court indicated that the dismissal of an exception complaining of vagueness and embarrassment is not ordinarily appealable. In the light of this Court's judgment in *Lebashe*,[205] appealability would depend on an assessment of the interests of justice.[206]

[292] The CAC went on to say that BNP employed Mr Katz from September 2011 to 2013. (The superseding affidavit alleged that in 2013 Mr Katz moved from BNP to ANZ.) Mr Katz had been the "glue" which bound a number of the other traders together in sharing confidential information. This placed a burden on BNP to explain its conduct. Bearing in mind that BNP's complaint was confined to vagueness and embarrassment, the Commission had, in the CAC's view, made out a sufficient case calling for an answer from BNP.

[293] Insofar as non-compliance with *CAC I* was concerned, in particular relating to the SOC's terminal date, the superseding affidavit alleged "that the SOC ended in 2013 and that Mr Katz was employed until that date", so there was, in the CAC's view, "very little merit" in BNP's argument that it was adversely affected by the alleged non-compliance.[207] (The CAC's statement that the affidavit alleged that the SOC "ended in 2013" fails to take account of BNP's complaint that there were other allegations made by the Commission in relation to the SOC which were inconsistent with this terminal date.)

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[205] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).

[206] *CAC II* above n 1 at paras 147-9.

[207] Id at para 151.

[294] It is unclear whether the CAC intended, by these latter remarks, to find that it was not in the interests of justice to treat the dismissal of BNP's exception as appealable or whether it intended to reject the appeal on its merits. The CAC's order suggests the latter, since BNP's appeal was dismissed, not struck from the roll.

[295] In my view, the dismissal of BNP's exception, grounded in alleged vagueness and embarrassment, is not appealable. That would usually be the case when such an exception is dismissed. Applying *Lebashe*, there are no overriding considerations of justice which require us to treat this interlocutory order as nevertheless constituting an appealable order. No overriding constitutional interests are at stake, nor does the exception raise any arguable point of law of general public importance. A litigant's rights under section 34 of the Bill of Rights are not automatically implicated where a court requires the litigant to plead a case which, in the litigant's opinion, is vague and embarrassing.

[296] The primary supposed inconsistency, which was the focus of BNP's counsel's oral argument in this Court, was between the allegation that the SOC lasted "until at least September 2013" and the allegation that the Commission does not know the date on which the SOC ceased to operate, if indeed it had. This, in my opinion, is an unobjectionable way of pleading. Those two allegations convey that the Commission knows that the SOC lasted at least until September 2013 but does not know when after that date, if at all, it ceased. This occasions no embarrassment.

[297] The allegation that the respondents continued as participants in the SOC, or are deemed to have done so until they expressly disassociated themselves from it, appears to me to be an unobjectionable legal assertion. It conveys the Commission's stance that cessation in respect of any particular bank will require evidence from such bank of a positive act of disassociation. The correctness of the legal assertion need not detain us. If it is sound, it can stand alongside the two allegations discussed in the immediately preceding paragraph, on the basis that the Commission does not know whether after September 2013 there were such acts of disassociation.

[298] By contrast, the allegation that the SOC "continued to operate using different modes of communication after September 2013" is a positive assertion seemingly at odds with those I have just been discussing. But even if this creates some vagueness and embarrassment, BNP should have no difficulty in filing an answer on the merits. If BNP's internal investigations reveal that it must admit its participation in the SOC to some extent, it will plead when the admitted conduct ceased, and deny any allegations in the superseding affidavit inconsistent with its version. BNP can assess the viability of a time-bar defence and its potential liability for penalties on the basis of its own version of the facts.

[299] Allegations in the superseding affidavit that are too vague to allow BNP to undertake targeted internal investigations (the allegation of the continuation of the SOC after September 2013 may fall into this category) can, if necessary, be placed in issue with an appropriate explanation as to why BNP cannot be more specific. BNP in due course will be entitled to seek directions from the Tribunal entitling it to request further particulars of any post-September 2013 conduct on which the Commission intends to rely.[208]

[300] It follows that BNP's application for leave to appeal must be refused.

CSS' application for leave to appeal in CCT 27/24

[301] CSS, the twenty-third respondent in CCT 30/24, has applied for leave to appeal in CCT 27/24. As with Nedbank and SAI, I have dealt with issues relating to initiation and post-referral joinder. CSS' arguments in that regard have been rejected.

[302] The superseding affidavit contains the following CSS-specific allegations:

[208] The Tribunal Rules do not make specific provision for further particulars, but the Tribunal often orders such particulars to be given, either for pleading or trial preparation, the guiding principle being fairness: *Competition Commission v Tiger Brands Ltd t/a Albany; Competition Commission v Pioneer Foods (Pty) Ltd t/a Sasko* [2009] ZACT 34 at para 48. See also *Paramount Mills (Pty) Limited v Competition Commission* [2012] ZACAC 4; [2012] 2 CPLR 215 (CAC) at para 63.

