IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: _____
CAC No: 167/CAC/Jul18
CT No: CR129SEP15

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA Applicant

and

PICKFORDS REMOVAL SA (PTY) LTD
Respondent

In Re: The complaint referral between

PICKFORDS REMOVAL (PTY) LTD First Respondent

JH RETIEF TRANSPORT CC Second
Respondent

SIFIKILE TRANSPORT CC Third Respondent

CAPE EXPRESS REMOVALS (PTY) LTD Fourth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

KATLEGO DONAVIN MONARENG

do hereby make oath and state that:

1 I am an adult male employed as an investigator in the Cartels Division of the Competition Commission (*Commission*). I have deposed to the Commission's founding affidavit before the Tribunal in this matter and I am duly authorised to depose to this affidavit on behalf of the Commission.

2 The facts deposed to in this affidavit relating to the merits of the complaint referred to the Tribunal are based on the Commission's investigations and I believe such facts to be true and correct. Save as aforesaid, the facts deposed to herein are within my personal knowledge except where the context indicates otherwise, and are true and correct.

3 Where I make legal submissions I do so on the advice of the Commission's legal representatives, which advice I accept as correct.

THE PARTIES

4 The applicant is the Competition Commission, a regulatory body established in terms of section 19(1) of the Competition Act 89 of 1998

(*the Act*) as a juristic person, with its office and address at Block C, Mulayo Building, DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria. Its statutory functions include the implementation of measures to increase market transparency and the investigation and evaluation of prohibited practices, including collusive practices and promoting and maintaining the objects of the Act.

5 The respondent is Pickfords Removals SA (Pty) Ltd, a company duly incorporated as such in accordance with the applicable laws of South Africa, with its principal place of business at Halfway House, Cnr 2nd Road & Setter Street, Midrand, Industrial Park, Gauteng.

NATURE OF THE APPLICATION

6 The Commission seeks leave to appeal against the judgment and order of the Competition Appeal Court delivered on 03 April 2019 and attached hereto as Annexure "**FA1**".

7 The complaint in this case was referred to the Competition Tribunal on 11 September 2015 following an investigation initiated on 3 November 2010 and subsequently amended on 1 June 2011.[1] The referral concerned the investigation of certain furniture removal firms.

[1] The CAC set aside the finding by the Tribunal that the second initiation was not an amendment of the earlier initiation statement. See para 25

8 In substance, the complaints against Pickfords pertain to the practice of *'cover quoting'* or *'cover pricing'*. A firm is asked to submit a quotation by a customer and solicits from one or more competitors a fictitious bid, higher than its own quote, in order to win the contract. Pickfords is alleged to have requested and provided cover bids in response to requests for a quotation from customers. In the complaint referral each instance of cover pricing is alleged to constitute a self-standing incident of collusive tendering and separate relief is sought in respect of each one.

9 Section 67 (1) of the Competition Act reads as follows:

> *'A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased'*.

10 Pickfords alleged that twenty out of the thirty-seven counts brought against it should be dismissed: fourteen because they are time barred and the remaining six because they have not been sufficiently pleaded. The argument pertaining to insufficient pleading placed the prescription issue into focus.

11 The Commission made two arguments in support of a purposive and interpretive approach to understanding section 67(1) of the Competition Act:

11.1 First, it argued that section 67(1) be read in to provide that prescription runs only from the date that the Commissioner acquires knowledge of the existence of the prohibited practice; and

11.2 *In the alternative*, it asked that the Tribunal invoke its power to condone non-compliance with regard to any time period set out in the Competition Act on *'good cause shown'*.

THE RULINGS OF THE TRIBUNAL AND COMPETITION APPEAL COURT

How did the Tribunal and CAC deal with the knowledge argument?

12 The *'reading in'* argument made on behalf of the Commission was based on a comparative interpretation of the Prescription Act 68 of 1969, which provides that the prescription period only begins to run from when the creditor has acquired knowledge of the debt and the identity of the debtor.

13 The Tribunal considered this argument by dealing generally with the question of whether the analogy to the *'unknowing'* debtor contemplated in the Prescription Act was apposite. The Tribunal

dismissed these arguments and cited three reasons for its dismissal in doing so (at para 90-92):

13.1 First, it held that the Commissioner does not easily fill the same shoes as the creditor for whom, on the Commissioner's argument, the former serves as a proxy for the latter. It continued:

> *"[The] Commissioner is a public official clothed with public powers and resources – creditor is a private person with neither. But this is not the only problem with having the Commissioner serve as the proxy for the creditor. What if one of the victims of the prohibited practice knew in good time, but did not timeously report this to the Commissioner? Must knowledge of the transgression be attributed not to the victim but to the Commissioner?"*

13.2 Second, it accepted that the Prescription Act permits prescription to run also from when the creditor acquires knowledge of the identity of the debtor. However, it emphasised that section 67 of the Competition Act is less exacting in this regard than a claim in common law; and that *'It is knowledge of the existence of the cartel that suffices to found a valid initiation, not the identity of its members'*.

