



CONSTITUTIONAL COURT OF SOUTH AFRICA

Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited

CCT 123/19

Date of hearing: 27 February 2020

Date of judgment: 24 June 2020

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 24 June 2020 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the whole judgment and order of the Competition Appeal Court dismissing an appeal against a decision of the Competition Tribunal (the Tribunal). The applicant is the Competition Commission of South Africa (the Commission). The respondent is Pickfords Removals SA (Pty) Limited (Pickfords).

In this case, various furniture removal companies were accused of tendering collusively by providing “cover pricing” to customers in respect of tenders for furniture removal services, in contravention of sections 4(1)(b)(i), (ii) and (iii) of the Competition Act 89 of 1998 (Competition Act). The Commission had initiated two complaints – the first one on 3 November 2010 (the 2010 initiation) and the second one on 1 June 2011 (the 2011 initiation). Pickfords was not identified in the 2010 initiation, but was only identified in the 2011 initiation, wherein it was accused of engaging in 37 separate instances of prohibited practices, these being thereafter referred to the Tribunal. Pickfords contended that fourteen of these alleged incidents occurred more than three years prior to the 2011 initiation, and that six were insufficiently pleaded. To this end, Pickfords relied on section 67(1) of the Competition Act, arguing that the fourteen late instances were time-barred. As a counter argument, the Commission contended that the three-year period only started to run once the Commission acquired knowledge of the prohibited practice in line with the Prescription Act 68 of 1969 (Prescription Act). The Commission further argued that it would be incorrect to apply the 2011 initiation date for section 67’s time-barring purposes, as it was a mere amendment (i.e. a continuation) of the 2010 initiation.

The Tribunal held that section 67(1) of the Competition Act marks prescription from the end of the consequences of the event, rather than from the date of occurrence. It found that the arguments raised by the Commission about imposing the knowledge requirement from the Prescription Act were misplaced as there are marked differences between the two Acts. Accordingly, and with reference to the principles of legal interpretation and fairness, the Tribunal concluded that the Commission's interpretation lacked the necessary precision and, if adopted, would interfere with the Legislature's mandate, by imposing a limitation on actions and consequences of the investigative process. On the condonation argument, the Tribunal held that it has no discretion to invoke the provisions of section 58(1)(c)(iii) of the Competition Act to condone non-compliance with the time period in section 67(1). Furthermore, the Tribunal held that the 2011 initiation was not an amendment to the 2010 initiation, but was self-standing. As such, the Tribunal considered the 2011 initiation to be the correct trigger date for the purpose of section 67(1).

The Commission appealed this decision to the Competition Appeal Court. The Competition Appeal Court held that section 67(1) of the Competition Act is a limitation or expiry period, and that the knowledge requirement (similar to that found in the Prescription Act) cannot be read into this provision. To this end, the Competition Appeal Court found that the purpose of section 67(1) of the Competition Act is to bar, in the public interest, investigations into cartel behaviour that has ceased an appreciable time ago, and thus no longer endangers the public weal. Turning to the condonation argument, it held that the discretion conferred to the Tribunal in section 58(1)(c)(ii) does not apply to section 67(1), due to the risk it brings by allowing the Commission to exercise its powers in a way which is initially unlawful, but then later capable of restoration by way of the Tribunal applying section 58(1)(c)(ii). Although the Competition Appeal Court rejected the finding of the Tribunal in relation to the trigger date, and found that the 2011 initiation did constitute an amendment of the 2010 initiation (and not a separate self-standing initiation), it still held that the section 67(1) time limit should be read from the date of the 2011 initiation, as Pickfords was only identified then. Aggrieved by the decision of the Competition Appeal Court, the Commission approached the Constitutional Court.

In a unanimous judgment penned by Majiedt J, the Constitutional Court held that the 2010 initiation is the correct trigger date and that the 2011 initiation was merely an amendment of the 2010 initiation. This Court held that, having proper regard to the provisions of the Competition Act and the language of all the initiation statements as well as the facts underlying this matter, it is evident that the date from which the three-year period for purposes of section 67(1) of the Competition Act must be calculated is the date of the first initiation, namely 3 November 2010. In respect to the interpretation of section 67(1) of the Competition Act, the Court held that interpreting section 67(1) of the Competition Act as imposing an absolute time-bar in the form of a prescription provision proper would clearly subvert access to the Tribunal, the Competition Appeal Court and other courts. Absent a knowledge requirement or the possibility of condonation, which would ameliorate the effect of section 67(1) of the Competition Act, the purpose of the Competition Act would be undermined. More importantly, a rigid, inflexible interpretation of section 67(1) drastically undermines the right of access to courts. There is a further reason why an interpretation of section 67(1) as a procedural time-bar is to be preferred over an inflexible substantive time-bar. A finding by the Tribunal or by the Competition Appeal Court that certain

conduct is a prohibited practice provides a gateway to a claimant who has suffered loss or damage as a result of that prohibited practice, to sue for damages. Moreover, the preferred interpretation is, as stated, not only more constitutionally compliant and purposive, but also meets the rationality test. The Court held that there is clearly a rational connection between interpreting the section as a procedural time-bar and its purpose. Thus, the Court held that this was a procedural time-bar.

On the question of whether the Tribunal has the power, under section 58(1)(c)(ii) of the Competition Act to condone non-compliance with section 67(1), the Court held that excluding the condonation of non-compliance of section 67(1) under these general condonation powers would incentivise secrecy and non-disclosure. According to Majiedt J, secretive cartel conduct will flourish if the Commission is precluded from accessing the Tribunal in justified cases, more than three years after cessation. Accordingly, the Court concluded that the Tribunal enjoyed the power, in terms of section 58(1)(c)(ii) of the Competition Act, to condone non-compliance with section 67(1). As a result, the appeal was upheld with costs.