(a) Its traders were Messrs Hatton (who moved from HBUS to CSS with effect from November 2010) and Heinrich Putter.

(b) CSS joined the SOC "by at least 3 November 2010".

(c) The affidavit alleges 11 chatroom incidents in which Mr Hatton was involved for CSS on eight dates[209] between November 2010 and April 2011. The only other banks in these chatroom incidents were foreign banks.

(d) The affidavit alleges one chatroom incident involving Mr Putter, the other trader being Mr Katz (at that time with Barclays). This was on 17 May 2011. Commercially sensitive information was allegedly shared.

(e) CSS is not alleged to have been involved in any specific incident of market conduct observed on the Reuters platform.

[303] The CAC reasoned thus in respect of CSS:[210]

(a) The superseding affidavit pleaded eight chatroom incidents[211] involving its two traders. Most of these involved Mr Hatton, "a particularly active member of the Old Gits chatroom, the longest running and most prolific of all the implicated chatrooms".

(b) CSS' counsel had argued that CSS was predominantly in communication with foreign banks – BoA, Citibank and SCB. However, so the CAC observed, Barclays was also in the Old Gits chatroom. The evidence suggested that other participants in these chatrooms included Citibank, which conducted a banking business in South Africa and had settled with the Commission, and SCB, which also had an office in South Africa and had also settled with the Commission. It was thus incorrect to say that the case against CSS was that it was a party to chats only with "American banks".

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[209] There were two incidents on each of 3 November 2010, 2 December 2010 and 6 January 2011.

[210] *CAC II* above n 1 at paras 137-9.

[211] I have stated that there were 11 incidents, which occurred on eight dates. The CAC may have been referring to the eight dates on which Messrs Hatton and Putter were involved for CSS.

(c) Moreover, CSS was a local *peregrinus*, so that only subject matter jurisdiction was required.

(d) CSS' counsel had stressed non-compliance with *CAC I*, complaining that CSS could not investigate whether the complaints against it were time-barred. This was because the superseding affidavit had not provided the date on which the SOC ended or when CSS' participation ceased. In substance, however, the affidavit prima facie implicated CSS. The "intensity" of Mr Hatton's involvement "on behalf of a local *peregrinus*" justified the conclusion that CSS had a case to answer.

[304] It is common cause that, contrary to what the CAC stated, CSS is not a local *peregrinus*. It is a pure *peregrinus*. Personal jurisdiction thus indeed had to be established. This is not a mere error in the assessment of the adequacy of the pleaded facts. It implicates the statutory power of the Commission and the Tribunal to prosecute and adjudicate the case against CSS. The exercise of public power by these institutions is a constitutional matter.

[305] The question is thus whether the Tribunal has personal jurisdiction in respect of CSS. Based on the law applicable in this case (as laid down in *CAC I*), this depends on compliance with the ACF test. The CAC observed that CSS was alleged to have been involved in implicated chatrooms inter alia with SCB and Citibank, both of which were local *peregrini* with South African branches. The CAC did not, however, explicitly state that this sufficed for personal jurisdiction, perhaps because it went on to say – mistakenly – that CSS was a local *peregrinus*. In respect of other pure *peregrini*, such as MLP and HBUS, the CAC plainly did not regard interactions with Citibank and SCB as satisfying the ACF test.

[306] As I mentioned earlier, the superseding affidavit does not allege that participation by pure *peregrini* in an SOC including only local *peregrini* as the other participants is an adequate connecting factor for purposes of personal jurisdiction. I have also said that, while impugned communications with the South African branch of

a local *peregrinus* might suffice to satisfy the ACF test, the same cannot be said if the relevant interactions had nothing to do with the local *peregrinus*' South African branch. The affidavit does not allege that any of the local *peregrini*'s implicated traders worked at the South African branches of those banks.

[307] In the circumstances, CSS' appeal must succeed.

Conclusion and costs

[308] The overall result is as follows. In CCT 25/24, BNP's application for leave to appeal must be refused. The other applications for leave to appeal, as I said earlier in this judgment, should be granted. In CCT 27/24, CSS' appeal must succeed. Since CSS opposed its joinder inter alia on the basis that the Tribunal lacked personal jurisdiction, the correct substitute order is one having the effect of reversing the Tribunal's decision joining CSS, thus rendering a decision on CSS' exception application moot. In CCT 30/24, the Commission's appeal succeeds against JPM Bank and SAI, but fails against BAMLI, ANZ, SBSA, Nomura, Commerzbank, Macquarie, HBUS, MLP, BANA, Nedbank and FRB. In the same case, HBEU's cross-appeal fails.

[309] This means that, at the level of pleading, the SOC case may go ahead against the following active respondents: BNP, JPM Co, JPM Bank, Investec, HBEU and SAI. Additionally, although the relevant banks have settled or been granted leniency, the pleaded SOC will also include SCB, Citibank, Absa and Barclays.

