

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

COMMISSION'S PRACTICE NOTE

HEARING DATE

1 Thursday, 27 February 2020

NATURE OF THE APPLICATION

2 This matter concerns the ability of the Competition Commission ("**the Commission**") to initiate against, and ultimately prosecute, conduct that has ceased to have effect more than three years prior. Section 67(1) of the

Competition Act 89 of 1998 (“**the Competition Act**”) is currently applied as a complete bar to such prosecution before the Tribunal even in circumstances where the Commission could not reasonably have had any knowledge of the prohibited practice and parties involved.

- 3 An ancillary issue in this matter is the initiation date to be applied to an amended initiation for the purposes of section 67(1).
- 4 The Commission has referred complaints concerning the collusive practice of cover pricing in respect of tenders issued by the State and private enterprises amongst certain furniture removal firms. The respondent in this appeal, Pickfords Removals SA (Pty) Ltd (“**Pickfords**”) is a furniture removal firm alleged to have taken part in multiple contraventions in this manner. Pickfords raised an exception to the referral on the basis that certain contraventions referred to the Tribunal could not validly have been initiated against it or be referred to the Tribunal for adjudication by virtue of section 67(1) of the Act, which limited the Commission’s ability to initiate a complaint in respect of a prohibited practice more than three years after the practice has ceased.
- 5 The Tribunal did not decide the exception but required both parties to plead the date at which the conduct ceased in respect of various contraventions before it could make a determination.

- 6 However, when considering the exception, the Tribunal expressly rejected the Commission's interpretative argument that section 67(1) required knowledge on the part of the Commission before the three-year time period would begin to run, *alternatively* that the Tribunal had the power to condone an initiation that took place after the three year period had expired. It also rejected the Commission's argument that when considering multiple initiations into the same prohibited practice, the earliest initiation date should apply for the purpose of section 67(1). It was on these bases that the Commission appealed the Tribunal's decision to the Competition Appeal Court ("**CAC**").
- 7 The Commission seeks leave to appeal the order and judgment of the CAC on the following grounds: As Pickfords points out, this relief has been erroneously left out of the notice of motion. An amendment to this affect will be sought at the hearing of this application to the extent necessary.

ISSUES FOR DETERMINATION

- 8 This Court must determine the following issues:
- 8.1 Whether the CAC erred in characterising section 67(1) of the Competition Act as setting out a limitation or expiry period without the possibility of condonation; and whether it erred further in holding that the knowledge requirement in section 12 of the Prescription Act 68 of 1969 ("**the**

Prescription Act") cannot be read into section 67(1) of the Competition Act;

8.2 Whether the CAC ought to have recognised its and the Tribunal's power to condone non-compliance under the Competition Act on good cause shown; and

8.3 Whether a necessary corollary to the finding by the CAC that the initiation on 01 June 2011 was merely an amendment of the earlier initiation of 3 November 2010 is that the initiation date for the purposes of section 67(1) is the earlier initiation date, as that was the date upon which the investigation into the *prohibited practice* was initiated.

SUMMARY OF COMMISSION'S ARGUMENT

8.1 The CAC erred in characterising section 67(1) of the Competition Act as setting out a limitation or expiry period without the possibility of condonation. It erred further in holding that the knowledge requirement in section 12 of the Prescription Act cannot be read into section 67(1) of the Competition Act.

8.2 The CAC ought to have recognised its and the Tribunal's power to condone non-compliance under the Competition Act on good cause shown.

8.3 Finally, while the Commission supports the CAC's finding that the initiation on 1 June 2011 was merely an amendment of the earlier initiation on 3

November 2010, it submits that a necessary corollary from that finding is that the initiation date for the purposes of section 67(1) is the earlier initiation date as that was the date on which the investigation into the *prohibited practice* was initiated. 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.

RELIEF SOUGHT

9 The Commission seeks the following relief.

9.1 Leave to appeal be granted;

9.2 The appeal be upheld;

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

9.4 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;

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

- 9.5.1 The Commission's purposive interpretation of section 67(1), requiring a knowledge requirement, is upheld;
- 9.5.2 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.
- 9.5.3 The relevant initiation date for both the original and the amending initiation is 03 November 2010.

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

PORTIONS OF THE RECORD THAT ARE NECESSARY FOR THE DETERMINATION OF THE MATTER

11 The full record must be read for the determination of this matter.

ESTIMATED DURATION OF ORAL ARGUMENT

12 3 Hours

TEMBEKA NGCUKAITOBU

ISABELLA KENTRIDGE

CINGASHE TABATA

Counsel for Pickfords

Chambers, Sandton

6 January 2020

LIST OF AUTHORITIES

Statutes

1. The Constitution of the Republic of South Africa, 1996
2. The Competition Act 89 of 1998
3. The Prescription Act 68 of 1969

Case Law

4. *African Banking Corporation v Owen* (1897) 4 Off Rep 253
5. *AGS Frasers International (Pty) Ltd v Competition Commission* [2016] ZACT 35 (7 April 2016)
6. *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC)
7. *Clover Industries Limited and Others v Competition Commission; Competition Commission v Clover Industries Limited and Others (103/CR/DEC06) [2008] ZACT 46*
8. *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010)
9. *Competition Commission v Yara (South Africa) (Pty) Ltd* 2013 (6) SA 404 (SCA)
10. *Competition Commission v Yara South Africa (Pty) Limited and Others (2012) 9 BCLR 923 (CC)*
11. *Curtis v Johannesburg Municipality* 1906 TS 308
12. *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (CCT236/16) [2018] ZACC 7 (20 March 2018)
13. *Fraser v Absa Bank Ltd (NDPP as Amicus Curiae)* 2007 (3) SA 484 (CC)
14. *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC)

15. *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)
16. *Kuhne & Nagel AG Zurich v A P A Distributors (Pty) Ltd* 1981 (3) SA 536 (W)
17. *Langerman v Van Iddekinge* 1916 TPD 123
18. *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC)
19. *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*
20. *Macleod v Kweyiya* 2013 (6) SA 1 (SCA)
21. *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC)
22. *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A)
23. *Power Construction (Pty) Ltd and The Competition Commission* 145/CAC/SEP16
24. *RAF v Mdeyide* 2011 (2) SA 26 (CC)
25. *S v Dlamini* 1999 (4) SA 623 (CC)
26. *S v Mhlungu* 1995 (3) SA 867 (CC)
27. *Society of Lloyds v Price; Society of Lloyd's v Lee'* (327/05) [2006] ZASCA 88; [2006] SCA 87 (RSA) (1 June 2006)
28. *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC)
29. *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA)
30. *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC)