IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO:123/19

In the appeal of:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
and	
PICKFORDS REMOVALS SA (PTY) LTD	Respondent

In Re: The complaint referral between

PICKFORDS REMOVALS (PTY) LTD	First Respondent
JH RETIEF TRANSPORT CC	Second Respondent
SIFIKILE TRANSPORT CC	Third Respondent
CAPE EXPRESS REMOVALS (PTY) LTD	Fourth Respondent

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INTRODUCTION

1 One of the most important functions of the Competition Commission ("the Commission") is to prosecute cartels. It does so for the protection of consumers. Cartels distort competition. In so doing, they harm consumers. Consumers pay uncompetitive prices, to their detriment. Cartelists, on the other hand reward themselves handsomely through their exploitation of consumers.

2 This case is one of those. The form of the cartel conduct is bid rigging, through cover pricing. The respondent is being prosecuted by the Commission for some 60 odd instances of bid rigging through cover-quoting. It has taken a technical argument that the Commission is time-barred from prosecuting it in relation to some of the instances under prosecution. Consequently, it argues that it cannot be prosecuted for some of the cartel conduct. Prosecutions under the Competition Act 89 of 1998 ("the Act") are not governed by the Prescription Act 68 of 1969 ("the Prescription Act") – with its exacting provisions which require knowledge of the debt and the identity of the debtor. Rather they are regulated by section 67(1) of the Competition Act. This Act simply states that the Commission may not prosecute a cartelist for conduct that ceased three years before the prosecution.

3 This provision is at the heart of this appeal. Cartels are by their nature secretive. Deliberate strategies are employed to supress information about their existence. The most effective manner in which the Commission acquires knowledge of cartel

behaviour is through the leniency process, which allows parties to approach the Commission with information about the infringements of the Act in exchange for no prosecution or negligible fines.

4 The Commission argued before the Tribunal (and the Competition Appeal Court) that section 67(1) Competition Act should be interpreted to encapsulate a knowledge requirement. Without this, the Commission's ability to prosecute cartels will be undermined and the goals of the Act severely imperilled. Both the Tribunal and the CAC rejected the argument. The Commission's second argument, that the Tribunal has residual discretion to condone non-compliance with the three year time bar, was also rejected.

5 This appeal seeks to correct the findings of law made by the Tribunal, endorsed by the CAC. In the first instance, we argue that the Competition Act should be read to require knowledge on the part of the Commission, as provided for in the Prescription Act – to the extent that section 67(1) is a prescription provision. In the alternative, we submit that the Tribunal has power to condone any non-compliance with the three year period.

6 The matter properly falls within the jurisdiction of this Court. It raises a constitutional matter par excellence – the issue is about the correct interpretation of a statutory provision in a manner which best promotes the goals of the legislation. Section 67(1) manifestly impacts on the right of access to court, which is provided for in section 34 of the Constitution. The inability of the Commission to

prosecute cartel cases three years after the conduct complained of ceased infringes the Commission's rights protected in section 34 of the Constitution.

7 This Court also has jurisdiction because the matter raises arguable points of public importance. The matter implicates the public interest. Cartel conduct is now criminalised. The public is also entitled to sue for damages in respect of cartel conduct. But in either scenario, the Tribunal plays a gate-keeper role. It must first make a finding that there has been an infringement of the Act. But it is limited from making a finding because of section 67(1) of the Competition Act. If we are correct, the Tribunal should not be limited from entertaining cases which come to the attention of the Commission three years after the conduct has ceased.

8 The matter is accordingly within the jurisdiction of this Court. It is in the interests of justice to entertain the appeal. We begin by tracing the history of the dispute.

HISTORY OF THE DISPUTE

The exception application before the Competition Tribunal

9 The Commission referred a complaint of bid rigging against Pickfords to the Competition Tribunal on 11 September 2015. The investigation which led to the complaint was initiated on 3 November 2010. It was amended on 1 June 2011 to add additional firms which were not identified in the original investigation.