[310] Costs should not be awarded against the Commission where it has acted in good faith, even if zealously.[212] On this basis, the CAC did not award costs against the Commission (to the extent it lost) or in favour of the Commission (to the extent it won). In my view, we should follow the same course. I would, however, make an exception

[212] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc* [2013] ZACC 50; 2014 (2) SA 480 (CC); 2014 (3) BCLR 251 (CC); [2015] 1 CPLR 1 (CC) at paras 19-28 and *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission* [2024] ZACC 3; 2024 (4) SA 391 (CC); 2024 (6) BCLR 771 (CC); [2024] 7 BLLR 665 (CC); (2024) 45 ILJ 1507 (CC) at para 94.

in relation to BNP. In my view, its application for leave to appeal was sufficiently lacking in substance that it should be dismissed with costs, including the costs of two counsel. For the guidance of the Taxing Master, the case as a whole was argued over three days, and the argument in respect of BNP's application did not take up more than one hour.

Order

[311] The following orders are made:

Case CCT 25/24

Leave to appeal is refused with costs, including the costs of two counsel.

Case CCT 27/24

1. Leave to appeal is granted.
2. The appeal succeeds.
3. Paragraph 2 of the order of the Competition Appeal Court, insofar as it relates to the applicant in Case CCT 27/24 (the twenty-third respondent in the Tribunal proceedings), Credit Suisse Securities (USA) LLC, is set aside and replaced with the following order:
   "(a) The appeal against the joinder of Credit Suisse Securities (USA) LLC (CSS), forming part of paragraph A[1] of the Tribunal's order, succeeds.
   (b) The Tribunal's decision in that respect is set aside and replaced with an order dismissing the Competition Commission's application to join CSS."

Case CCT 30/24

1. The applicant, the Competition Commission (Commission), is granted leave to appeal.

2. The fourteenth respondent, HSBC Bank plc (HBEU), is granted leave to cross-appeal.
3. The Commission's appeal is upheld in relation to the fourth respondent, JPMorgan Chase Bank N.A. (JPM Bank), and the twenty-eighth respondent, Standard Americas Incorporated (SAI).
4. The Competition Appeal Court's decision in respect of JPM Bank and SAI is set aside and replaced with orders dismissing those parties' appeals against the Tribunal's decision.
5. Save as aforesaid, the Commission's appeal is dismissed.
6. HBEU's cross-appeal is dismissed.

Case CCT 25/24

For the Applicant:	J Campbell SC and S Mohammed instructed by Bowman Gilfillan Incorporated
For the Respondent:	T Ngcukaitobi SC, F Hobden, L Zikalala, H Drake, M Nxumalo and K Monareng instructed by Ndzabandzaba Attorneys Incorporated

Case CCT 27/24

For the Applicant:	M Norton SC, G Marriott and N Nyembe instructed by Werksmans Attorneys
For the Respondent:	T Ngcukaitobi SC, F Hobden, L Zikalala, H Drake, M Nxumalo and K Monareng instructed by Ndzabandzaba Attorneys Incorporated

Case CCT 30/24

For the Applicant:	T Ngcukaitobi SC, F Hobden, L Zikalala, H Drake, M Nxumalo and K Monareng instructed by Ndzabandzaba Attorneys Incorporated
For the First, Twentieth and Twenty-First Respondents:	P Farlam SC, P Ngcongo and M Mbikiwa instructed by Webber Wentzel
For the Third and Fourth Respondents:	D A Turner SC instructed by Webber Wentzel
For the Fifth Respondent:	C D A Loxton SC and P Maharaj-Pillay instructed by Cliffe Dekker Hofmeyr Incorporated
For the Eighth Respondent:	K Hofmeyr SC and L Mokwena instructed by Herbert Smith Freehills Kramer South Africa Attorneys Incorporated
For the Ninth Respondent:	M M Le Roux SC instructed by Mackenzie Granville Incorporated

For the Twelfth Respondent:	A R Bhana SC and K L Williams instructed by Webber Wentzel
For the Thirteenth Respondent:	J Wilson SC and P Bosman instructed by Bowman Gilfillan Incorporated
For the Fourteenth and Nineteenth Respondents:	A Cockrell SC and C Avidon instructed by Herbert Smith Freehills Kramer South Africa Attorneys Incorporated
For the Twenty-Fifth Respondent:	A Gotz SC and T Marolen instructed by Werksmans Attorneys
For the Twenty-Seventh Respondent:	M Wesley SC, N Muvangua and N Mahlangu instructed by Cliffe Dekker Hofmeyr Incorporated
For the Twenty-Eighth Respondent:	M Engelbrecht SC and L Mokwena instructed by Herbert Smith Freehills Kramer South Africa Attorneys Incorporated