REPUBLIC OF SOUTH AFRICA

IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC CASE NO: 167/CAC/Jul18

CT CASE NO: CR129SEP15

CC CASE NO.: 2010NOV5447 AND 2011JUN0069

In the appeal of:

THE COMPETITION COMMISSION OF SOUTH AFRICA	Appellant
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

Judgment

Van der Linde, AJA:

[1] This appeal primarily concerns the correct interpretation of s.67(1) of the Competition Act 89 of 1998 ("the Act") which provides as follows:[1]

"67. Limitations of bringing action

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

[2] The appellant, in this case the Commission, appeals a decision of the Competition Tribunal of 28 June 2018 in which it held that the date on which the appellant acquired knowledge of the date on which the prohibited practice ceased, was not the trigger event for the commencement of the running of the three year period referred to in s.67(1).

[3] The Tribunal also held that the initiation statement of 1 June 2011 (which the appellant calls the *"the second initiation"*) was not an amendment of the earlier initiation statement dated 3 November 2010 (which the appellant calls *"the first initiation"*), and that the second initiation was a self-standing initiation which founded the counts in the pending referral against Pickfords, the respondent in the present appeal. The appellant also appeals this finding.[2]

[4] The respondent was not included in the first initiation, but only in the second. The second initiation asserted that the respondent had been involved in 36 individual instances of collusive tendering involving the provision of "cover quotes" to customers in respect of tenders for furniture removals offending s.4(1)(b)(i), (ii) and (iii) of the Act. In 20 of these 36 instances, the alleged offending conduct had ceased more than three years before 1 June 2011.

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[1] The Competition Amendment Act 18 of 2018 has amended this section as follows:
*"37. Section 67 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: '(1) 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.' "*Act 18 of 2018 was first published in Government Gazette No.42231 as a law on 14 February 2019, and so that was the day on which it took effect; compare s.13(1) of the Interpretation Act 33 of 1957. It was not submitted that this amendment has any effect on the outcome of this appeal, and I do not believe it has.

[2] Pursuant to its findings, the Tribunal directed (record p21) both parties reciprocally to provide further particulars so as to enable the exception application to be finalised. These particulars include the respondent's answering affidavit, a pleading usually irrelevant in exception proceedings proper.

[5] The appellant referred the second initiation to the Tribunal on 11 September 2015, asserting a contravention of only s.4(1)(b)(iii) of the Act. The Tribunal held, upon preliminary objection raised by the respondent, that these 20 alleged contraventions had been time-barred by virtue of s.67(1).

[6] The appellant submits that s. 67(1) means that the three year time-bar runs only from the date that the Commissioner or complainant acquired knowledge of the prohibited practice. Alternatively, it submits that the Tribunal has a discretion to exercise its powers under the Act to condone non-compliance with the three-year time period for a valid initiation as set out under s.67(1). During oral argument submissions took a different slant with the alternative argument taking centre focus, with appellant's counsel seeking to persuade the court that the provision should be interpreted to be procedural than substantive in nature, whilst the knowledge issue was no longer argued with as much force.

[7] The appellant submits also that the second initiation was a mere amendment of the first, and so the three year period, even if it had begun running already when the prohibited practice ceased – meaning before the appellant had acquired knowledge of its cessation, had not yet expired by the time of the (relevant) first initiation.

[8] The respondent's over-arching submission is that the language of section 67(1) is incapable of sustaining the interpretation advanced by the appellant. The provision contains no language which could, on the argument, conceivably refer to knowledge on the part of the Commissioner, and the knowledge requirement is at odds with the measure which is prescribed, namely the cessation date.

[9] The respondent contends that the first issue is whether the complaint against it was initiated on 3 November 2010 (which it calls *"the 2010 initiation"*) or on 1 June 2011 (*"the 2011 initiation"*). It calls this issue *"the initiation issue"*, and contends here that the Tribunal correctly held that the 2011 initiation was the relevant initiation, since it described the complaint differently from the 2010 initiation, and for the first time included Pickfords. And

the respondent contends that, even if the 2011 initiation merely amended the 2010 initiation, then for the purposes of applying s.67(1) of the Act, the effective date for the initiation of the complaint against the respondent was the date of the 2011 initiation.

[10] The parties both argued that there is a third issue, that of whether the Tribunal has the power to condone the appellant's failure to initiate a complaint within three years after it has ceased. This point became an issue because of the appellant's instance that s.67(1), properly construed, contained a mere procedural time-bar, non-compliance with which was therefore capable of being condoned.