10 The complaint was that certain furniture removal firms had breached section 4(1)(b)(i), (ii) and (iii) of the Competition Act in that they colluded to fix the price at which they rendered their services, divided markets and/or engaged in collusive tendering in respect of tenders issued by the State and private enterprises.[1]

11 As against Pickfords the factual substratum of the complaint was that it engaged in the practice of *"cover quoting"* or *"cover pricing"*. The way this is executed is that 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 requested and provided cover bids in response to requests for a quotation from customers.[2]

12 At the relevant time section 67(1) of the Competition Act read as follows:

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

13 On the basis of its reading of section 67(1), 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 pleaded with sufficient clarity.[3]

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1 Record: Complaint Referral 03 November 2010 Vol. 2, Annexure A, Item No. 7.1, p 129 – 130

2 Record: Complaint Referral 01 June 2011 Vol. 2, Annexure B, Item No. 7.2, pp 131 – 134

3 Record: Pickfords' Answering Affidavit in Tribunal Vol. 2, Item No. 8, p 147, para 26

14 In paragraphs 1 and 2 of the Tribunal order, the Tribunal required both parties to plead the date of cessation of conduct in respect of different contraventions in order for the Tribunal to determine Pickfords' exception.[4]

15 One of the main issues to be decided in this case is whether knowledge on the part of the Commission is required. If not, it must be decided whether the Tribunal can grant condonation if the conduct is found to have ceased more than three years before the initiation. The Tribunal decided the matter on principle, holding that there is no power to condone at all. The question is whether the Tribunal correctly interpreted its powers. If the Tribunal failed to appreciate its powers, the refusal to even consider condonation is a misdirection of law which stands to be corrected by this Court.

The amendment to section 67(1)

16 After this case was heard by both the Tribunal and CAC, the Competition Act was amended.[5] Section 67(1) now reads as follows:

> *"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"*.[6]

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4 Record: Tribunal Decision Vol 2, Item No. 10 p 197 paras 1 – 2

5 On 12 July 2019, President Ramaphosa published a notice in the Government Gazette to immediately bring into effect certain of the provisions of the Competition Amendment Act 18 of 2018.

6 Sub-s. (1) substituted by s. 37 of Competition Amendment Act 18 of 2018 (Ref 12 July 2019).

17 It is necessary for this Court to decide the matter. The new provision does not apply to the many initiations made prior to its enactment and which still need to be referred to or determined by the Tribunal. Furthermore, the new provision is not relevant to the issues before this Court. Finally, this Court's interpretation of the previous section 67(1) would provide needed guidance as to how the new section 67(1) is to be applied.

SECTION 67(1) OF THE COMPETITION ACT SHOULD BE READ PURPOSIVELY

18 The Commission makes two arguments in support of adopting a purposive and interpretive approach to reading section 67(1) of the Competition Act:

18.1 First, we submit that *if* section 67(1) is to be read as prescription provision, then the time period can only run from the date that the Commissioner acquires knowledge of the existence of the prohibited practice or could reasonably have been deemed to have such knowledge.

18.2 *In the alternative*, we submit that section 67(1) be held to be a time bar / procedural bar and that the Tribunal and CAC have the power to condone non-compliance with this procedural bar on *"good cause shown"*.

19 The CAC held that section 67(1) was not a prescription provision but rather established what it called a limitation or expiry period. It went on to hold that the Tribunal has no power to condone non-compliance with this procedural bar.

20 The impact of these decisions is that section 67(1) of the Competition Act will continue to act as a bar to any referral or prosecution of a competition contravention three years after the prohibited conduct ceased and irrespective of when the Commission could reasonably have had knowledge of the prohibited practice.

KNOWLEDGE ARGUMENT

21 The Prescription Act provides that the prescription period runs only from the time when the creditor acquires knowledge of the debt and identity of the debtor. If section 67 of the Competition Act serves the same purpose of extinguishing the right of action, it must be interpreted consistently with the Prescription Act. The latter Act, in turn, requires knowledge of the claim before prescription can apply.

22 The CAC dismissed this argument.[7] It held that the subjective knowledge (which it chose to term the *'reasonable suspicion'*) of the Commissioner is irrelevant, and that it was not necessary to read into the section the pre-existence of the Commissioner's reasonable suspicion in order for the section not to offend the Constitution.

23 We submit that section 67(1) of the Competition Act requires that the time-bar run only from the date that the Commissioner acquires knowledge of the prohibited

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[7] Record: Competition Appeal Court Judgment Vol. 2 Item No. 13, p. 223, paras 39 – 40

practice. Such an interpretation would be analogous to section 12(3) of the Prescription Act, which states that prescription shall not run *"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."*

Section 67(1) must be read and understood in accordance with the Prescription Act

24 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[8] and its extinguishing effect. It has not, however, been equally quick to imbue it with the protections afforded against extinctive prescription.

25 The Supreme Court of Appeal has held that statutory prescription periods are meant to protect defendants from undue delay by litigants who are laggard in enforcing their rights. It has also held that prescription penalises unreasonable inaction, not the inability to act.[9] Where there has been inaction by an unwitting creditor the provision works to ensure that the creditor does not lose the right to

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8 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

9 See *McLeod v Kweyiya* 2013 (2) SA 93 (SCA) at paragraphs 13 and 19

bring a claim until such a time as she has actual or constructive knowledge of the facts from which the debt arises and the identity of the debtor.

26 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 that 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.[10] Zondo J confirmed these principles in *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) where he said at paragraph 26 that section 12 *"[seeks] 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."*[11]

27 We discuss the implication of section 34 of the Constitution in our 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 we submit supports the argument for a similar interpretation of section 67(1), has been held to accord with section 34 of the Constitution. We also note that not only does section 67(1) have implications for accessing the Competition Tribunal and, following that, the

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10 *Macleod* paras 9 -10 and 13

11 Ibid para 26, insertion added

Competition Appeal Court or Constitutional Court on competition grounds, it also has implications for civil[12] or criminal proceedings[13] which stem from a competition contravention.

The CAC's reasons

28 The CAC held that section 67(1) is a limitation or expiry period and that a knowledge requirement such as is evident in section 12 of the Prescription Act cannot be read into it. We submit that while the CAC was correct in holding that the provision is not a prescription provision, the CAC erred in concluding that knowledge was irrelevant. We submit further that an interpretation requiring knowledge on the part of the Commissioner before the time bar begins to run best promotes the purpose of the Competition Act.

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12 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.

13 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 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."*

29 Pickfords argues that, to the extent that the Commission seeks a reading-in in respect of section 67(1), this is incompetent as it has not sought a declaration of constitutional invalidity.[14]

30 We do not ask for a "reading-in" as remedy. Rather we ask for an interpretation of the legislation – this may in fact be referred to as "reading down". The Tribunal was merely asked to apply an interpretation of section 67(1) that best accords with the Constitution, which, we submit should be in line with the knowledge requirement of the Prescription Act. This does not require a declaration of invalidity as it is mandatory in terms of section 39 of the Constitution.

CONDONATION

31 We submit that the Tribunal was wrong when it held that it has no power to condone initiations outside the three year period. Section 67(1) is a procedural, rather than substantive, time bar.

A constitutional interpretation

32 Section 67(1) must be interpreted to give effect to the Constitution, specifically the right to access courts in section 34. When this is undertaken the constitutionally compliant interpretation is one that restricts section 67(1) to a procedural time bar.

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[14] Record: Opposing Affidavit Vol 3, Item No. 16, p 288, para 45

33 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.[15]

34 As this Court put it in *Makate v Vodacom (Pty) Limited*, section 39(2) means that courts are *"bound to read a legislative provision through the prism of the Constitution.*"[16] This obligation is *"activated"* whenever *"the provision under construction implicates or affects rights in the Bill of Rights"*.[17]

35 Section 39(2) is not discretionary, and it places three obligations on a court when interpreting legislation:

35.1 Following the principle this Court established in *Hyundai*[18], 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.

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15 Section 2 of the Constitution provides for the supremacy of the Constitution. It says –

> *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.*

Section 39(2) of the Constitution provides for the interpretation of the Bill of Rights. It says –

> *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.*

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

17 Ibid at para 88.

18 *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

35.2 If more than one constitutionally compliant interpretation is reasonably possible, the court should adopt the interpretation that *"better"* promotes the spirit purport and objects of the Bill of Rights.[19]

36 These obligations envisaged by section 39(2) accord with the general principle of avoidance.[20] 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.

37 In *Makate* Jafta J stated that "*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."*

38 In essence:

38.1 courts are bound to read provisions through the prism of the Constitution; and

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19 *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.

20 *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

38.2 the obligation to read legislative provisions through the prism of the Constitution is mandated whenever the provision under construction implicates or affects the rights in the Bill of Rights.

39 We 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.

40 Not all time bar provisions are necessarily unconstitutional. But 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.

41 This Court considered time bar clauses in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) and said the following at paragraph 51 of that judgment:

> *"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."*

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

43 In *RAF v Mdeyide*[21] this 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 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, this Court held that the functioning and financial stability of a hugely important public body which renders indispensable services to vulnerable members of society warranted such a limitation.

44 As far as the functions of the Commission are concerned, access to the Tribunal is central to its work. The current approach to section 67(1) hinders the functioning of the Commission to perform its mandated function as a public body acting on behalf of the public interest. The difficulty the Commission has in adopting the approach taken in *Mdeyide* is that it endorses the absence of a knowledge requirement, combined with the absence of a condonation provision when interpreting section 67(1). We submit such an interpretation renders the provision too inflexible.[22]

45 It is not necessary to apply for the striking down of the provision. A constitutionally compliant interpretation is permitted by the language of the Act. One of them, which we advance below is to view section 67(1) as a procedural time bar only.

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21 *RAF v Mdeyide* 2011 (2) SA 26 (CC) at para 94

22 See dissenting judgment of Froneman J in *RAF v Mdeyide* 2011 (2) SA 26 (CC) at para 141

A procedural rather than substantive time-bar

46 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.[23]

47 In *Kuhne & Nagel AG Zurich v A P A Distributors (Pty) Ltd*[24], O'Donovan J held:

> *"Statutes of limitation merely barring the remedy are part of the law of procedure. If, however, they not only bar the remedy but extinguish altogether the right of the plaintiff they belong to the substantive law"*.[25]

48 Where there is a statute of limitation barring remedy the naked right is allowed to remain but the remedy of enforcing it by action is taken away.[26] Where the provision in question only purports to deal with remedies, there is no reason to say the debt is extinguished.[27]

49 These principles were relied on by the SCA in *Society of Lloyds v Price; Society of Lloyd's v Lee'*[28] where the Court held:

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23 *African Banking Corporation v Owen* (1897) 4 Off Rep 253

24 *Kuhne & Nagel AG Zurich v A P A Distributors (Pty) Ltd* 1981 (3) SA 536 (W) at 537

25 Ibid at p 537 -538A, authorities omitted

26 *Curtis v Johannesburg Municipality* 1906 TS 308

27 *Langerman v Van Iddekinge* 1916 TPD 123 at p 125

28 *Society of Lloyds v Price ; Society of Lloyd's v Lee'* (327/05) [2006] ZASCA 88; [2006] SCA 87 (RSA) (1 June 2006)

> *"A distinction has traditionally been drawn, in both South African and English law, between two kinds of prescription/limitation statutes: those which extinguish a right, on the one hand, and those which merely bar a remedy by imposing a procedural bar on the institution of an action to enforce the right or to take steps in execution pursuant to a judgment, on the other. Statutes of the former kind are regarded as substantive in nature, while statutes of the latter kind are regarded as procedural."*[29]

50 This Court has most recently endorsed the distinction between procedural and substantive prescription periods in *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited*[30]. In the context of section 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.

51 Similar to what is at stake here, the section which was under consideration in FAWU regulated the period by when a dispute had to be referred to arbitration. Section 191 of The Labour Relations Act deals with disputes about unfair dismissals in the workplace. It says –

> *191. Disputes about unfair dismissals*

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29 Ibid para 10

30 *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.

52 The CCMA is granted power to condone non-compliance with the time bar provisions by section 191(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 under section 58(1)(c)(ii).

53 We submit that it is not necessary interpret section 67(1) 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.

54 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.

55 The power to condone non-compliance would not leave firms accused of cartel conduct without an expiry or limitation 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 considered.[31]

56 As to when such condonation should be sought, we 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 and supported by good cause.

Condonation

57 The CAC found against the Commission's condonation argument for three reasons:[32]

57.1 The legislature did not intend to permit condonation;

57.2 The provision does not expressly include the power of the Tribunal to condone non-compliance; and

57.3 Section 67(1) is couched in prohibitive language.

A sensible reading of the Act

58 The CAC held that the plain language does not require the implication [of a condonation provision] for the provision to be implemented sensibly. It said that once the period has expired, there is no statutory power to initiate a complaint

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31 The factors and onus taken into consideration for condonation applications are well known and uncontroversial. See for example *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532 C-D; *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) paras 20 – 23

32 Record: Competition Appeal Court Judgment Vol. 2, Item No.13, p. 225, paras 46 – 48

and to engage the power of the State against the subject.[33] However, the CAC itself points out that the power of the State can be engaged against the subject once the period has expired since the Commission will often not know, at the time of initiating and investigating, that the prohibited practice ceased more than three years prior. Such condonation will be even more easily reconcilable with the new section 67(1) which permits initiation but bars referral.

59 We submit that the sensible reading must take into account the exclusion of other courts in regulating competition infringements. The Competition Act gives the Tribunal and Competition Appeal Court exclusive jurisdiction in competition matters.[34]

60 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.

61 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

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33 Record: Competition Appeal Court Judgment Vol. 2, Item No.13, p. 225, para 48

34 Section 62(1) of the Competition Act

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.

62 If section 67(1) were to be interpreted an expiry provision, or a time bar without the possibility of condonation, 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.

63 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.[35]

64 For these reasons we submit that the only sensible reading of the Act must be one that permits of condonation.

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

The express inclusion of the power to condone

65 We submit that the Competition Act expressly includes the power of the Tribunal to condone non-compliance with any time limit set out in it. The power to condone is provided for in section 58 of the Act. Section 58(1)(c)(ii) says –

> *"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."*

66 The CAC also has the power to condone non-compliance of a time limit by virtue of section 58(1)(c)(ii) read with section 62(1)(a). It also has inherent power and by virtue of section 36(1)(a) read with section 173 of the Constitution which permits high courts, and courts of similar status, to regulate their own procedure.

67 Pickfords' contention that section 58(1)(c)(ii) only applies to mergers is without merit. The provision expressly states it applies to "this Act" in its entirety not merely to chapter 3 Merger Control. The reference to sections 13(6) and 14(2) do not provide the ambit for the application of condonation but rather the exceptions to the general rule allowing for condonation. Tellingly, the time limit in section 67(1) is not similarly included as an exception to the Tribunal's power of condonation.

68 In these circumstances there is no basis to the submission that the Act does not allow condonation. It expressly does so. We turn to some of the justifications for the conclusions of the CAC and demonstrate why they are unfounded.

The CAC's reasons

Public versus private power

69 The CAC held that the purpose of section 67(1) was to limit the considerable power conferred upon the Commissioner in terms of section 49B(1), a power which may only be exercised on having first acquired a reasonable suspicion of the existence of a prohibited practice.[36] The judgment goes on to frame initiation as the engagement of "the power of the State against the subject."[37]

70 What the above analysis failed to consider was the implication of section 67(1) for complaints initiated under section 49B(2). This provides for any person to initiate a compliant either through the submission of information to the Commission or through the submission of a complaint. Initiations are therefore not solely the purview of the Commission.

71 There are three ways in which a referral can come before the Tribunal:

71.1 through a self-initiation by the Commission,

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36 Record: Competition Appeal Court Judgment Vol. 2, Item No.13, p. 222 – 223 , paras 37 and 38

37 Record: Competition Appeal Court Judgment Vol. 2, Item No.13, p. 225, para 48

71.2 through a complaint submitted by any person and referred either by the Commission or by the complainant in the event of -non-referral by the Commission,

71.3 as a referral from the High Court.