13.3 Third, it held that the debt in the Prescription Act is typically an event, such as the commission of a delict or a breach of contract. The Tribunal continued:

> *"[The] analogue to this in the Act, would be the agreement or understanding i.e. that is the event that leads to the existence of the prohibited practice. However, section 67(1) does not mark the prescription period from the date of the occurrence of the event, unlike the Prescription Act, but from the end of the consequences of the event. This is an important difference"*.

14 The Tribunal also considered the mischief behind section 67 of the Competition Act. Section 67 requires that one ask whether more than three years have elapsed between the date of cessation of the practice and the date of initiation of the complaint. It held that reading in should be resorted to sparingly as it constitutes a possible encroachment by the judiciary on the terrain of the legislature.

15 The Commission unsuccessfully appealed to the Competition Appeal Court. The CAC held that section 67(1) of the Competition Act is a limitation or expiry period and that the knowledge requirement evident in section 12 of the Prescription Act cannot be read into it. This

conclusion implied that there was no scope for condonation by the Tribunal or the CAC as there was no power to condone. (CAC Decision para 41).

16 The CAC explained its reasoning as follows at paragraphs 38 and 39 of its judgment:

> *"The context of s 67(1) is that once the s 49B(1) power is exercised, the statutory obligation under section 49B(3) to direct an inspector to investigate the complaint as quickly as possible, is triggered. The relevant particulars of the alleged offensive conduct are likely only to become known when the inspector is about her/his investigation. But since the complaint will by then already have been initiated, the Commissioner need not be concerned that the process will have been time barred.*
>
> *The overarching purpose of s 67(1) seems to me to be to bar – in the public interest – investigations into events (prohibited practices) that have ceased an appreciable time ago, and are therefore no longer endangering the public weal. If that is correct, the subjective knowledge (more correctly, the reasonable suspicion) of the Commissioner is irrelevant; more importantly, it is not necessary to read into s 67(1) the pre-existence of the*

Commissioner's reasonable suspicion for that section not to offend the Constitution".

How did the Tribunal and CAC deal with the condonation argument?

17 The second argument made on behalf of the Commission was for the Tribunal to exercise its powers in the Competition Act condone non-compliance with any time limit set out in the Competition Act. The Commission relied on the provisions of section 58(1)(c)(ii) of the Competition Act in support of that argument.

18 The Competition Tribunal rejected these arguments. It held that the Commission's arguments did not justify a new reading of section 67 from the one the Tribunal has always adopted. It further held that the complaint in this matter was initiated on 01 June 2011, with the consequence being that the prohibited practice only ends when the last payment has been made in respective of a prohibited practice. This has an impact for the running of the prescription period in the current matter.

19 The impact of the decision is that the provisions of section 67(1) of the Competition Act will continue being interpreted in the manner that the Competition Tribunal has always adopted irrespective of when the Commission could reasonably have had knowledge of the prohibited

practice. The effect of this reasoning for the running of prescription within the broader context of the Competition Act will be discussed in detail below.

20 The Competition Appeal Court dismissed the condonation argument. It went on to say that the language of section 67(1) is cast in the form of a prohibition, and that it does not leave scope for the condonation asked for. It continued by saying '[The] plain language does not require the implication for the provision to be implemented sensibly. Once the period has expired there is no statutory power to initiate a complaint and so engage *the power of the State against it's the subject'*. (CAC Judgment para 48).

How did the Tribunal and CAC deal with the two initiation dates?

21 The third argument made on behalf of the Commission was that the initiation statement dated 01 June 2011 (*the second initiation*) was an amendment of the initiation statement dated 03 November 2010 (*the first initiation*). It rejected the argument that the second initiation was a self-standing initiation which founded the counts in the referral against Pickfords in doing so.

22 The CAC dismissed the finding by the Tribunal that the second initiation statement was not an amendment of the first (See Tribunal

Decision para 52). Van Der Linde J says the following at paragraphs 25 + 29 of its judgment:

> *"It is not disputed that the Commissioner has the power to amend a complaint initiation. Has the Commissioner by the second complaint initiated a new complaint, or has he merely amended the first initiation? It seems to me that if the Commissioner is to be taken at his word – and I suggest that at least in so far as concerns the factual assertions in the two complaint initiations, that cannot legitimately be contentious – then the Commissioner has done no more than to amend the first complaint initiation by means of the second complaint initiation, for reasons that now follow . . ."*

23 Van Der Linde J continues at paragraph 29 of the judgement:

> *"[This] conclusion is at odds with the conclusion to which the Tribunal came. I respectfully disagree with its conclusion that the 2011 initiation was not an amendment of the 2010 initiation. The Tribunal reasoned that the latter initiation did not identify the offensive conduct as a single, overarching conspiracy that was still ongoing. It reasoned that the second complaint initiation is made up of discrete conspiracies, none of which are ongoing"*

24 However, having correctly held that the second complaint initiation was an amendment of the first, Van Der Linde J then went on to hold that Pickfords only became a named party when the second complaint initiation occurred. The reasoning for such a finding appears at paragraphs 33 of the judgment:

> *"[If] as I have concluded, the complaint initiation must be taken at face value for purposes of determining its contents, then it would follow that the respondent was not alleged to be a party to the prohibited practice until the second initiation complaint had occurred. This position may be put differently: the substance of the complaint initiation cannot be assessed with reference to facts that only came into existence after the complaint was initiated, whether one is concerned with a first or a second initiation. The effect for the respondent is therefore that it only became a named party when the second complaint initiation occurred; before that, the alleged prohibited practice did not involve it. After all, if it has, the Commissioner was free to have mentioned the respondent by name when it first initiated the complaint, but it did not."*

25 I submit that the reasoning and finding of The Competition Appeal Court was flawed on this issue for reasons that follow under the chapter dealing with the Grounds of Appeal.