[11] It seems then that the appropriate sequence in which to address these issues is to begin with the appropriate date of initiation against the respondent, then prescription and the knowledge point, and finally the condonation point.

The date of initiation

[12] It is helpful to commence with some general observations concerning the statutory background. Under s.49B(1) of the Act the Commissioner may *"initiate"* a complaint against an alleged prohibited practice. The word *"initiate"* is not defined, and so bears its ordinary meaning of causing *"(a process or action) to begin"*.[3] In the context of the Act, it impels an investigation into action, because under s.49B(3) the Commissioner *"must"*, upon *initiating* a complaint (or *receiving* a complaint), *" ... direct an inspector to investigate the compliant as quickly as practicable."* Such an inspector is an appointment under s.24 of the Act, and such an investigation implies powers of search and seizure under chapter 5 part B of the Act.[4]

[13] Chapter 2 of the Act deals with *"prohibited practices"*. Two classes of practices are proscribed: restrictive horizontal practices (s.4) and restrictive vertical practices (s.5). In both instances the proscribed practice is an endeavour in which a *"firm"* or *"party"* (these

[3] The Concise Oxford Dictionary, Tenth Edition, revised.
[4] See generally, Woodlands Dairy (Pty) Ltd and Another v Competition Commission (2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA)) [2010] ZASCA 104; 105/2010 (13 September 2010) at [13] ff.

concepts are used interchangeably) is engaged. It would follow that when a complaint is initiated against a prohibited practice, the Commissioner must have in mind at least some of the firms or parties that are potentially participants in that prohibited practice.

[14]The reference to *"practices"* has relevance in this appeal. The concept (or word) is not defined in the Act, but its ordinary meaning includes *"the customary or expected procedure or way of doing something"*.[5] This notion, of a degree of ongoing conduct, is evident in the description of a restrictive horizontal practice: either an agreement (singular) or a decision (singular) or a concerted practice, which either has a particular *"effect"*, or involves certain *"practices"*. The notion of a *"concerted practice"* is defined: it means *"co-operative"* or *"co-ordinated conduct"* that has particular features.

[15]The point is that it would in my view be inappropriate, conceptually, to break down a practice, or ongoing conduct, into its constituent single acts, and then to describe each of those individual instances as a self-standing prohibited practice, be it to determine whether a complaint initiation is a fresh initiation or merely an amendment of an earlier one, or be it to determine whether a prohibited practice has ceased. As we shall see below the parties and the Tribunal treat the different agreements involved in this case as each constituting a separate, self-standing alleged prohibited horizontal practice.

[16]This is not to say that the Commissioner may not, in the course of investigations, come across more than one practice – say groups of practices – that all contravene the same prohibition. After all, both s.4 and s.5 expressly envisage an activity which groups together more than one firm in a single, illegal bond. But there may – as a fact - be a multitude of such groups in a particular market.

[17]In this case the Commissioner expressly spelt out in the referral to the Tribunal what his case against the respondent is. His case is that the respondent *"entered into discrete bilateral collusive agreements with each of the other (three) respondents."* In all, 37 separate

[5] The Concise Oxford Dictionary, Tenth Edition, Revised.

agreements are alleged to have been entered into, one each with Cape Express (Cape Express Removals (Pty) Ltd) and Sifikle (Sifikile Transport CC), and 35 with JH Retief (JH Retief Transport CC), the three other respondents.

[18]I revert below, in the context of discussing the cessation of a prohibited practice for the purposes of s.67(1), to the respondent's submission that some of these individual "counts" had ceased more than three years before the Commissioner initiated a complaint against them. For now the examination does not go that far; it is not concerned with the more substantive question whether any practice had ceased three years before initiation, but with the earlier question of whether the second initiation is an amendment of the first.

[19]The Commissioner's first complaint initiation is dated 3 November 2010. The prescribed covering form provides three blocks that are required to be completed: respectively the name of the *"person submitting the complaint"*, the name of the *"person whose conduct is the subject of the complaint"*, and a *"concise statement of the conduct that is the subject of the complaint."* The Commissioner is the person entered in the first block, the eight firms are listed in the second block (the respondent is not one of these), and the third block contains this description:

"The respondents, who are all in the business of furniture removal, are alleged to have contravened section 4(1)(b)(i), (ii) and (iii) if (sic) of the Competition Act no 89 of 1998 as amended in that they have 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."