72 The Tribunal in *Linpac* held that a referral from the High Court was not subject to section 67(1) *"prescription"* due to the fact that it did not arise from a section 49B initiation or result in a section 50 referral.[38]

73 A complaint submitted by any person– ie a member of the public – under section 49B(2)(b) would fall within the section 67(1) time limitation. All complaints under section 49B are headed "initiating complaint". Section 49B(1) and (2) were held to be an initiation by the Tribunal in *Linpac*[39], and in *Clover Industries Limited and Others v Competition Commission; Competition Commission v Clover Industries Limited and Others.*[40] Initiations occurring as a result of information having been submitted by a member of the public under section 49B(2)(a) would also fall within the section 67(1) limitation.

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38 *Linpac Plastics (SA) Pty Ltd and Another v Du Plessis and Another In Re: Linpac Plastics Ltd and Others v Du Plessis and Others* (019513) [2014] ZACT 64

39 *Linpac Plastics (SA) Pty Ltd and Another v Du Plessis and Another In Re: Linpac Plastics Ltd and Others v Du Plessis and Others* (019513) [2014] ZACT 64 at para 48

40 *Clover Industries Limited and Others v Competition Commission; Competition Commission v Clover Industries Limited and Others* (103/CR/DEC06) [2008] ZACT 46 at para 11

74 A section 67(1) limitation would also prevent the Commission from utilising Rule 17 of the Competition Commission Rules and inviting members of the public *"who believe that the alleged practice has affected or is affecting a material interest of* [those persons] *to file a complaint in respect of that matter"*.[41]

75 The CAC judgment does not consider these initiation provisions emanating from or affecting a private complainant rather than the Commission. It only refers to the procedure under section 49B(1). We submit that it is artificial for the CAC to have distinguished initiations under the Competition Act as solely public in nature. Section 67(1) implicates a private person's ability to seek to prosecute contraventions and to obtain declarations for the purposes of section 65 (without first having to institute legal proceedings in the civil courts at higher costs). It

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41 Rule 17 of The Competition Commission Rules provides for the complaint procedure to be follow when there are multiple complaints. It says –

(1) At any time after a complaint has been initiated by the Commissioner, or submitted by another person, the Commission may publish a notice disclosing an alleged prohibited practice and inviting any person who believes that the alleged practice has affected or is affecting a material interest of that person to file a complaint in respect of that matter.

(2) The Commission may consolidate two or more complaints under a common investigation if they concern the same firm as potential respondent.

(3) If the Commission consolidates two or more complaints as permitted by subrule (2) –

(a) Each of those complaints must continue to be separately identified by its own complaint number;

(b) Each person who submitted one of those complaints to the Commission remains the complaint with respect to the complaint that they submitted; and

(c) After referring one of those consolidated complaints to the Competition Tribunal, or issuing a notice of non-referral in respect of it, the Commission may continue to investigate any of the remaining consolidated complaints, subject only to the time constraints set out in section 50.

Rule 17 would only be affected by the old section 67(1).

prevents members of the public from joining as complainants in terms of section Rule 17 of the Competition Commission Rules.

Public interest

76 The CAC held that "the over-arching purpose of s 67(1) is 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.[42]

77 We submit that a time bar without the possibility of condonation promotes a culture of impunity which endangers the public weal. The possibility of prosecution not only serves to punish past behaviour but also serves to deter future conduct. That is why previous findings of contraventions can affect future penalty orders.[43] Successful competition regulation arises not only from prosecution but from self-regulation by players in the market. If firms know that contraventions which are hidden for a number of years will never be able to be prosecuted and penalised once discovered, it reduces the risk of undertaking secretive cartel conduct. Conversely, if the Tribunal and courts are known to have discretion to condone late initiation on good cause, then the spectre of prosecution remains a deterrent.