26 The Commission brings this appeal against specific parts of the decision of the Competition Appeal Court handed down on 03 April 2019. The appealed parts dismissed the Commission's argument for a purposive and interpretive approach to section 67(1) of the Competition Act and the alternative condonation argument. The Commission also appeals those parts of the judgment by Van Der Linde J which held that Pickfords only became a named party when the second initiation statement was issued on 01 June 2011

27 The Commission's grounds of appeal are, in brief:

27.1 First, the CAC erred in finding that section 67(1) of the Competition Act is a limitation or expiry period, and that a knowledge requirement as is evident in section 12 of the Prescription Act cannot be read into it (CAC Judgment para 40). The CAC ought to have held that the Tribunal erred by discounting the flexibility provided by section 12 of the Prescription Act.

27.1.1 The flexibility provided for by section 12 of the Prescription Act supports the argument for a similar interpretation of section 67(1). It has also been held to accord with section 34 of the Constitution.

27.1.2 An interpretation requiring knowledge on the part of the creditor, in line with section 12 of the Prescription Act, would include constructive knowledge and would not cover wilful or negligent ignorance on the part of the Commission.

27.1.3 Section 67(1) not only has implications for accessing the Competition Tribunal and following that the CAC or Constitutional Court on competition grounds, it also has implications for civil or criminal proceedings which stem from a competition contravention.

28 Second, the CAC erred when it held that an implied consequence of dismissing the claim that prescription only runs from the date that the Commissioner or complainant acquired knowledge of the prohibited practice was that there was no scope for it to exercise its discretion to exercise its powers under the Competition Act to condone non-compliance with the three-year time period for a valid initiation as set out under section 67 (CAC Judgment para 41). It ought to have nonetheless retained the power to condone non-compliance with the Competition Act on good cause shown.

28.1 A grant of condonation would have provided an alternative basis on which the CAC would have ensured that the

purpose of the Competition Act was fulfilled and the interests of justice served.

28.1.1 The power to condone non-compliance would not leave firms accused of cartel conduct without a time-bar defence.

28.1.2 Firms would still be able to oppose applications by the Commission for condonation of non-compliance. When those applications are considered, the Tribunal would be considering all relevant circumstances, including prejudice be suffered in the event of condonation being granted.

28.1.3 In the exercise set out above, all relevant circumstances would be taken into account.

29 Third, the CAC erred in finding that Pickfords only became a named party when the second complaint initiation occurred and that the alleged prohibited practice did not involve Pickfords before the initiation of the second complaint (CAC Judgment para 33). The CAC ought to have held that the first initiation left open the possibility of further firms being added.

29.1 The language used in the first initiation statement contemplated the possibility of other firms being named. This

formulation of the initiation statement was in accordance with a plain reading of section 49 of the Competition Act read with section 67.

29.2 The remainder of this application for leave to appeal is structured as follows:

29.3 First, I set out why it is in the interests of justice to grant leave to appeal;

29.4 Second, I set out the relevant legal framework, specifically:

29.4.1 cover pricing in context;

29.4.2 legal arguments pertaining to the knowledge requirement in prescription and principles regarding the grant of condonation by a court; and

29.4.3 principles reaffirming the principle that initiation statements are concerned with prohibited conduct and do not require the inclusion of specific firms in the first initiation

30 Third, I set out the grounds of appeal which illustrate the Commission's prospects of success on the merits.

31 Finally, I address the appropriate remedy on appeal.

LEAVE TO APPEAL

Collusive conduct in context

32 Collusion invokes constitutional values of equality and freedom. The preamble of the Act echoes its transformative purpose: to provide South Africans with equal opportunity to participate fairly in the national economy, restrain trade practices which undermine a competitive economy and regulate the transfer of economic ownership in keeping with the public interest.

33 The Act must be interpreted in a manner that is consistent with the Constitution and promotes its spirit, purport and objects. The purpose of the Act is to promote and maintain competition in the South African economy by inter alia:

33.1 Providing consumers with competitive prices and product choices;

33.2 Promoting employment and advancing the social and economic welfare of South Africans;

33.3 Ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

33.4 Promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

34 The Act thus seeks to improve and protect consumers' equal access to economic participation to protecting competition and punishing anti-competitive behaviour as a deterrent. Collusion is one of the worst infringements of this equality and freedom. It permits no justification and is a 'per se' offence in terms of the Act. Where firms collude they not only breach the Act but they also breach the values of equality, freedom and restrict the ability of many to participate in the national economy. It stands to reason that the poor and those at the margins of the economy experience the greatest hardships as a result of collusion. It is them who suffer the effects of artificial increases in prices as a result of collusion.