[20]This concise statement of the offensive conduct in effect does no more than identify the statutory provisions potentially engaged and the business in which the conduct has occurred.

Annexed to the covering form is an *"Initiation Statement"*[6] which provides greater detail of the offensive conduct. That statement asserts that *"various furniture removal companies"* have engaged in the conduct; that *"the main companies implicated in the alleged conduct include"* the eight identified companies; that the collusion *"is still ongoing"*; and it concludes:

"In the light of the aforegoing and in terms of section 49B(1) of the Act, I initiate a complaint in respect of alleged contraventions of section 4(1)(b)(i), (ii) and/or (iii) of the Act by the abovementioned firms in the furniture removal market."

[21]Had the matter ended there, there would not have been any doubt about the non-inclusion of the respondent. The Initiation Statement does suggest that more companies are involved, since the named eight are the *"main companies"* involved. But it does not suggest that the others, the less significant ones, are unknown or unknowable. And it would have been surprising had these others been unknown or unknowable: how conceivably is one aware that other companies are involved in price fixing, market division or collusive tendering without being able to identify the participant?

[22]But the matter did not end there. The complaint initiation dated 1 June 2011 next came. It again lists the Commissioner as the person submitting the complaint in the first block. The third block, the concise statement of the offensive conduct, is to all intents and purposes the same as the third block in the earlier complaint initiation.

[23]But the second block is different, notably in that it refers the reader to the Initiation Statement *"for a complete list of the Respondents."* This time the respondent is expressly listed, together with forty-six others, in all nearly six times as many as in the first complaint initiation. None of the eight respondents mentioned in the first initiation is repeated. The same sections of the Act are alleged to be implicated.

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[6] Record, p164.

[24]The Initiation Statement commences by referring to the first complaint initiation by reference to the respondents that were there targeted. It then continues:

"Following the aforesaid initiation, further information has come to light indicating that the following companies have also been involved in price fixing, market allocation and/or collusive tendering in respect of the provision of furniture removal services to the State departments, private enterprises and individuals in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act, namely ...", and then follow the forty-seven names, including that of the respondent.

[25]It is not disputed that the Commissioner has the power to amend a complaint initiation.[7] Has the Commissioner by the second complaint initiation commenced 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.

[26]First, the offensive conduct is alleged to have occurred in a market that overlaps: that for furniture removal services to various government departments and large corporates in the first complaint initiation, and that for furniture removal services to State departments, various private enterprises and individuals in the second complaint initiation. It does appear that the market has become extended by the addition of individuals, but that would be an expected consequence following the accumulation of more facts as the investigation continued; after all, the first complaint initiation did say that the collusion was still ongoing.

[27]Second, the second complaint initiation expressly said that it was an extension of the first: it began by recording the historical fact of the first complaint initiation; then went on to say that *"further information"* has come to light *"following the aforesaid initiation"*; and

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[7] Compare Woodlands Dairy, op cit; Power Construction (Pty) Ltd v The Competition Commission, 145/CAC/SEP16.

concluded by saying the upshot of the further information was that *"... the following companies have also been involved ..."*.

[28]Third, the second complaint initiation retains as firms targeted by the complaint the first eight firms; that much appears from the introductory reference back to them as being the target of the first complaint initiation, linked with the listed identification of the forty-seven companies that have also been involved, upon the receipt of the further information.

[29]This conclusion is at odds with the conclusion to which the Tribunal came.[8] I respectfully disagree with its conclusion that the 2011 initiation was not an amendment of the 2010 initiation. The Tribunal reasoned that the later initiation did not identify the offensive conduct as a single, over-arching conspiracy that was still ongoing. It reasoned that the second complaint initiation is made up of discrete conspiracies, none of which are ongoing.

[30]Leaving aside formalistic points, such as that the conspiracy may simply have ceased by the time the second complaint initiation came along, conduct prohibited under s.4 and s.5 of the Act includes an *"arrangement or understanding"*, notions that imply states of mind of individuals that are easy to obscure and difficult to prove. Gathering facts that sustain such a case, will also be trying. In these circumstances it would not be surprising to find that a top down investigation uncovers greater participation by a larger number of participants than might initially have been envisaged.