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42 Record: Competition Appeal Court Judgment Vol. 2, Item No.13, p. 223, para 39 citing *Mohlomi v Minister of Defence* 1997 SA 124 (CC) at para 11

43 Section 59(3)(g) of the Act

A SINGLE INITIATION DATE SHOULD APPLY TO THE PROHIBITED PRACTICE

78 The first initiation statement dated 03 November 2010 alleged that various firms in the furniture removal industry had contravened section 4(1)(b)(i) (ii) and (iii) of the Competition Act in that they:[44]

> *". . . colluded to fix the price at which they render their services, divided markets and/or alternatively engaged in collusive tendering in respect of tenders issued by the State and private enterprises".*

79 Pickfords was not listed among the firms set out in the first initiation statement. However, language used in the first initiation statement contemplated the possibility of other firms being named.[45]

80 On 1 June 2011, the Commissioner citied additional furniture removal companies in a second complaint initiation form. Pickfords was named in this second initiation statement.[46] The Commission refers to both initiation statements in the complaint referral – and describes the second initiation statement as an amendment to the first initiation dated 3 November 2010.[47]

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44 Record: Complaint Referral 03 November 2010 Vol. 2, Annexure A, Item No. 7.1, p 129

45 Record: Complaint Referral 03 November 2010 Vol. 2, Annexure A, Item No. 7.1, p 129. The Commissioner sets out *'The main companies implicated in the alleged conduct include . . .'*

46 Record: Complaint Referral 03 November 2010 Vol. 2, Annexure A, Item No. 7.1, p 129

47 The Competition Commission makes the following allegations at paragraph 13 of its complaint referral:

81 Since section 67(1) makes the date of initiation the endpoint of the three year period following the date the prohibited practice ceased, the date of initiation is central to a valid complaint initiation under the old section 67(1).[48] The initiation date also remains central to a valid referral under the new provision. In the present matter seven months elapsed between the date of the first and second initiation statement. Depending on when the effect of the conduct ceased in respect of each count (which is a matter still to be pleaded per paragraphs 1 and 2 of the Tribunal's order) this gap in time may affect the validity of the initiation in respect of certain counts.

82 The CAC correctly held that the second initiation was merely an amendment of the first.[49]

"On 03 November 2010, the Commission initiated a complaint into the alleged collusive conduct in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act, in the market for the provision of furniture removal services. On 01 June 2011, the Commissioner amended its complaint initiation to include Pickfords under case number 2011June0068. The Commissioner initiated the complaint in terms of section 49B(1) of the Act". See Record: Complaint Referral 03 November 2010 Vol. 2, Annexure A, Item No. 7.1, p 129. Record: Applicant's Founding Affidavit, Vol 1, Item No. 3, p 11, pp 13

48 The Tribunal explained the function of section 67(1) of the Competition Act at paragraphs 22 and 23 of its decision. See Record Reasons for Decision of the Competition Tribunal Vol. 2, Item No. 10, p. 181, para 22 – 24:

> *"What the operation of section 67(1) does is to make the date of the initiation the endpoint of the three year period referred to. This means that if a complaint is initiated on 03 November 2010, any conduct that has ended more than three years prior to that date would be subject to the limitation or action. Up until now this has been understood in the case law as a prescription provision despite the fact that the section itself does not expressly use this term.*
>
> *Since a number of counts would be within time if 03 November 2010 is the endpoint but of time if 01 June 2011 is the endpoint, we can now understand why the legal effect of the two initiation matters".*

49 Record: Competition Appeal Court Judgment Vol. 2, Item No. 13, p 219 – 220bru, paras 25 – 29

82.1 The SCA in *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* SCA states that the Commission is entitled to subsequently use further information obtained in an investigation to amend a complaint or the initiation of a complaint.[50]

82.2 In *Power Construction (Pty) Ltd and The Competition Commission* the CAC found that a complaint may be subsequently amended to include parties that were not originally named in the initiation.[51]

83 Pickfords' contention that *Yara* established that a new citation implies a new initiation is therefore at odds with the earlier SCA judgment in *Woodlands*[52] and the later CAC judgment[53] of *Power Construction*.[54]

84 The CAC found that the 1 June 2011 initiation was an amendment of the 3 November 2010 initiation[55], but held that the date of the amendment is the applicable date for Pickfords as it was the first time Pickfords was mentioned in an initiation.[56] We submit the Court erred in this regard for the reasons which follow.

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50 *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA); [2011] 3 All SA 192 SCA para 36

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

52 *Woodlands* paras 35 – 36

53 *Power Construction* paras 33 and 40

54 Record: Opposing Affidavit Vol 3, Item No. 16, p 298, para 78

55 Record: Competition Appeal Court Judgment Vol. 2, Item No. 13, p 219 - 220, paras 25 – 29

56 Record: Competition Appeal Court Judgment Vol. 2, Item No. 13, p 221, paras 33

The earlier initiation date should apply

85 The CAC held that the complaint initiation must be taken at face value and the failure to cite Pickfords in the earlier initiation meant that the date of initiation could only be that of second complaint initiation as before that the alleged prohibited practice did not involve it.[57]

86 We respectfully submit that the CAC's reasoning misinterprets the wording and requirement of section 67(1), which does not require the Commission or a complainant to initiate against a specified firm.

87 Section 67(1) only refers to initiating in respect of a *prohibited practice*. Similarly, section 49B(1) refers only to an initiation of "a complaint against an allege *prohibited practice*" and not a firm. As does sections 49B(2)(a) and (b), which apply to members of the public's ability to supply information or submit complaints concerning "an alleged *prohibited practice*".

88 The first reference to naming a firm appears in the CC1 form as a schedule to the Competition Commission's Rules.[58] This cannot affect the meaning of the Act. In addition, the Commission is not required to complete or comply with a CC1 complaint form in order to validly initiate. While the Commissioner may choose to use a CC1 form for convenience it does not elevate those check boxes into

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57 Record: Competition Appeal Court Judgment Vol. 2, Item No. 13, p 221, para 33

58 See Record: Competition Appeal Court Judgment Vol. 2, Item No. 13, p 217, para 19

requirements for a competent initiation into a prohibited practice. As was held in *Power Construction,* the Commission can initiate in any manner, even by tacit initiation.[59] It therefore not a requirement for the initiation to contemplate every party that may eventually be included in an amending initiation. The initiation must identify the prohibited practice.

89 There is no merit to Pickfords' contention that such an application of the Competition Act would be *"purposeless or procedurally unfair"*.[60] It would in fact be the fairest application of the provision and one that best accords with the purpose of the Act. We therefore submit that this Court should find that the date of initiation in respect of the prohibited practice to be 3 November 2010 for both the original and amending initiation.

RELIEF SOUGHT

90 The Commission seeks the following relief.

90.1 Leave to appeal be granted;

90.2 The appeal be upheld;

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59 *Power Construction (Pty) Ltd and The Competition Commission* 145/CAC/SEP16 at para 40

60 Record: Opposing Affidavit Vol 3, Item No. 16, p 298, para 77

90.3 The decision of the CAC dismissing the Commission's purposive interpretation is of section 67(1) be set aside and replaced with a declaration that section 67(1) includes a knowledge requirement;

90.4 Alternatively, the decision of the CAC which found that there was no 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;

90.5 The CAC's order be replaced with the following:

90.5.1 The Commission's purposive interpretation of section 67(1), requiring a knowledge requirement, is upheld;

90.5.2 Alternatively, the Tribunal and CAC have the power under the Competition Act to condone non-compliance with the time period set out in section 67(1) on good cause shown.

90.5.3 The relevant initiation date for both the original and the amending initiation is 03 November 2010.

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

CONCLUSION

92 We submit that it is possible to interpret s 67(1) in a manner that accords with the right to access 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 Commission's interpretation *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.

93 For this reason, we submit that this Court should either interpret section 67(1) to provide for a knowledge requirement before the time bar begins to run or alternatively interpret section 67(1) as a procedural bar to referral. In the event that it is held to be procedural bar, the Tribunal and the CAC must have the power to condone non-compliance on good cause shown.

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6 January 2019