35 This Court has held that non-competitive public procurement raises constitutional issues and that the public has an interest in fair public procurement and its consequences for economic transformation. Because these prohibited practices can often be so clandestine, section 67(1) should be read in to provide that prescription only runs from the date that the Commissioner acquired knowledge of the existence of the prohibited conduct.

36 Collusion in the form of cover-pricing defeats the ability of organs of state to procure in a constitutionally compliant fashion. It means that they will be unable to determine if there is genuine price competition among bidders. It also means that organs of state cannot determine the cost-effectiveness of their services.

37 Cover pricing further undermines the transformation and economic redress central to our Constitution, competition and procurement legislative frameworks. Black economic empowerment legislation gives effect to section 217(2) of the Constitution which provides for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination in public procurement. Clearly, an uncompetitive procurement process manipulated by dummy tenders and/or opaque commercial benefits among tenderers that should be fairly competing with each other in the open market, undermine both fair procurement and its transformation imperatives.

38 In what follows I will argue that section 67(1) is, on its face, merely a time bar clause. It imposes a procedural bar on a complainant initiation but does not extinguish the claim. It is therefore a law of procedure over which the Tribunal has the power to regulate and condone non-compliance.

39 The investigation, referral and determination of contraventions of the Competition Act occurs within the context of covert collusive cartel

conduct. Information and activities are hidden from view and the secretive nature of cartels makes discovery of this malfeasance difficult and often requires whistleblowing or leniency applications to bring this conduct to light. It also heightens the need for prosecution because preventing (rather than punishing post fact) cartel behaviour will require self-regulation by the would-be cartelists. Thus, it is imperative to create an incentive to comply with the Competition Act and to enforce repercussions if the Act is contravened.

40 If s 67(1) were to be interpreted as extinctive prescription, then a right to prosecute a complaint would be extinguished after three years even where the Commission or member of the public had no knowledge of the prohibited practice prior to the three years expiring. A cartelist may merely cover up its contravention for three years and thereafter neither fear nor face any repercussions for its actions. The public, coming to know of this conduct after the fact, as it almost always the case, is denied a remedy.

41 I submit that it is in the interests of justice that this Court decide this matter.

LEGAL FRAMEWORK

The constitutional framework for interpreting section 67

42 The provision must be interpreted to give effect to the Constitution, specifically the right to access to court in section 34. When this is undertaken the constitutionally compliant interpretation, alternatively the interpretation which best promotes the Bill of Rights is one that restricts section 67(1) to a procedural time bar.

43 Since the advent of the Constitution, all statutes (and the common law) must be interpreted in the light of sections 2 and 39 of the Constitution.

44 Section 2 of the Constitution provides as follows:

> *"Supremacy of Constitution –*
>
> *This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".*

45 Section 39(2) of the Constitution provides as follows:

> *"Interpretation of Bill of Rights*
>
> *(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or*

forum must promote the spirit, purport and objects of the Bill of Rights".

46 As the Constitutional Court put it in *Makate v Vodacom*, section 39(2) means that courts are *'bound to read a legislative provision through the prism of the Constitution'*.[2] This obligation is *'activated'* whenever *'the provision under construction implicates or affects rights in the Bill of Rights'*.[3]

47 Section 39(2) is not discretionary. It places obligations on a court when interpreting legislation:

47.1 Following the principle the Constitutional Court established in *Hyundai*[4], if a court is able to construe an impugned provision to be consistent with the Constitution, this interpretation is preferred over one that would result in an order of invalidity. This is provided that such an interpretation can be reasonably ascribed to the section.

47.2 If more than one constitutionally compliant interpretation is reasonably possible, the court should adopt the interpretation

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[2] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 87

[3] Ibid at para 88.

[4] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) at para 23.

that *'better'* promotes the spirit purport and objects of the Bill of Rights.[5]

48 These obligations envisaged by section 39(2) accord with a general principle of avoidance.[6] This principle demands that, even when the Bill of Rights could be applied directly to a legal dispute, the provisions of ordinary law must first be applied, and, if necessary, interpreted in a manner which is compatible with the Bill of Rights, before considering a direct constitutional challenge through the application of the Bill of Rights.

49 In *Makate* Jafta J stated that –

> *'[90] It cannot be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, the High Court was obliged to follow section 39(2), irrespective of whether the parties had asked for it or not. This is so because the operation of section 39(2) does not depend on the wishes of litigants. The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.*
>
> *[91] In Road Accident Fund, this Court, having expressed reservations on whether an obligation may constitute a debt contemplated in the Prescription Act, stated that the failure to meet a prescription deadline set in terms of the Act, denies a litigant access to a court. What this means is that if the Act finds*

[5] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107; *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC) at para 47.

[6] *S v Mhlungu* 1995 (3) SA 867 (CC) at para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) at para 8; *S v Dlamini* 1999 (4) SA 623 (CC) at para 7.

application in a particular case, it must be construed in accordance with section 39(2). On this approach an interpretation of debt which must be preferred, is the one that is least intrusive on the right of access to courts'.

50 In essence:

50.1 Courts are bound to read provisions through the prism of the Constitution; and

50.2 The obligation to read statutory provisions through the prism of the Constitution is achieved whenever the provision under construction implicates or affects the rights in the Bill of Rights.

51 I submit that any interpretation of section 67(1) must accept as the starting premise that prescription is a limit of section 34 of the Constitution, which provides for the rights of access to courts and tribunals.

52 In *South African Transport and Allied Workers Union (SATAWU) v Moloto NO*[7] 2012 (6) the Constitutional Court confirmed that:

"[C]are must be taken against unduly limiting a fundamental right which has been conferred (as in this case) without express limitation by reading implied restrictions into it".[8]

[7] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* 2012 (6) SA 249 (CC)

[8] Ibid para 20

53 Not all time bar provisions are necessarily unconstitutional. However, I submit that the most important feature that may save a time bar from an unconstitutional reading is whether it allows for **knowledge** on the part of a possible claimant.

54 The Constitutional Court considered time bar clauses in *Brümmer v Minister for Social Development*[9] as follows:

> *"The principles that emerge from these cases are these: time-bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard-and-fast rule for determining the degree of limitation that is consistent with the Constitution. The 'enquiry turns wholly on estimations of degree'. Whether a time-bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time-bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time-bar is not necessarily decisive".*[10]

55 Section 67(1) must therefore be interpreted within the context and purpose of the Competition Act as a whole.

56 In *RAF v Mdeyide*[11] the Constitutional Court, considering section 23(1) of the Road Accident Fund Act 56 of 1996, held that it was permissible for that Act to include a less flexible prescription provision (and one

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9 *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC)

10 Ibid para 51, emphasis added, footnotes omitted.

11 *RAF v Mdeyide* 2011 (2) SA 26 (CC)

less favourable to 'creditors') than that found in the Prescription Act. While acknowledging the right of access to courts provided for in section 34 was limited by section 23(1) of the RAF Act, the Court held that the *'functioning and financial stability of a hugely important public body which renders indispensable service to vulnerable members of society'* warranted such a limitation. I submit, in contrast, that access to the Tribunal and Courts is integral to the Commission's functioning and the interpretation of section 67(1) endorsed by the Tribunal in fact hinders the functioning and viability of the Commission to perform its mandated function as a public body acting on behalf of the public interest.

57 The Competition Act gives the Tribunal and Competition Appeal Court exclusive jurisdiction in competition matters.[12]

58 The Competition Commission is mandated to investigate and prosecute prohibited anti-competitive practices for the benefit of the public at large. The public too is empowered to initiate complaints of prohibited practices. The rulings of the Tribunal are important for combating, redressing and deterring those practices. They vindicate and protect the public's right to be consumers in a competitive market.

[12] Section 62(1) of the Act

59 The investigation, referral and determination of contraventions of the Competition Act occurs within the context of covert collusive cartel conduct. Information and activities are hidden from view and the secretive nature of cartels makes discovery of this malfeasance difficult and often requires whistleblowing or leniency applications to bring this conduct to light. It also heightens the need for prosecution because preventing (rather than punishing post fact) cartel behaviour will require self-regulation by the would-be cartelists. Thus, it is imperative to create an incentive to comply with the Competition Act and to enforce repercussions if the Act is contravened.

60 If s 67(1) were to be interpreted as extinctive prescription then a right to prosecute a complaint would be extinguished after three years even where the Commission or member of the public had no knowledge of the prohibited practice prior to the three years expiring. A cartelist may merely cover up its contravention for three years and thereafter neither fear nor face any repercussions for its actions. The public, coming to know of this conduct after the fact, as it almost always the case, is denied a remedy.

61 Beyond the redress that is available at the Tribunal or Appeal Court level, referral to, and ruling delivered by, the Competition Authorities is also a necessity for damages claims and criminal prosecution.[13]

62 Considering all of the above a provision which extinguishes a claim after three years, whether or not there was knowledge on the part of the initiator in this three year period is clearly incompatible with purpose of the Act as a whole and the context in which initiations, referrals and prosecutions inevitably take place.

A procedural rather than substantive time-bar

63 I submit it is not necessary interpret s 67(1) it to entail substantive prescription. There is no express wording to that effect. It imposes a procedural bar on a complaint initiation but does not extinguish the claim. The Tribunal has the power to regulate and condone any non-compliance with procedural provisions.

64 If the provision is interpreted to be procedural rather than substantive in nature, then the purpose of the provision can still be accommodated while not unduly limiting the constitutional right. A complainant or the Commission would be time barred from initiating a complaint. The Tribunal, however, would retain the power to condone an initiation on good cause shown.

[13] Sections 65(6)(b) and 73A of the Act

65 The power to condone non-compliance would not leave firms accused of cartel conduct without a time bar defence. They would still be able oppose any applications by the Commission for condonation of non-compliance. When those applications are considered the Tribunal would consider all relevant circumstances, including prejudice to be suffered in the event condonation is allowed. In that exercise, all relevant circumstances would be taken into account.