[31]And this fact leads to a prior consideration. When considering whether a complaint initiation is merely amending an earlier complaint initiation, or whether it is a fresh initiation unrelated to the earlier one, it seems to me to be inappropriate to consider material that came into existence subsequent to the complaint initiation, such as the complaint referral. By then substantially more information would have become available than would have been

[8] The question of whether the second initiation was an amendment of the first is of course, as appears from this judgment, different to the question of when the complaint was initiated against respondent.

available when the complaint was initiated, requiring only a reasonable suspicion at that stage:

"[13] A complaint has to be 'initiated'. The commissioner has exclusive jurisdiction to initiate a complaint under s 49B(1). The question then arises whether there are any jurisdictional requirements for the initiation of a complaint by the commissioner. I would have thought, as a matter of principle, that the commissioner must at the very least have been in possession of information 'concerning an alleged practice' which, objectively speaking, could give rise to a reasonable suspicion of the existence of a prohibited practice. Without such information there could not be a rational exercise of the power. This is consonant with the provisions of s 49B(2)(a) which permit anyone to provide the commission with information concerning a prohibited practice without submitting a formal complaint."[9] (Emphasis added)

[32]The next question is whether this conclusion implies that, as far as the respondent was concerned, the complaint against it was already initiated on the date of the first complaint initiation (3 November 2010) when it was not yet mentioned as a respondent, or whether the complaint against it was only initiated on the date of the second complaint initiation (1 June 2011), in which it was first mentioned as a respondent.

[33]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 a prohibited practice until the second complaint initiation had occurred. This proposition 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 had, the Commissioner was free to have mentioned the respondent by name when first it initiated the complaint, but it did not.

Prescription, expiry periods, and knowledge

[9] Woodlands Diary, op cit.

[34] There are a number of statutory provisions that constrain the institution of legal proceedings by one party against another. The cases have, in analysing these, differentiated between a limitation or expiry period on the one hand and a prescription period on the other.[10] Instances of the former class, a limitation or expiry period, are considered irreconcilable with the provisions of chapter 3 of the Prescription Act 68 of 1969 ("the Prescription Act"), dealing with instances of the latter class.[11]

[35]Chapter 3 of the Prescription Act contains s.12, which restrains the commencement of the running of a prescriptive period until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arise, unless the creditor was able by the exercise of reasonable care to have acquired this knowledge at an earlier date. A provision containing a limitation or expiry period may – and often is – ameliorated by some other provision expressly conferring a power of condonation to assuage the potentially harsh effect of the application of the limitation or expiry provision.

[36]Whether a statutory provision falls into the one or the other class depends on a proper interpretation of the relevant statutory provision, and so it is necessary to consider s.67(1) from that perspective. In doing so, the text, context and purpose of the provision needs to be considered.

[37]It seems to me that its text is to limit the considerable power conferred upon the Commissioner in terms of s.49B(1), a power which may only be exercised on having first acquired a reasonable suspicion of the existence of a prohibited practice.[12] That is a comparatively low threshold, certainly substantially lower that the requirement laid down in

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[10] Compare Premier of the Western Cape Provincial Government NO v Lakay (184/11) [2011] ZASCA 224; 2012 (2) SA 1 (SCA); [2012] 1 All SA 465 (SCA) (30 November 2011) at [7] to [10]; Commissioner for Customs & Excise v Standard General Insurance Company Ltd. (507/98) [2000] ZASCA 55; 2001 (1) SA 978 (SCA) (29 September 2000) at [10] ff; Labuschagne v Labuschagne; Labuschagne v Minister van Justisie, 1967(2) SA 575 (AD) at p584G ff; LAWSA, second edition, vol 21, par 158.

[11] Labuschagne op cit; LAWSA op cit.

[12] Woodlands, op cit [20].

s.12 of the Prescription Act, of knowledge of the identity of the debtor and the facts from which the debt arose.

[38]The context of s.67(1) is that once the s.49B(1) power is exercised, the statutory obligation under s.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.

[39]The over-arching 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.[13] 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.[14]

[40]I therefore conclude that s.67(1) is a limitation or expiry period and that a knowledge requirement such as is evident in s.12 of the Prescription Act cannot be read into it. This conclusion also implies that there is not scope for condonation by the Tribunal or this court, as there is no power. This is expanded upon below. Does that mean that the appeal must be dismissed?

[41]To answer that question it is appropriate now to revert to the discussion above concerning prohibited practices and their ongoing nature. In considering whether the respondent's exception application should be upheld, the Tribunal was now free to weigh the material contained in the complaint referral; after all, that is the object of the respondent's objection. Accepting in favour of the respondent that a prohibited practice ceases when the last

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[13] Cf. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), para 11

[14] Cool Ideas 1186 CC v Hubbard and Another, 2014 (4) SA 474 (CC) at [28]. I suggest too that the respondent's reliance in this regard on Marc J Gabelli and Bruce Alpert v Securities and Exchange Commission 568 U.S. 1046 (2013) is well-founded.

payment is made by a customer who was subjected to a prohibited practice, the question is whether the respondent has shown that on the Commissioner's case the prohibited practice alleged against the respondent had ceased more than three years before the second complaint referral.

[42]As indicated, the Commissioner's allegation against the respondent is that it had entered into *"discrete bilateral collusive agreements with each of the other respondents"* in contravention of the prohibition against the restrictive horizontal practice of *"collusive tendering"* in contravention of s.4(1)(b)(iii) of the Act. These agreements, as is evident from the various "parts" in which they are cast, span the period from 2007 to 2010 in the case of JH Retief, 2011 in the case of Sifikile, and 2008 in the case of Cape Express.

[43]The point is, in the case of JH Retief, the fact that no less than 35 agreements are alleged to have been concluded suggests that these were all simply examples of the execution by the respondent and JH Retief of one, single, concerted practice between them during the years in question; and that 35 separate, distinct agreements, each one completely unrelated to the others, smacks of improbability. If that were so, then that one single concerted practice would only cease for the purposes of s.67(1) of the Act when the last payment was made by a victim customer. On the facts of this case, this implies that none of the earlier mere individual instances of execution of the one single concerted practice is capable of "prescribing".[15]

[44]This line of reasoning brings into play the correct approach to be adopted in this "exception application"; is it to be dealt with as an exception proper, in which the impugned pleading is taken at face value, read benevolently, and then assessed for excipiability (from an expiry/limitation point of view)? It seems that was the approach both of the parties and of the Tribunal, and so it is appropriate that we too adopt it here, on the basis that that was the agreed process.

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[15] I leave aside, in using this language, the fact that I have concluded that prescription is inapplicable in this context, and that s.67(1) has instead a limitation or expiry period.

[45]On that basis one must then look again at the Commissioner's referral to assess what the case is in its own terms. When that is done, then one must eschew the notion of one single, over-arching collusive practice. Then it seems reasonably uncontested that the case is that of 35 individual, discrete, agreements, just as the Tribunal has – with respect – assessed it. Then each of those agreements is an alleged prohibited horizontal practice for purposes of s.4(1)(b)(ii); and then some of those agreements are in fact capable of being hit by the limitation/expiry period laid down by s.67(1), leaving scope indeed for the respondent's argument that some of these 35 individual practices have ceased more than three years before the complaint referral in respect of them had occurred.

Condonation

[46]Is there any scope for the condonation of the failure of the Commissioner to have initiated complaints within three years of the prohibited practice having ceased? There is no express power, and so it would have to be implied. A moment's reflection should dispel such a notion. In s.67(1) Parliament has provided that State power may not be invoked against its subjects unless it is done within three years of the prohibited practice ceasing. Why should the provision be interpreted so as to grant a court the implied power to extend that period?

[47]Condonation provisions often appear in legislation containing expiry periods within which the subject must take steps to enforce her rights.[16] The power in those cases is not implied, and the condonation provisions are often the subject-matter of close judicial analysis.

[48]More importantly, in the present matter the language of s.67(1) is cast in the form of a prohibition, and it does not leave scope for the implication contended for. The plain language certainly 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 the subject.

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[16] See The Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, and the discussion in the LexisNexis electronic publication, Prescription in South African Law, by Johan Saner at chapter 5.3 at footnote 78 ff.

Conclusion

[49]The Tribunal, following on the Commissioner's case as pleaded, made an order directing the parties to provide certain information so as to make clear precisely when the last payments were made in respect of the separate impugned practices, and there does not appear to be a basis to interfere with it.

Order

[50]In the result I make the following order:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

WHG van der Linde

Acting Judge of Appeal

I agree.

NP Boqwana

Judge of Appeal

I agree.

F Kathree-Setiloane

Acting Judge of Appeal

Date argued: 13 December 2018

Date judgment: 3 April 2019

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