66 The power to condone non-compliance would not leave firms accused of cartel conduct without a time bar defence. They would still be able oppose any applications by the Commission for condonation of non-compliance. When those applications are considered, the Tribunal would consider all relevant circumstances, including prejudice to be suffered in the event condonation is allowed. In that exercise, all relevant circumstances would be taken into account.

67 It is established South African law stretching back over more than a century that a law that bars a remedy is procedural in nature while a law that extinguishes a right (like prescription) is substantive.[14]

68 This Court has most recently endorsed the distinction between procedural and substantive prescription periods in *Food and Allied*

[14] *African Banking Corporation v Owen* (1897) 4 Off Rep 253

Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited[15]. In the context of s 191 of the Labour Relations Act, Kollapen AJ for the majority cited the distinction drawn in *Society of Lloyd*s and held both procedural prescription (barring the institution of an action) and substantive prescription (ie prescription governed by the Prescription Act, extinguishing a right) can run in tandem as follows:

> *"[184] In this sense, section 191(2) is procedural as opposed to substantive in nature. The difference between procedural and substantive prescription periods was described in Society of Lloyd's, where the Supreme Court of Appeal distinguished between statutes that extinguish a right and those that bar a remedy by imposing a procedural bar on the institution of an action. In this regard, section 191 deals with what may be described as matters of a procedural nature while the Prescription Act deals with what is described as substantive in nature. This distinction is important in that it contemplates a substantive issue such as prescription and a procedural matter such as a time bar running along parallel tracks and having different objectives. The former regulates and imposes a cut-off period in respect of litigation while the latter seeks to regulate, through the imposition of time bars, the procedure to be followed in asserting a right. They are separate and distinctive processes and indeed can operate in harmony with each other when one is interlaid with the other. On this basis alone, my view would be that whatever meaning was ascribed to the words "at any time" would hardly matter, given the very different nature of prescription periods and time bars and what they seek to achieve."* (footnote omitted)

69 Similar to what is at stake here, the section which was under consideration in the *FAWU* case regulated the period by when a dispute had to be referred to arbitration:

> *"191. Disputes about unfair dismissals*

[15] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (CCT236/16) [2018] ZACC 7 (20 March 2018).

(1) If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute in writing within 30 days of the date of dismissal".

70 The CCMA is granted power to condone non-compliance with the time bar provisions by s191(2) of the LRA. A similar provision applies here too since the Tribunal also has power to condone non-compliance with procedural time bar provisions.

The Tribunal has the power to condone non-compliance

71 The Tribunal is entitled to exercise its various powers to regulate its procedures and condone non-compliance with the time periods set out in the Competition Act. The relevant provisions of the Act read as follows:

71.1 Section 27(1)(d): "the Competition Tribunal may make any ruling or order necessary or incidental to the performance its functions in terms of this Act."

71.2 Section 58(1)(c): "In addition to its other powers in terms of this Act, the Competition Tribunal may subject to section 13(6) and 14(2), condone, on good cause shown, any non-compliance of (i) the Competition Commission or Competition Tribunal rules; or (ii) a time limit set out in this Act."

71.3 Section 31(5): “If the Competition Tribunal may extend or reduce a prescribed period in terms this Act, the Chairperson of the Tribunal or another member of the Tribunal assigned by the Chairperson, sitting alone, may make an order – (a) extending or reducing that period; or condoning late performance of any act that is subject to that period.”

72 The Tribunal held that section 58(1)(c)(ii) is the one most favourable to the condonation approach in these circumstance, however it held that the condonation power cannot be invoked in respect of section 67(1).[16]

73 The Tribunal went on to hold:

“The Commission’s interpretation would mean that these powers could be exercised initially unlawfully, but later be capable of subsequent restoration, if good cause is shown. Nor would it be clear when such condonation should be sought?”[17]

74 As we understand it, the initial unlawful exercise of public powers that the Tribunal is wary of is the initiation of a complaint and subsequent investigation undertaken into a prohibited practice which ceased more than three years before and therefore undertaken in contravention of section 67(1). Later by seeking condonation from the Tribunal at the

[16] Tribunal Decision p 18 paras 99 and 103

[17] Tribunal Decision p 19 para 107

time of referral the Tribunal would in essence be asked to validate this initial unlawful conduct.

75 It must, however, be understood that even as the section is currently utilised many initiations are, and must be, commenced with before the exact date of cessation of the conduct is known. The Commission is tasked with investigating instances of covert collusion and secret dealing amongst competitors and it is often not possible to known how and when these collusive practices were entered into and carried out without first investigating the matter. In some instances it is only by initiating and thus investigating that the Commission can establish that it is barred from initiation.

76 As to when such condonation should be sought, I submit that as with many laws the growth of precedent as the provision is utilised will aid in clarifying when condonation is within the public interest has supported by good cause.

77 This would be in line with the recent judgment of *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 where Theron J reaffirmed the principle that the approach to undue delay within the context of a legality challenge involves a broader discretion than that traditionally applied to a PAJA review. Theron J says at para 50.

> *"The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay"*.

78 I am advised that this case is analogous in the present case. An interpretation requiring knowledge on the part of the creditor, in line with section 12(3) of the Prescription Act, would include constructive knowledge and would not cover wilful or negligent ignorance on the part of the Commission. Determining whether and when the Commission should have known of the contravention would depend on the facts of the specific case and the Commission's powers and resources would undoubtedly affect an assessment of the "reasonableness" of the its claimed lack of knowledge in each case.

The CAC made an error of law when it held that Pickfords became a named party when the second complaint initiation occurred

79 The Competition Act envisions that The Commission may initiate a complaint against prohibited *conduct*.

80 Section 49B(1) provides that the Commissioner may initiate a complaint against an allegedly *prohibited practice*.

81 Sections 49B(2)(a) and (b) of the Competition Act provide that any person may submit information or complaints concerning an alleged *prohibited practice* to the Commission in any manner or form or in the prescribed form.

82 The legal argument was explored in *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 13 September 2010 where the Supreme Court of Appeal said the following at para 35:

> *"[A] suspicion against some cannot be used as a springboard to investigate all and sundry. This does not mean that the Commission may not, during the course of a properly initiated investigation, obtain information about other or about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation".*

83 This dictum was also discussed in *Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others; Felix Holdings (Pty) Ltd v Competition Commission South Africa and Other* (102/CAC/Jun10) [2011] ZACAC 4 (06 May 2011) where The Competition Appeal said at para 55:

> *"In referring to the possibility of both an amendment and the initiation of another complaint the learned judge contemplated two possibilities. The first is that the information obtained in the course of an investigation may relate to and fortify the existing complaint and justify an amendment of the particulars of that complaint as initiated without altering its fundamental nature. The second is where the information discloses a quite different transgression or participation by a party not hitherto the subject of a complaint. In those circumstances either the original initiation must be amended to encompass the additional complaint or party or a fresh initiation of a complaint is required.*

84 In *Power Construction (Pty) Ltd and The Competition Commission* 145/CAC/SEP16 the Tribunal found that a complaint may be subsequently amended.[18] The question of which date would operate for the purposes of prescription was not determined, and remains open to this court to determine if it accepts that the second initiation amounted to an amendment of the first initiation.

[18] *Power Construction (Pty) Ltd and The Competition Commission* 145/CAC/SEP16 para 38

GROUNDS OF APPEAL

First ground of appeal: Section 67(1) of the Competition Act requires knowledge of the prohibited practice

85 The CAC erred in finding that section 67(1) of the Competition Act is a limitation or expiry period, and that a knowledge requirement as is evident in section 12 of the Prescription Act cannot be read into it (CAC Judgment para 40). The CAC ought to have held that the Tribunal erred by discounting the flexibility provided by section 12 of the Prescription Act.

85.1 I am advised that section 67(1) of the Competition Act should be interpreted to require that the time-bar run only from the date that the Commissioner acquires knowledge of the prohibited practice. Such an interpretation would be analogous to section 12 of the Prescription Act 68 of 1969 which reads as follows:

12. When prescription begins to run. —

(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Interpretation in accordance with the Prescription Act

86 Section 67(1) of the Competition Act makes no reference to prescription. Nonetheless, the Tribunal has been quick to imbue the section with the nomenclature of "prescription"[19] and its extinguishing effect. It has not, however, been equally quick to imbue it with the protections afforded against extinctive prescription.

[19] See for example *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010) at para 84; *AGS Frasers International (Pty) Ltd v Competition Commission* [2016] ZACT 35 (7 April 2016) at para 31;

87 The SCA has held that *"the statutory prescription periods are meant to protect defendants from undue delay by litigants who are laggard in enforcing their rights"*[20] and that *"prescription penalises unreasonable inaction, not inability to act."*[21]

88 In *Macleod v Kweyiya*[22], the SCA made the point with specific reference to section 12(3) of the Act holding: *"It is the negligent and not an innocent inaction that s 12(3) of the Prescription Act seeks to prevent. ..."*[23]

89 Where there has been inaction by an unwitting creditor the provision works to ensure the creditor does not lose the right to bring a claim until such a time as the creditor has actual or constructive knowledge of the facts from which the debt arises and the identity of the debtor.

90 The SCA has held that the courts must consider what is reasonable with reference to the particular circumstances in which the plaintiff found him or herself, and a defendant bears the full evidentiary burden to prove a plea of prescription, including the date on which a plaintiff obtained actual or constructive knowledge of the debt.[24]

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20 *Minister of Finance and Others v Gore N.O.* 2007 (1) SA 111 (SCA) at para 16
21 *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) at para 19
22 *Macleod v Kweyiya* 2013 (6) SA 1 (SCA) at para
23 Ibid para 13, emphasis added
24 *Macleod* paras 9 -10 and 13

91 In *Links v Department of Health, Northern Province*[25] the Constitutional Court held as follows:

> *"The provisions of s 12 seek to strike a fair balance between, on the one hand, the need for a cut off point beyond which a person who has a claim to pursue against another may not do so after the lapse of a certain period of time if he or she has failed to act diligently, and, on the other, the need to ensure fairness in those cases in which a rigid application of prescription legislation would result in injustice. As already stated, in interpreting s 12(3) the injunction in s 39(2) of the Constitution must be borne in mind. In this matter the focus is on the right entrenched in s 34 of the Constitution [The right to access to courts]".*[26]

92 I discuss the implication of s 34 of the Constitution in the second ground of review to follow, but note for the present argument that the flexibility provided for by section 12 of the Prescription Act, and which submit supports the argument for a similar interpretation of section 67(1), has been held to accord with section 34 of the Constitution. I also note that not only does section 67(1) have implications for accessing the Competition Tribunal and following that the Appeal Court or Constitutional Court on competition grounds, it also has implications for civil[27] or criminal proceedings[28] which stem from a competition contravention.

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25 *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC)

26 Ibid para 26, insertion added

27 In terms of section 65(6) of the Act a person who has suffered loss or damage as a result of a prohibited practice when instituting proceedings in a civil court, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of the Competition Act, the date of this finding, and section of the Competition Act in terms of which the Tribunal or Competition Appeal Court made its finding.

28 Section 73A of the Competition Act provides for criminal liability for cartel conduct. Under section 73A, absent a consent order in terms of s 49D, a person may only be prosecuted for an offence under the

Second ground of appeal: The power of condonation in terms of section 67(1)

93 The CAC erred when it held that an implied consequence of dismissing the claim that prescription only runs from the date the that Commissioner or complainant acquired knowledge of the prohibited practice was that there was no scope for it to exercise its discretion to exercise its powers under the Competition Act to condone non-compliance with the three-year time period for a valid initiation as set out under section 67 (CAC Judgment para 41). It ought to have nonetheless retained the power to condone non-compliance with the Competition Act on good cause shown.

94 I submit that if even if the Tribunal rejected an argument on the interpretation of 67(1) of the Act in accordance with the principle of prescription under the Prescription Act it nonetheless retained the power to condone non-compliance with the Competition Act on good cause shown. I submit that section 67(1) need only be read as a procedural, rather than substantive, time bar and the Tribunal therefore has the discretion to condone an initiation which commenced more than three years after a prohibited practice has ceased.

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section if there is finding by the Competition Tribunal or the Competition Appeal Court that the relevant firm engaged in a prohibited practice in terms of section 4(1)(b) of the Act. Read with s 67(1) the effect is that no criminal prosecution could be instituted if no competent referral could be made to the Tribunal three years after the prohibited practice ceased. If s 67(1) indeed operates as a prescription provision, and extinguishes the claim, this would allow for the prescription of criminal sanctions after three years. In contrast, section 18 of the Criminal Procedure Act 51 of 1977 provides: *"The right to institute a prosecution for any offence,* [other than specific offences] *shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed."*

Third ground of appeal: The Competition Act requires that an initiation statement set out prohibited conduct

95 The CAC erred in finding that Pickfords only became a named party when the second complaint initiation occurred and that the alleged prohibited practice did not involve Pickfords before the initiation of the second complaint (CAC Judgment para 33). The CAC ought to have held that the first initiation left open the possibility of further firms being added.

96 The language used in the first initiation statement contemplated the possibility of other firms being named. This formulation of the initiation statement was in accordance with a plain reading of section 49 of the Competition Act read with section 67.

REMEDY

97 It would be just and equitable for the Court to grant The Commission the following relief.

97.1 The appeal be upheld;

97.2 The decision of the Competition Appeal Court dismissing the Commission's purposive interpretation is of section 67(1) be set aside;

97.3 *Alternatively*, the decision of the Competition Appeal Court which found the Competition Appeal Court did not have power under the Competition Act to condone non-compliance with the time period prescribed by section 67(1) on good cause shown be set aside;

97.4 The finding by the Competition Appeal Court that Pickfords only became a named party when the second complaint initiation occurred is set aside

98 The Commission seeks the costs of the appeal including the cost of two counsel.

CONCLUSION

99 It is possible to interpret s 67(1) in a manner that accords with the right to access to courts and independent and impartial tribunals. Where such an interpretation is possible it must be preferred over one that does not accord with this constitutional right. Even if both interpretations were constitutionally permissible, the procedural interpretation that "better" promotes the spirit purport and objects of the Bill of Rights since it is the interpretation that leaves an avenue open for access to the Tribunal, and the courts, rather than extinguishing any opportunity.

100 For this reason I submit that this Court should either interpret section 67 to provide for a knowledge requirement before the time bar begins to run or alternatively as a procedural bar to referral which the Tribunal has the power to condone.

WHEREFORE I pray that relief as sought in the Notice of Motion be granted.

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DEPONENT

SIGNED and **SWORN** to before me at on this day of APRIL 2019, the Deponent having acknowledged that he knows and understands the contents of this Affidavit; that he has no objection to taking the prescribed oath and that he considers the oath as binding on his conscience.

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COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

CAPACITY:

AREA: