Nie rapporteerbaar nie.

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 7585/2010

In the matter between:

5/7/2011

AGRI WIRE (PTY) LIMITED	First Applicant
AGRI WIRE UPINGTON (PTY) LIMITED	Second Applicant

and

THE COMMISSIONER OF THE COMPETITION COMMISSION	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
CONSOLIDATED WIRE INDUSTRIES (PTY) LIMITED	Third Respondent
CAPE GATE (PTY) LIMITED	Fourth Respondent
ALLENS MESHCO (PTY) LIMITED	Fifth Respondent
HENDOCK (PTY) LIMITED	Sixth Respondent
WIRE FORCE (PTY) LIMITED	Seventh Respondent
AGRI WIRE NORTH (PTY) LIMITED	Eighth Respondent
CAPRE WIRE (PTY) LIMITED	Ninth Respondent
FOREST WIRE (PTY) LIMITED	Tenth Respondent
INDEPENDENT GALVANISING (PTY) LIMITED	Eleventh Respondent
ASSOCIATED WIRE INDUSTRIES (PTY) LIMITED t/a MESHRITE	Twelfth Respondent
THE COMPETITION TRIBUNAL	Thirteenth Respondent

JUDGMENT

ZONDO, J

Introduction

[1] The applicants have brought this application in this Court for an order:

(a) reviewing and setting aside the decision of the first respondent granting the third respondent conditional immunity in terms of the first respondent's Corporate Leniency Policy.

(b) declaring that the evidence obtained by the first respondent from the third respondent pursuant to the first respondent's leniency policy was unlawfully obtained and is inadmissible.

(c) alternatively to the prayer in (b) above, (an order) declaring that the initiation and referral of the complaint in Tribunal case number 63/CR/Sep 09 are unlawful and fall to be set aside.

Obviously the applicants also seek an order of costs against those respondents who oppose this application. Before a consideration of the application, it is necessary to set out the background to the application.

Background

[2] The purpose of the Competition Act, 1998 (Act 88 of 1998) ("the Act") is the promotion and maintenance of competition in the country. Certain behaviour by business firms or enterprises undermines that purpose and cannot be allowed if that purpose is to be achieved. Conduct which undermines that purpose includes the types of conduct stipulated in sec 4(1) (b) (i) (ii) and (iii) of the Act. Sec 4(1) (b) of the Act falls under Chapter of 2 of the Act. Those types of conduct involve an agreement between or a concerted practice by, or a decision

by an association of firms that are parties to a horizontal relationship if such agreement or decision or practice involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii)dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.

Sec 4(1) (b) of the Act prohibits, among others, these types of conduct. (Sec 4(1) (b) (i) (ii) and (iii). There are other types of conduct that also undermine the promotion and maintenance of competition which are dealt with in the Act but they are not of any relevance to the present case.

[3] The Act has created certain institutions which play certain roles towards the attainment of the objects of the Act. These are the Competition Commission, the Competition Tribunal and the Competition Appeal Court each of which plays a critical role in the promotion and maintenance of competition in our country. The functions of the Commission include:

(a) the implementation of measures to increase transparency (sec 21(1)(a));

(b) the investigation and evaluation of alleged contraventions of chapter 2 of the Act (s21(1)(c));

(c) the granting or refusal of applications for exemptions in terms of chapter 2 (S21(1)(d);

(d) the negotiation and conclusion of consent orders in terms of sec 49D of the Act (s21(1)(f);

(e) the referral of matters to the Competition Tribunal as required by the Act (s21 (1) (g)).

[4] According to the Commissioner of the Competition Commission, it is very difficult to detect or prove conduct that is prohibited by sec 4(1)(b) (i), (ii) and (iii) of the Act. Obviously, this is partly because normally the parties to agreements and decisions such as are referred to in sec 4(1)(b) would be very determined to keep their agreements or decisions secret among themselves. The Commissioner says it was as a result of this difficulty that the Commission decided to adopt a policy which would encourage firms or business enterprises involved in such decisions or agreements to break ranks and report such prohibited conduct to the Commission and provide the Commission with evidence of such prohibited conduct so that the Commission could conduct its investigations and, in appropriate cases, refer complaints about such conduct to the Competition Tribunal. The policy that the Commission adopted in this regard is called the Corporate Leniency Policy ("CLP"). The CLP is contained in a document that was annexed to the first respondent's answering affidavit and had been published in the Government Gazette.

[5] In paragraph 2.5 of the CLP it is stated that the Competition Commission developed the CLP "to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution". It is also stated in the same paragraph that the Commission adopted the CLP as part of its endeavours to detect, stop and prevent cartel behaviour. It is indicated that the adoption of a policy such as the

CLP is in line with international practice for bodies performing the same functions as the Commission. In paragraph 2.6 of the CLP it is provided that the CLP sets out the benefits, procedures and requirements for co-operation with the Commission in exchange for immunity. It is further stated that the granting of immunity becomes an incentive for a firm that participates in a cartel activity to terminate its participation, and, inform the Commission accordingly.

[5] In paragraph 3.1 of the CLP it is provided that the corporate leniency policy "outlines a process through which the Commission will grant a self-confessing cartel member who is first to approach the Commission immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP. Paragraph 3.3 of the CLP explains what immunity means in this context. It reads:

> "Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed to (sic) that successful applicant."

Paragraph 4.2 explains the term "immunity" as used in the CLP as referring to: "Immunity from prosecution before the tribunal in relation to the alleged cartel which forms part of the application under the corporate leniency policy." The term "adjudication" as used in paragraph 3.3 is given the following meaning:

"A referral of a contravention of chapter 2 to the tribunal by the Commission with a view of (sic) getting a prescribed fine imposed to (sic) the wrongdoer. Prosecution has a similar import to adjudication herein."

This means that, when a referral of a complaint concerning the contravention of Chapter 2 is made to the Tribunal but is not made with a view to getting the Tribunal to impose a fine upon a party that is a respondent in the referral proceedings before the Tribunal, that does not amount to subjecting such party to adjudication.

[7] In paragraph 9.1.1.1 of the CLP it is provided that conditional immunity is granted to an applicant at the initial stage of the application so as to create a good atmosphere and trust between the applicant and the Commission pending the finalisation of the infringement proceedings. In the next sentence it is stated that this is done in writing between the applicant and the Commission signaling that immunity has been "provisionally granted". In paragraph 9.1.2 it is stated that conditional immunity precedes "total immunity or no immunity." It is also explained therein that the Commission "will give the applicant total immunity after it has completed its investigation and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Appeal Court, as the case may be, provided that the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings". Paragraph 9.1.13 provides that the Commission may revoke the conditional immunity at any stage prior to the granting of total immunity if the applicant for immunity does not co-operate or fails to fulfill any condition or

requirement stipulated in the CLP. It is provided in paragraph 9.1.2 of the CLP that once the Tribunal or the Appeal Court has reached a final decision on the alleged cartel, "total immunity is granted to a successful applicant who has fully met all the conditions and requirements under the CLP."

[9] Paragraph 10 of the CLP deals with the requirements and conditions for the granting of immunity under the CLP. The requirements or conditions are that:

(a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;

(b) the applicant must be the first to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view to institute proceedings in relation to such cartel activity;

(c) the applicant must offer full and expeditious co-operation to the Commission concerning the cartel activity continuously until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or Competition Appeal Court are completed;

(d) the applicant must immediately stop the cartel activity or act as directed by the Commission;

(e) the applicant must not alert other cartel members or any other third party that it has applied for immunity;

(f) the applicant must not destroy, falsify or conceal information or evidence and documents relevant to any cartel activity;

(g) the applicant must not make a misrepresentation concerning the material facts of a cartel activity or act dishonestly.

[9] The applicants, on the one hand, and, the third up to the twelfth respondents, on the other hand, are competitors in the manufacture and distribution of wire and wire-related products in South Africa and elsewhere. In July 2008 the third respondent applied to the Commission for conditional immunity under the CLP in exchange for evidence revealing that, together with the applicants and the fourth up to the twelfth respondents, it had been engaged in conduct prohibited by sec 4 (1)(b) (i), (ii) and (iii) of the Act.

[10] The Commission granted the third respondent conditional immunity. The Commission then initiated a complaint and embarked upon an investigation of alleged contraventions of sec 49(1)(b) of the Act. On the strength of the information and evidence provided by the third respondent the Commission formed the view that the applicants and the third upto the twelfth respondents had engaged in conduct prohibited by sec 4(1)(b)(i), (ii) and (iii) of the Act. The prohibited conduct alleged against the applicants and the third up to the twelfth respondents was said to involve price fixing, allocation of markets and collusive tendering. The Commission then referred a complaint to the Tribunal in which the present applicants and the third up to the twelfth respondents were cited as respondents. In the referral of the complaint to the Tribunal the present third respondent is cited as the twelfth respondent.

[11] In the referral of the complaint to the Tribunal the deponent to the applicants' founding affidavit stated that no relief was being sought against the present third

respondent as it had applied for and was granted conditional immunity by the Commission. It was stated that the present third respondent was cited purely for the interest it could have in the proceedings relating to the complaint in the Tribunal. In the referral of the complaint to the Tribunal the Commission sought relief in the following terms against the present applicants and the present fourth up to the twelfth respondents:

> "1. an order declaring that the first to eleventh respondents have contravened section 4(1)(b)(i), (ii) and (iii) of the Act as detailed in paragraphs 28 to 33 above;
>
> 2. an order directing the first to eleventh respondents to refrain from engaging in the aforesaid conduct in contravention of the Act;
>
> 3. an administrative penalty to be levied on each of the first to eleventh respondents of 10% of their annual turn over for the 2008 financial year;
>
> 4. such further and/or alternative relief as the Tribunal may consider appropriate."

[12] The applicants brought this application at a time when the Commission's referral of the complaint to the Tribunal against them and the third up to the twelfth respondents was still pending and was yet to be decided. Indeed, even at the time of the hearing of this application the referral was still pending. The Tribunal has probably not decided it yet and it awaits the outcome of this application.

[13] The first respondent says in his answering affidavit that the CLP is a policy adopted by the Commission to encourage cartel members to blow the whistle on cartel conduct. He says that effective prosecution of cartels would simply not be possible without the incentive created by the CLP.

[14] The first respondent points out that by granting an applicant for leniency conditional immunity the Commission conditionally undertakes not to seek relief against that applicant for leniency in the referral to the Tribunal. Such conditional immunity is conditional on the applicant for leniency co-operating with, and assisting, the Commission in the referral to the Tribunal. The first respondent says that the Commission considers it appropriate to forsake relief against one cartel member in exchange for uncovering and proceeding against the remainder of the cartel.

[15] It is pointed out in the first respondent's answering affidavit that, should a firm or company that has been granted conditional immunity not co-operate fully and not assist the Commission, the Commission can amend the relief it seeks so as to include relief against such party. The first respondent makes it clear in his answering affidavit that invariably the applicant for leniency or the party that has been granted conditional immunity is cited as a party in the referral to the Tribunal. He says that the Commission grants final immunity at the end of the referral proceedings in the Tribunal. He says that "the grant of final immunity is, in essence, the final decision by the Commission not to seek relief against the leniency applicant." (Par 39 of the first respondent's answering affidavit). In par

40 of his answering affidavit the first respondent states that by reason of the express and implied powers under the Act, the Commission has a discretion as to the conduct of its investigations and the referral and in respect of the relief it seeks before the Tribunal. He says that in accordance with such discretion, the Commission may inter alia seek relief against some of the participants in the prohibited conduct but elect not to seek relief against a leniency applicant that assists, and, co-operates with, the Commission.

[16] The first respondent submits that the third respondent's evidence was obtained pursuant to, and in accordance with, a lawful measure or policy adopted by the Commission. He submitted in par 52 of the answering affidavit that there was no basis for the contention that such evidence was obtained unlawfully. He pointed out, however, that even if the position was that such evidence was obtained unlawfully, this would not automatically mean that the evidence would be inadmissible. He says that in such a case the admissibility of the evidence would have to be decided by the Tribunal, taking into account all relevant factors, the nature of the proceedings, the nature of the evidence and the interests of justice.

[17] The first respondent contends in par 59.1 of his answering affidavit that the grant of conditional immunity is an interim decision as the Commission may yet determine at the end of the referral proceedings in the Tribunal that the information given by the third respondent was incomplete or untrue and decide not to grant the third respondent final immunity. In the light of this, contends the first respondent, it is inappropriate for the Court to intervene at this stage.

[18] In par 59.2 of his answering affidavit the first respondent states that the third respondent has furnished substantial evidence and assistance to the Commission and, as a result, a referral has been made to the Tribunal. He goes on in the next sentence and points out that the third respondent acted "on the basis of an undertaking by the Commission that it would not seek relief against [the third respondent] in any referral". He went on to say that it would be "extremely unfair and prejudicial to [the third respondent] if the grant of conditional immunity to it was set aside at this stage".

[19] The third respondent also delivered an answering affidavit in support of its opposition to the applicant's application. It contended that this Court has no jurisdiction to entertain this application and that this application should have been brought in the Tribunal. With reference to the applicant's prayer that the evidence obtained from the third respondent be declared inadmissible, the third respondent also contended that that is an issue that should be dealt with by the Tribunal before which the referral is pending. The third respondent contended that this Court has no jurisdiction to entertain that issue either.

[20] The third respondent's answering affidavit was deposed to by Mr Johannes Jacobus Botha, the third respondent's Chief Executive Officer. The third respondent pointed out that on 21 April 2008 and on 5 June 2008 the Commission initiated certain investigations in relation to certain steel mills, namely, ArcellorMittal South Africa ("AMSA"), Scaw South Africa (Pty) Ltd ("SCAW"), Cape Gate (Pty) Ltd ("Cape Gate"), Highveld Steel and Vanadium

Corporation Limited ("Highveld") and Cape Iron and Steel Works (Pty) Ltd ("CISCO"). Mr Botha says that as part of its investigations the Commission conducted dawn raids in the premises of certain businesses.

[21] Mr Botha went on to say in the third respondent's answering affidavit that on the 23rd June 2008 the Commission issued a press statement. In that statement it made, among others, the following points:

(a) on the 19th June 2008 it had raided the premises of CISCO and Highveld as part of its investigation.

(b) the investigation was into alleged price fixing and exclusive dealing in the steel industry.

(c) it initiated the investigations as a result of concerns raised by various stakeholders.

(d) preliminary research had shown that local customers paid prices charged at import parity pricing levels even though South Africa was not a net exporting country.

(e) it had also received a complaint from a member of the public that ArcellorMittal South Africa, Highveld Steel and Vanadium Corporation adjust their prices for flat and long steel products around the same time and with similar percentage increases.

[22] Botha points out that as a result of the Commission's investigation referred to in the Commission's press statement, SCAW, which Botha says has management control over the third respondent, initiated its own internal investigation into potentially anti-competitive conduct in its business operations. He says that

SCAW's investigations revealed some anti-competitive conduct. Thereafter, SCAW applied to the Commission for conditional immunity in terms of the CLP. The Commission granted SCAW conditional immunity and in due course referred a complaint about SCAW's anti-competitive conduct to the Tribunal for adjudication.

[23] Botha says that during SCAW's internal investigation, certain anti-competitive practices on the third respondent's part also came to light and, the third respondent also applied to the Commission for conditional immunity which was granted. The third respondent says that in its application for leniency it supplied the Commission with a significant body of evidence relating to its involvement in a variety of agreements and understandings with the applicants in this application as well as with the fourth to the twelfth respondents. The third respondent says that such agreements and understandings were in contravention of the provisions of sec 4 (1) (b) of the Act.

[24] Botha also points out that, although the third respondent was obliged in terms of the Commission's leniency policy to produce the evidence that it produced, even if the CLP had not been in operation, the third respondent would still have provided all that evidence to the Commission because it, like SCAW, had decided to co-operate fully with the Commission regarding the existence of anti-competitive conduct in which it had been involved. In this regard Botha points out that, given the Commission's wide ranging investigations into anti-competitive conduct in the South African steel industry that was already underway, it was evident to the third respondent that the anti-competitive conduct in which the third

respondent had taken part was going to come to light in due course in any event and the third respondent accordingly decided to bring all of the evidence that it had uncovered to the attention of the Commission.

[25] Botha says that the third respondent believed that its co-operative approach to the Commission would be in its best interests not only for the purpose of obtaining leniency from the Commission in terms of the CLP but also and in any event, for the purpose of concluding a favourable settlement agreement with the Commission if the Commission did not grant it leniency. Botha emphasised that irrespective of the existence of the Commission's CLP, the third respondent would still have provided the information that it provided to the Commission for potential settlement purposes.

[26] The fourth respondent, namely Cape Gate (Pty) Ltd, also delivered to the Tribunal and served on the other parties to the referral an answering affidavit in response to the referral. A copy of that answering affidavit was attached as annexure "ITB" to the third respondent's supplementary affidavit. The third respondent drew attention in its supplementary affidavit to the fact that in such answering affidavit the fourth respondent admitted the Commission's allegations that it, the first applicant herein and the fifth to the twelfth respondents, had engaged in conduct that is prohibited by the provisions of sec 4(1) (b) of the Act.

[27] The fourth respondent's answering affidavit in the referral proceedings was deposed to by Mr. Barend Nicolaas Coetzee. He is the Chief Operating Officer of

the fourth respondent. In par 4 of the fourth respondent's answering affidavit Coetzee says:

> "[The fourth respondent] admits that it engaged in certain conduct in contravention of section 4(1) (b) (i), 4(1) (b) (ii) of the Competition Act, No 89 of 1998 ("The Act") and tenders all reasonable co-operation to the competition authorities in these proceedings."

In par 5 of its answering affidavit the fourth respondent expresses its wish to enter into settlement negotiations with the Commission and to avoid having the matter reach the stage of the hearing of argument before the Tribunal. In par 6 the fourth respondent records that it is sincerely remorseful for having engaged in conduct that is prohibited by sec 4(1) (b) of the Act. In par 7 the fourth respondent undertakes to fully co-operate with the Commission with regard to the Commission's investigations and to provide the Commission "with all and any information that fourth respondent may be aware of in this regard". In par 6 the fourth respondent says that it does not resist the relief sought by the Commission against itself in prayers 1 and 2 but contends that the relief in prayer 3 for an administrative penalty of 10% of its turnover could not be appropriate.

[28] It is not necessary to go into any further details about the contents of the fourth respondent's answering affidavit in the referral proceedings before the Tribunal. It suffices to say that in the answering affidavit the fourth respondent admits its own participation in conduct prohibited by sec 4(1) (b) of the Act and implicates the applicants or at least the first applicant and the fifth to the twelfth respondents in the present proceedings.

The review application

[29] I have set out above the gist of the orders which the applicants seek in this matter. It is obvious that what the applicants want to achieve through this application is to avoid the adjudication by the Tribunal of the complaint referred to it by the Commission concerning the alleged participation of the applicants and the third to the twelfth respondents in conduct prohibited by sec 4(1)(b) of the Act. They seek to do so by having the grant of conditional immunity to the third respondent, the initiation of the complaint and its referral to the Tribunal reviewed and set aside and obtaining an order declaring that the evidence provided by the third respondent to the Commission pursuant to the latter's leniency policy is inadmissible and falls to be struck out.

[30] The first and third respondents oppose the application. The applicants' case is briefly that the Commission promised the third respondent through its corporate leniency policy that it would grant the third respondent immunity if the third respondent furnished it with information and evidence of conduct prohibited by sec 4(1) (b) of the Act on the part of the applicants and the third and further respondents and that it was as a result of such promise that the third respondent furnished the Commission with information and evidence about their alleged conduct in this regard. The applicants contend that the Commission has no authority in terms of the Act to grant such immunity to a participant in conduct prohibited by sec 4(1) (b) and, because it had no such authority, it also had no authority or right in terms of the Act to make such a promise to the third

respondent. The applicants contend that therefore the promise was unlawful and the grant of conditional immunity to the third respondent was also unlawful. The applicants also contended that in failing to seek relief against the third respondent in its referral of the complaint to the Tribunal while it sought relief against the applicants and the fourth up to the twelfth respondents, the Commission acted selectively and it has no authority in terms of the Act to "prosecute" some of the participants in prohibited conduct and not "prosecute" others. They contend that, since their "prosecution" is selective prosecution, which, they contend, the Commission has no authority to do, the initiation of the complaint and its referral to the Tribunal are unlawful and fall to be reviewed and set aside.

[31] The applicants also contended that because the Commission had no authority to grant the third respondent conditional immunity, the initiation and referral of the complaint to the Tribunal was unlawful because they occurred as a result of unlawful conduct on the part of the Commission in that it promised the third respondent something it had no authority to promise (i.e. conditional immunity) and granted the third respondent conditional immunity when it had no authority to do so under the Act. The applicants also seek to have an order made that the evidence obtained by the Commission from the third respondent was obtained unlawfully and is inadmissible because it was provided by the third respondent after being induced to do so by an unlawful promise by the Commission.

[32] The first point taken by both the first and the third respondents in support of their opposition to the applicants' application is that this court does not have jurisdiction to entertain this application and on that ground alone the application should be dismissed. Counsel for the first and third respondents relied upon the provisions of sec 62(1) read with those of sec 27(1)(c) of the Act in support of their contention that this Court has no jurisdiction to entertain this application. Section 62(1) of the Act reads as follows:

> "*62 Appellate jurisdiction*
>
> *(1) The Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of the following matters:*
>
> *(a) Interpretation and application of Chapters 2,3 and 5, other than –*
>
> (i) a question or matter referred to in subsection (2); or
>
> (ii) a review of a certificate issued by the Minister of Finance in terms of section 18(2); and
>
> *(b)* the functions referred to in sections 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2)"

The relevant provision is in (b).

[33] It will be observed from the provisions of sec 62(1) that the functions of the Tribunal in respect of which the Tribunal and the Competition Appeal Court have exclusive jurisdiction include the functions of the Tribunal set out in sec 27(1) of the Act. Sec 27(1) (c) and sec 27(1) (d) are relevant to the point under consideration. Sec 27(1) (c) and (d) read as follows:

> "*27. Functions of Competition Tribunal*

(1) The Competition Tribunal may-

(a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in this Act;

(b) adjudicate on any other matter that, may, in terms of this Act, be considered by it, and make any order provided for in this Act;

(c) hear appeals from or review any decision of the Competition Commission that may, in terms of this Act, be referred to it; and

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act."

[14] It is convenient to start with the applicants' prayer for an order declaring that the evidence obtained by the Commission from the third respondent is inadmissible. Counsel for the first respondent submitted that this court has no jurisdiction to make such an order and only the Tribunal has jurisdiction to make such an order. He went on to submit that, even if the Tribunal did not have exclusive jurisdiction in this regard, it is for the tribunal to make such an order if it is satisfied that such an order should be made because that ruling will be required in the course of the adjudication of a matter that is before the Tribunal. Counsel for the third respondent also made a submission to the effect that such a ruling should be left to the Tribunal to make. Counsel for the third respondent referred to the provisions of sec 55(3) (a) and (b). Sec 55(3) reads as follows:

"The tribunal may-

(a) accept as evidence any relevant oral testimony, document or other thing, whether or not-

(i) it is given or proven under oath or affirmation; or

(ii) would be admissible as evidence in court; but

(b) refuse to accept any oral testimony, document or other thing that is unduly repetitious."

[35] It was submitted by Counsel for the third respondent that it is clear from the provision of sec 55(3) that the threshold for the admission of evidence in proceedings before the Tribunal is lower than the threshold applicable in a court of law. It was submitted that the provision of sec 55(3)(a)(i) was a clear indication that the Legislature intended the Tribunal to be the arbiter of what evidence is admissible or inadmissible in proceedings before it. I agree that it is quite clear from the provision of sec 53(3) (a) (ii) that it is up to the Tribunal to decide the threshold for the admission of relevant evidence in proceedings before it and it is not for this court to determine such issue. For reasons that are probably connected with the nature of the Tribunal, its functions and the challenges it is likely to face in the performance if its functions to help achieve the objects of the Act, Parliament has decided that the threshold for the admission of evidence in proceedings before the Tribunal should be lower than that applicable in a court of law. It is within its power to make that choice. It is probably for a sound reason that the Legislature made this choice.

[36] Counsel for the first respondent, as I have said, also argued that the determination of whether evidence before the Tribunal is or is not admissible is a

function or matter for the Tribunal to decide. The submission was that the determination of the admissibility or otherwise of evidence presented in proceedings before any Court or Tribunal is a "ruling or order necessary or incidental to the performance" of the functions of the Tribunal within the meaning of that phrase in sec 27(1) (d) of the Act. In reply Counsel for the applicants did not persist in his contention that this Court should make an order declaring the evidence provided by the third respondent to the Commission inadmissible. In fact for all intents and purposes he conceded that this Court should leave that issue to be dealt with by the Tribunal. I am in agreement with the submissions made by Counsel for the first and third respondents that:

(a) the Tribunal has exclusive jurisdiction (to the exclusion of this court) to determine the admissibility of evidence in proceedings before that Tribunal; this much is clear from the provisions of sec 62(1) read with sec 27(1)(d) of the Act, and,

(b) even if the Tribunal did not have exclusive jurisdiction referred to in (a) above, the Tribunal, and not this Court, would be the right forum to decide the admissibility of evidence in a matter that is before it. In the circumstances the applicant's prayer for this Court to make an order declaring that the evidence in question is inadmissible cannot be granted and falls to be dismissed.

I now turn to the question of whether or not this Court has jurisdiction to entertain this application in so far as it relates to the prayer for the reviewing and setting aside of the first respondent's grant of conditional immunity to the third respondent, the initiation and referral of the complaint by the first respondent to the Tribunal.

Does this court have jurisdiction to review and set aside the Commission's grant of conditional immunity to the third respondent?

[37] Counsel for the first and third respondents contended that this court does not have the requisite jurisdiction to entertain this application and contended that the Tribunal has exclusive jurisdiction which it shares with the Competition Appeal Court to deal with this review application. In support of their contention Counsel for the first and third respondents referred to the provisions of sec 62(1) read with sec 27(1)(c) of the Act. I have quoted these two provisions earlier in this judgment and do not propose to repeat that exercise. It suffices for present purposes to say that sec 62(1) provides that the Tribunal and the Competition Appeal Court have exclusive jurisdiction in respect of the functions of the Tribunal set out in sec 27(1). One of the functions of the Tribunal set out in sec 27(1) is to be found in sec 27(1) (c). In so far as it is relevant to this matter, sec 27(1)(c) provides that the Tribunal "may . . .review any decision of the Competition Commission that may, in terms of this Act, be referred to it." In other words Counsel for the first and third respondents submit that this is an application in which this court is asked to review certain decisions of the Commission and yet in terms of sec 62(1) read with sec 27(1)(c) of the Act only the Tribunal and the Competition Appeal Court may review such decisions of the Commission.

[38] Counsel for the applicants' answer to the first and third respondents' reliance upon sec 62(1) and sec 27(1) (c) in support of their contention that this court

does not have jurisdiction to deal with this review was that the decisions of the Commission which fall within the exclusive review jurisdiction of the Tribunal and the Competition Appeal Court under sec 27(1) (c) are those that "may in terms of this Act, be referred to [the Tribunal]". He submitted that the Act does not have any provision in terms of which the Commission's decision to grant conditional immunity may be referred to the Tribunal. He advanced the same submission in respect of the Commission's decision to initiate a complaint and its decision to refer a complaint to the Tribunal. This submission by Counsel for the applicants was based upon the fact that sec 27(1) (c) refers to "any decision of the Competition Commission that may, in terms of this Act, be referred to it."

[39] Faced with this argument Counsel for the first and third respondents submitted that this argument by counsel for the applicants ignores the definition of the phrase "this Act" in sec 1 of the Act. In sec 1 the phrase "this Act" is defined as including "the regulations and schedules" to the Act. Indeed, the term "regulation" is defined as meaning a regulation made under the Act. Against the definition of the phrase "this Act", Counsel for the first and third respondents drew attention to Rule 42 of the Tribunal Rules promulgated under the Act by the Minister of Trade and Industries as regulations under the Act. They submitted that Rule 42 contemplated the review of any decision of the Commission as contemplated in sec 27(1)(c) of the Act. They also relied on the decision of the Competition Appeal Court in the matter of TWK Agriculture Limited v The Competition Commission (case no.: 67/CAC/Jan 07) in support of their submission in this regard. The question therefore is whether or not Rule 42

provides for the referral of any decision of the Commission to the Tribunal as is contemplated in sec 27(1)(c) of the Act.

[40] Rule 42 falls under Division E of the Tribunal Rules. The heading for Division E is: "Other Appeals, Reviews, Variations, or Enforcement Proceedings". Rule 42 reads as follows:

"*42. Initiating Other Proceedings*

(1) Any proceedings not otherwise provided for in these Rules may be initiated only by filing a Notice of Motion in Form CT6 and supporting affidavit setting out the facts on which the application is based.

(2) The applicant must serve a copy of the Notice of Motion and affidavit named in the Notice, within 5 days after filing it.

(3) A Notice of Motion in terms of this Rule must –

(a) indicate the basis of the application; or

(b) depending on the context –

(i) set out the Commission's decision that is being appealed or reviewed;

(ii) set out the decision of the Tribunal that the applicant seeks to have varied ore rescinded;

(iii) set out the Tribunal Rule or Commission Rule in respect of which the applicant seeks condonation;

(iv) allege conduct referred to in -

(aa) *section 59(1) (c) in respect of which the Commission seeks an administrative fine; or*

(bb) section 60(1) in respect of which the Commission seeks an order of divestiture;

(c) indicate the order sought;

(d) state the name and address of each person in respect of whom an order is sought."

[11] Rule 42 was intended to cater for any proceedings that were supposed to have been provided for in the Rules of the Tribunal but were not provided for anywhere from Rule 1 to Rule 41 and outside of Division E. That is why Rule 42(1) states:

> *"Any proceedings not otherwise provided for in these Rules may be initiated*
>
> *only by filing a Notice of Motion…."*

This means that in order to determine whether or not Rule 42 applies to a matter, one must ask whether or not it is a matter which "constitutes" proceedings not otherwise provided for in the Rules outside of Division E of the Tribunal Rules. If it does, then Rule 42 applies to it. If it does not, then Rule 42 is of no application to it.

[12] There is no Rule in the Tribunal Rules other than Rules 42 and 43 which deals with the initiation and processing of an application for the review of a decision of the Commission by the Tribunal. Rule 42 reveals in Rule 42(3) (b) (i) that the proceedings which are contemplated to be initiated under Rule 42 include proceedings in which a decision of the Commission is sought to be reviewed. In

my view this suggests that all applications that may be brought before the Tribunal for the review of any decision of the Commission are required to the brought in terms of Rule 42.

[43] Against the above background, it is necessary to go back to the question: Is this review application one in which it is sought to review a decision of the Commission that "may, in terms of this Act, be referred [to the Tribunal]"? The answer to this question depends upon whether or not it can be said that Rule 42 provides for the referral to the Tribunal of the decisions of the Commission sought to be reviewed in the present proceedings. Rule 42 contemplates the initiation ("may be initiated") of proceedings in the Tribunal for which there is, otherwise, no provision in the Rules. The proceedings which may be initiated in the Tribunal in terms of Rule 42 include proceedings relating to the review of a decision of the Commission. I cannot see that there is any difference in substance between the referral of a decision of the Commission to the Tribunal and the initiation of review proceedings in the Tribunal for the review of a decision of the Commission. Rule 42 clearly contemplates proceedings that include review proceedings of decisions of the Commission before the Tribunal. Together with Rule 43, Rule 42 provides for the steps that must be taken to initiate such proceedings in respect of a decision of the Commission and what needs to be done to get the matter to the stage where all the affidavits have been filed in the Tribunal and the matter may be set down for hearing. In these circumstances I hold that Rule 42(1) does contemplate the referral of a decision of the Commission to the Tribunal for, among other things, review by the Tribunal.

[44] Since the phrase "this Act" in sec 1 of the Act is defined as including Regulations and Schedules to the Act and the Tribunal Rules are Regulations issued by the Minister concerned, the provisions of Rule 42 are, for this purpose, to be given the same effect as they would be given if they were provisions of the Act. If they were provisions of the Act, there would have been no doubt that they contemplate the referral of decisions of the Commission to the Tribunal for review. That they are in a Rule of the Tribunal should make no difference in the light of the definition of the phrase "this Act" in sec 1 of the Act and the reference to "this Act" in sec27(1)(c) of the Act. That being the case I hold further that the decisions of the Commission that the applicants seek to have reviewed and set aside in the present application are decisions that, in terms of Rule 42 of the Tribunal Rules, may be referred to the Tribunal for review. In the light of the definition of the phrase "this Act" in sec 1 of the Act, I hold that they are decisions of the Commission that "may, in terms of this Act, be referred to" the Tribunal as contemplated by sec 27(1)(c) of the Act. Accordingly, the contention by the first and third respondents' Counsel that this court does not have jurisdiction and that the Tribunal has exclusive jurisdiction (which it shares with the Competition Appeal Court) to entertain this review application is upheld.

[45] In their papers and in the oral address of their Counsel, the applicants took the attitude that this application was brought under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). When Counsel for the first respondent dealt with this aspect of the case, he submitted in effect that the applicants have a serious hurdle in this regard because their real case is directed at the Commission's initiation and referral of the complaint to the Tribunal and the possible admission

of the third respondent's evidence in the referral proceedings and there are no less than two decisions of the Supreme Court of Appeal in which that Court has held that the initiation and referral of a complaint to the Tribunal do not constitute administrative action. In support of this submission Counsel for the first respondent referred to *Simelane NO & Others v Seven Eleven 2003 (3) SA 64 (SCA) at paras 14-17 and Competition Commission of SA v Telkom SA Limited & Others 2009 SA 155 (SCA) at paras 9 to 11.* In these cases the Supreme Court of Appeal held, as Counsel for the first respondent submitted, that the decision of the Commission to refer a complaint to the Tribunal does not constitute an administrative action and that, accordingly, PAJA does not apply.

[43] When Counsel for the applicants addressed the Court in reply after Counsel for the first respondent had made the above submission, I asked him what his answer was to the submission that the *Simelane* and *Telkom* decisions of the SCA stood in the applicants' way to invoking PAJA. In reply Counsel for the applicants initially submitted that those decisions deal with the Commission's decision to refer a complaint to the Tribunal whereas the applicants' case is based on the Commission's failure to refer a complaint against the third respondent to the Tribunal. However, immediately thereafter Counsel for the applicants submitted that it was not in anyway important for the Court to decide whether PAJA did or did not apply in this case because, as he put it, administrative action or not, the point is that the Commission exercised public power in making the decisions that it made and the applicants contended that such decisions were invalid and fell to be reviewed and set aside. In effect the

applicants abandoned reliance on PAJA. That being the case I need not make any decision on PAJA in this case.

[47] The correctness of the conclusion that I have reached above that this Court does not have jurisdiction in this matter is not beyond question. For that reason I am of the opinion that I should deal with the merits of this matter in case my above conclusion is wrong. On that assumption, I proceed to deal with the merits of the matter below. I hope that irrespective of the correctness or otherwise of that conclusion, the views of this Court on the merits may well be of assistance to the parties in how they move forward in regard to the referral proceedings in the Tribunal.

In case this Court does have jurisdiction to entertain this application

[48] The first question to deal with in case this Court does have jurisdiction in this matter is whether or not the Commission's decision to grant the third respondent conditional immunity falls to be reviewed and set aside. To a certain extent that depends upon whether or not the Commission had authority to grant the third respondent conditional immunity because the applicants attack that decision only on the basis that the Commission had no authority under the Act to grant such immunity.

[49] In dealing with the question whether or not the Commission had authority to grant the third respondent conditional immunity, the first step is, in my view, to determine exactly what in essence the granting of conditional immunity in this

context means. To do so, one must first refer to the Commission's Corporate Leniency Policy because the conditional immunity referred to is derived from that policy. Par 3.3 of the CLP is to the effect that "immunity" in the context of the CLP has two elements to it, namely, that the Commission will not subject the party concerned to adjudication before the Tribunal for its involvement in conduct prohibited by sec 4(1)(b) of the Act and that the Commission will not seek any fines to be imposed by the Tribunal on such party. Par 3.3 of the CLP reads:

> "*Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed to (sic) that successful applicant.*"

In par 4.2 of the CLP the following appears about the term "immunity":

> "*The term immunity as used in the CLP refers to immunity from prosecution before the tribunal in relation to the alleged cartel which forms part of the application under the CLP.*"

[57] The term "adjudication" as used in par 3.3 is explained in footnote 4. Footnote 4 explains that the word "adjudication" refers to "a referral of a contravention of chapter 2 to the tribunal by the Commission with a view of (sic) getting a prescribed fine imposed to the wrongdoer. Prosecution has a similar import to adjudication". It seems to me from all of this that the citing in referral proceedings before the Tribunal of a participant in conduct prohibited by sec

4(1)(b) as a respondent does not on its own amount to subjecting such party to adjudication if the Commission does not seek the imposition of a fine on such a party.

[51] Par 5.9 of the CLP is to the effect that immunity under the CLP does not protect the applicant or beneficiary of such immunity from criminal or civil liability resulting from its participation in a cartel infringing act. In par 9.1.1.1 of the CLP it is stated that conditional immunity is given to an applicant at the initial stage of the application for immunity "so as to create a good atmosphere and trust between the applicant and the Commission pending the finalisation of the infringement proceedings". It is stated that such immunity is granted "provisionally".

[52] In par 9.1.1.2 it is stated in effect that conditional immunity precedes the decision to grant total immunity or the decision not to grant any immunity. It is also stated in par 9.1.1.2 that the Commission will give the applicant total immunity once a final determination has been made by the Tribunal or the Appeal Court, as the case may be, on the prohibited conduct referral provided the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.

[53] In par 9.1.1.3 it is provided that from the time conditional immunity is granted up to the time when the decision is made to grant total immunity, the Commission reserves the right to revoke the conditional immunity if at any stage the party that has been granted conditional immunity does not co-operate with the Commission

or fails to fulfill any condition or requirement of the CLP. Par 9.1.2.1 is to the effect that, once the Tribunal or the Appeal Court, as the case may be, has reached a final decision in respect of the alleged cartel, total immunity is granted to a successful applicant who has fulfilled all the conditions and requirements for such immunity under the CLP.

[54] With the above background in mind what then, in simple terms, does it mean under the CLP for the Commission to grant a party conditional immunity? In par 3.3 of the founding affidavit the applicants say that "conditional immunity amounts to a promise or an undertaking by the Commission that it will not prosecute the whistleblower". They go on in the next sentence: "More specifically, it means, in the words of paragraph 3.3 and footnote 4 on page 3 of the policy that the Commission undertakes not to refer a contravention of Chapter 2 of the Act by the whistleblower to the Tribunal with a view of getting a prescribed fine imposed on him".

[55] I have said above that par 3.3 of the CLP reveals that there are two elements to the term "immunity" in the context of the commission's CLP and they are that:

(a) the party concerned will not be subjected to adjudication for its role in cartel activities; and

(b) the Commission does not propose to have any fines imposed on such party for its role in cartel activity.

If I am correct in this understanding of the meaning of the term "immunity" as used in the CLP, as I think I am, then, it seems to me, the term 'immunity" under

the CLP has a special meaning. It means that the party that is granted immunity is free from being subjected to adjudication before the Tribunal and, more importantly, that the Commission will not propose to the Tribunal that any fine be imposed on such party. That is why the last sentence of par 3.3 reads: "*Furthermore, the Commission would not propose to have any fines imposed to that successful applicant*". Obviously, if the Commission says in par 3.3 that it would not propose to have any fines imposed on a party, it means it would not propose that to the Tribunal because it is only the Tribunal which has the power to impose fines on parties for their participation in cartel activity. Accordingly, in terms of par 3.3 of the CLP immunity is effectively a promise or undertaking by the Commission not to subject a party to adjudication before the Tribunal for its participation in conduct prohibited by sec 4(1)(b) and not to ask the Tribunal to impose a fine on such a party for its role in conduct prohibited by sec 4(1)(b) of the Act. If the Commission cites such a party in referral proceedings before the Tribunal but does not in the referral ask the Tribunal to impose a fine on such party, that does not constitute subjecting that party to adjudication within the meaning of that term as used in the CLP and that still accords with conditional immunity as that term is used in the CLP.

[68] It seems to me that the fact that such party is cited as a respondent in the referral proceedings has the advantage that that such party is brought before the Tribunal together with the other participants in conduct prohibited by sec 4(1)(b) and this would enable the Tribunal to have such party before it in case it should reject the Commission's proposal that no fine be imposed or no order at all be made against such party. In such a case the Tribunal would be able, for example,

to make a declaratory order that such party contravened sec 4(1)(b) of the Act with or without making an additional order imposing a fine of one or other amount on such party. All of this would be within the discretion of the Tribunal. I have no doubt that in exercising its discretion the Tribunal would attach a lot of weight to the request or proposal made by the Commission in regard to relief in relation to such party in recognition of the co-operation and assistance rendered by such party to the Commission in regard to the fight against anti-competitive conduct.

[57] The promise or undertaking that the Commission gives to a beneficiary of the CLP is, for all intents and purposes, a promise or undertaking not to seek the imposition of a fine on such party. I say this because such a party admits or confesses its own contravention of sec 4(1)(b) of the Act both to the Commission and, once there is a referral to the Tribunal, to the Tribunal as well . That being the case I cannot see that such a party would be seriously opposed to an order by the Tribunal declaring that it had contravened sec 4(1)(b) as long as the Tribunal does not impose a fine on such party. There would be no basis for the granting of an interdict restraining such party from continuing with conduct prohibited by sec 4(1)(b) because such a party would already have given an undertaking to the Commission that it will not continue with such conduct because that is one of the requirements or conditions for immunity under the CLP. Indeed this is the attitude that has been adopted by the fourth respondent in its answering affidavit in the referral proceedings before the Tribunal. The fourth respondent has said that it does not oppose the granting of a declaratory order and an interdict against it but seeks to avoid the imposition of a fine on its self.

[58] If immunity under the CLP is said to be conditional immunity, it simply means that that the Commission's promise is made provisionally pending the finalisation of the matter and on condition that such party continues to fulfill the requirements and conditions stipulated in the CLP. Conditional immunity is, to some extent (but not completely), like an interim order that is granted by the High Court pending the return day. If, on the return day, the applicant shows that it has met the requirements for the final relief, the rule is confirmed but, if the applicant has failed to show that it meets the requirements for final relief, the rule is discharged. In the case of conditional immunity, if at the end of the referral proceedings the party concerned has met the requirements for permanent immunity, permanent immunity is granted. If it has not met the requirements, permanent immunity is not granted.

[59] On the papers it is common cause between the parties that the reason why the third respondent furnished the Commission with the evidence and assistance that it did was the Commission's promise not to seek any relief against it in subsequent referral proceedings relating to conduct prohibited by sec 4(1)(b) in which it admitted its participation. That this is common cause between the parties can be gathered from a comparison of how the applicants and the Commission dealt with this aspect in the Commission's answering affidavit and in the applicant's replying affidavit. In paragraph 3.8 of its answering affidavit the Commission says in the last sentence:

"*The Commission considers it appropriate to forsake relief against one cartel member in exchange for uncovering and proceeding against the remainder of the cartel.*"

[60] In par 21 of their replying affidavit the applicants say that this is not in dispute. In 39.1 of its answering affidavit the Commission says in effect that the granting of conditional immunity to a leniency applicant "means that the Commission conditionally undertakes not to seek relief against it in the referral to the Competition Tribunal (also referred to as the prosecution, although it is not in fact a criminal trial)". In par 21 of their replying affidavit the applicants reply to the paragraph containing this allegation. They say that this is not in dispute.

[61] In par 59.2 of its answering affidavit the Commission says that the third respondent has "furnished substantial evidence and assistance to the Commission and, as a result, a referral has been made to the Competition Tribunal. [The third respondent] acted on the basis of an undertaking by the commission (encapsulated in the CLP) that it would not seek relief against [the third respondent] in any referral (my underlining). The applicants' reply to these allegations is to be found in par 28 of the applicants' replying affidavit. There the applicants do not dispute these allegations. Whether or not the third respondent provided the Commission with the evidence that it provided as a result of the Commission's undertaking that it would not seek any relief against it in a subsequent referral of a complaint to the Tribunal is a question of fact. Accordingly, the matter must be decided on the basis that the reason that the

third respondent furnished the Commission with the evidence and assistance that it did was that the Commission promised the third respondent that it would not seek any relief against it in any referral proceedings that could ensue. In par 71 of its answering affidavit the Commission states:

> "*As outlined above, the grant of conditional immunity is an undertaking by the Commission that it will not seek relief against the leniency applicant in the complaint referred to the Tribunal provided if continues to co-operate and assist the Commission in the conduct of the referral. However, the leniency applicant is still joined in proceedings before the Tribunal and its conduct is disclosed to the Tribunal. Accordingly, if it is not granted final immunity, the Commission may seek relief against it.*"

[42] What must be highlighted in the passage quoted in the preceding paragraph is that the Commission said that the grant of conditional immunity is an undertaking by the Commission that it will not seek relief against the leniency applicant in the complaint referred to the Tribunal. In their replying affidavit the applicants did not reply to this allegation. Accordingly, the allegation is not disputed. From this it is clear that the granting of conditional immunity by the Commission in terms of its CLP is not the granting of immunity in the normal sense of that term because par 3.3 of the CLP does not define immunity in the sense of giving the Commission the final say on what happens or does not happen to the party concerned. Par 3.3 defines immunity in such a way that it includes the Commission not asking the Tribunal to impose a fine on the party concerned. Nothing in the CLP says that the Tribunal is obliged not to impose a fine on a party if the Commission

asks it not to. Indeed, even if there was something in the CLP to that effect, it would not in law have been binding on the Tribunal. Accordingly, there is acknowledgment that the Tribunal has the final authority whether or not a fine is imposed on a respondent before the Tribunal.

[83] Against this understanding of what the grant of conditional immunity under the CLP means, it now becomes necessary to ask the question:

> Is the Commission entitled to promise a party that has participated in conduct prohibited by sec 4(1)(b) that it will not seek any relief against it in referral proceedings before the Tribunal and will, accordingly, not ask the Tribunal to impose any fine upon it for its involvement in such conduct?

It is clear from the above that what the third respondent was promised by the Commission was that in subsequent referral proceedings before the Tribunal arising out of the prohibited conduct to which it had been party the Commission would not seek any relief against it. It is this promise or undertaking, therefore, that this court must find the Commission to have had no right or authority to make if it is to find in favour of the applicants on this issue.

[84] In support of his contention that the Commission does have authority in terms of the Act to grant conditional immunity to a party in the possession of the third respondent, Counsel for the first respondent submitted in effect that such authority derived from the provisions of the Act that contemplates that the Commission can be a party to a consent order made by the Tribunal. In my view this submission has merit. I proceed to consider it together with the relevant

statutory provisions. In terms of sec 49B of the Act, the Commissioner has power to initiate a complaint against an alleged prohibited practice. In terms of sec 49B(3) the Commissioner must direct an inspector to investigate the complaint after he has initiated it. A prohibited practice is a practice that is prohibited in terms of Chapter 2 of the Act. That includes conduct prohibited by sec 4(1)(b) of the Act. In terms of sec 21(1)(c) of the Act the Commission is "responsible to" "investigate and evaluate alleged contraventions of Chapter 2" of the Act. In terms of sec 21(1)(g) of the Act the Commission is responsible to "refer matters to the Competition Tribunal, and appear before the Tribunal, as required by this Act." In terms of sec 21(1)(f) the Commission is responsible to "negotiate and conclude consent orders in terms of [sec 49D]." Sec 21(1)(f) refers to sec 63 but it was common cause between the parties that this was a printing error as sec 63 has nothing to do with consent orders and the reference should have been to sec 49D which deals with consent orders.

[85] Sec 49D deals with consent orders. It reads as follows:

"49D Consent Orders

(1) If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing evidence, may confirm that agreement as a consent order in terms of sec 58(1)(b)".

Sec 58(1)(b) provides that the Tribunal may "confirm a consent agreement in terms of section 49D as an order of the Tribunal". It is clear from the provision of sec 49D(1) that the making of a consent order contemplated therein has as its foundation the existence of an agreement between the Commission and a respondent. Sec 49D(1) refers to the confirmation as a consent order of an agreement between the Commission and a respondent. It is clear from sec 49D(1) that it is within the contemplation of the Act that the Commission may enter into an agreement that may be confirmed by the Tribunal as a consent order. This is confirmed by reference in sec 58(1)(b) to an agreement.

[56] It is clear from par 3.3 of the CLP that the Commission accepts that it is the Tribunal which has the authority to decide whether or not to impose a fine upon a party which is a respondent in proceedings before it. That is why the second of the two elements to "immunity" under the CLP is a promise or undertaking by the Commission not to ask the Tribunal to impose a fine on a participant in conduct prohibited by sec 4(1)(b) which has applied for immunity and meets the conditions and requirements for it.

[57] If the Commission can be a party to an agreement that can later be made a consent order, it obviously also can in terms of the Act promise a party in the position of the third respondent that it will ask the Tribunal not to impose a fine on such a party if the latter gives it full co-operation such as is required of the third

respondent in this matter under the CLP. It can say to such a party that such promise is conditional upon such party continuing to give it co-operation in this regard up to the end of the referral proceedings before the Tribunal. The third respondent or any entity in the same position can accept that proposal by the Commission in which case then the two parties have an agreement. There is no reason why such an agreement cannot be said to be an agreement as contemplated by sec 49D(1) and section 58(1)(b). After all, the agreement contemplated in sec 49D(1) and sec 58(1(b) is not even required to be in writing. This means that it can even be an oral agreement. In this case the Commission and the third respondent signed a written agreement. At the end of the referral proceedings, if the third respondent or a party in its position, has met all the conditions and requirements for immunity under the CLP, the Commission will ask the Tribunal not to impose a fine on such party and, if the Tribunal accepts that, it will not impose a fine on such party. In terms of sec 58(1)(a)(iii) read with sec 59 of the Act the imposition of a fine lies within the discretion of the Tribunal. I am satisfied that the Tribunal will be acting within its discretion if, in an appropriate case, it decides not to impose a fine on a party which is a respondent before it if such party has helped the Commission in a manner such as is contemplated in the CLP of the Commission. In that way then such party will have been saved from having a fine imposed upon it. The Commission and such party can at the end of the referral proceedings hand up an agreement that no fine is to be imposed on such party and ask the Tribunal to make it a consent order and the Tribunal may, in its discretion, make it an order of the Tribunal.

[68] I note that sec 49D(2) reads as follows:

> "(2) After hearing a motion for a consent order, the Competition Tribunal must –
>
> (a) make the order as agreed to and proposed by the Competition Commission and the respondent;
>
> (b) indicate any changes that must be made in the draft order before it will make the order; or
>
> (c) refuse to make the order.

The reference in sec 49D(2)(a) to an "order as agreed to and proposed by the Commission and respondent" is important because in par 3.3 of the CLP the second element of immunity is that the Commission will not propose the imposition of a fine on a party which has applied for immunity and has met all the conditions and requirements for such immunity under the Commission CLP. There is nothing in either the provision of subsection (1) or subsection (2) to sec 49D that suggests that the intention of the Legislature was that sec 49D should apply only in those cases where there was only one wrongdoer who was a respondent in referral proceedings. If the intention of the Legislature was that sec49D applies only in those cases where there is only a single respondent in proceedings, it would have said so in a clear language. It did not say so. Sec 49D applies whether one is dealing with a single wrongdoer or a number of joint wrongdoers who are respondents in referral proceedings before the Tribunal. If this is accepted, then it applies in the present case as well. That being the case, there can be no doubt whatsoever that the Commission does have authority to make the promise it made in this case. For that reason the applicants' contention

that its decisions to grant the third respondent conditional immunity, to initiate the complaint and to refer the complaint to the Tribunal were unlawful falls to be rejected.

[65] Counsel for the applicants advanced another ground to support his submission that the initiation and referral of the complaint to the Tribunal were unlawful and fall to be reviewed and set aside. This ground was that the Commission acted unlawfully in not seeking any relief against the third respondent whereas it sought various reliefs against the other participants in conduct prohibited by sec 4(1)(b) i.e. the applicants and the fourth and further respondents. In other words the applicants accused the Commission of "selective prosecution" and submitted that the Commission had no authority to be selective in "prosecuting" joint wrongdoers in prohibited conduct and, that for that reason, the initiation of the complaint and their "prosecution" are unlawful. In support of this submission Counsel for the applicants referred to sec 49B(1). That provision says that "the Commissioner may initiate a complaint against an alleged prohibited practice". In this regard he emphasised that the complaint is against the prohibited practice and not against the participants in the prohibited practice. If I understood Counsel well, he implied that, if there was a number of entities which had participated in a prohibited practice, the Commissioner would no longer be initiating a complaint against prohibited practice as contemplated in sec 49B(1) of the Act if he initiated the complaint only against some as opposed to all those who had participated in the prohibited practice.

[70] I am unable to agree with the above submission made by Counsel for the applicants. A prohibited practice in which a number of participants took part does not cease to be a prohibited practice simply because the Commissioner initiates a complaint about such practice in relation to only some and not all the participants in the practice. If one of the participants in a prohibited practice is a natural person and has died by the time the Commissioner has enough evidence to initiate a complaint, that would not mean that the Commissioner cannot initiate a complaint because, by virtue of the fact that one of the participants therein has died, such complaint will only be in relation to some and not all the participants. A complaint that the Commissioner would initiate after the death of one of the participants would be as much a complaint against the prohibited practice as it would have been if the deceased had been alive and a complaint had been initiated in relation to all the participants. Indeed, it would be as much of a complaint against a prohibited practice as it would have been if the deceased had been alive but no relief had been sought against him.

[71] In the field of labour law there is the concept of an unfair labour practice. Under the Labour Relations Act, 1956 (Act 28 of 1956) it was held quite early in the life of the Industrial Court that for conduct to fall within the ambit of an unfair labour practice, it was not necessary that such conduct should have occurred a number of times. It was held that a single act of dismissal could constitute an unfair labour practice. In my view under the Competition Act, the exclusion of one participant from relief or adjudication does not turn a prohibited practice into something other than a prohibited practice. In any event in this case the Commission cited the third respondent in the referral proceedings but simply did

not ask for any relief against it. The Commission was entitled to adopt the attitude that it would not propose to the Tribunal that a fine be imposed against the third respondent.

[72] If the applicants and the fourth and further respondents want the Tribunal to impose a fine upon the third respondent, they must go to the Tribunal, participate in the referral proceedings and make representations to the Tribunal to the effect that in the exercise of its discretion it must impose a fine on the third respondent as well if it imposes a fine upon them. It will then be up to the Tribunal how it exercises its discretion after hearing argument on all sides. In these circumstances I am of the view that, in doing what it has done in this case in respect of not seeking any relief against the third respondent, the Commission has done nothing wrong in law and has, in fact, acted within its authority. Accordingly, the applicants' contention that the initiation and referral are unlawful because of "selective prosecution" is bad and falls to be rejected.

[73] I note in that par 9.1.2.1 of the CLP it is stated in effect that whether or not a party is granted total immunity (i.e permanent immunity) is decided after the Tribunal or the Competition Appeal Court, as the case may be, has finalised the matter relating to prohibited conduct. This gives the impression that a decision separate from the decision of the Tribunal or the Competition Appeal Court is taken after the finalisation of the matter, e.g. a decision of the Commission. That may give a wrong impression. Par 3.3 of the CLP contemplates that one of the elements of immunity under the CLP is that in subsequent referral proceedings before the Tribunal the Commission proposes not to ask the Tribunal to impose a

fine on a party which was granted conditional immunity and which meets all the requirements for permanent immunity. Such a party will automatically obtain permanent immunity if, by the time the Tribunal issues its decision or judgment, the Commission has not asked it to impose a fine on such party and the Tribunal does not in its decision impose a fine on such party. Once the Tribunal has issued its decision that does not include a fine for such party, the Commission cannot, thereafter, ask the Tribunal to impose a fine on such party nor can it start referral proceedings against it relating to the same prohibited conduct in respect of which the Tribunal has already adjudicated. This is so because sec 67(2) is to this effect. It reads:

> "A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct."

This means, therefore, that the Commission has upto just before the Tribunal makes its decision to ask for the imposition of a fine upon such party if in the meantime such party has not provided its full co-operation to the Commission despite an earlier undertaking to do so under the CLP. If the Commission fails to do that and the Tribunal issues its decision and such decision does not include a fine for such party, it will be too late for the Commission thereafter to purport to refuse permanent or final immunity to such party. Such party will have effectively obtained final or permanent immunity through the Tribunal's completion of the referral proceedings (in which such party was a respondent) without imposing any fine on such party.

[74] In the light of the above even if this court had jurisdiction to deal with this review application, I would have dismissed it.

[75] In the result the application is dismissed with costs, such costs to include the costs consequent upon the employment of two Counsel by the first and third respondents.

Zondo, J

Appearances:

For the Applicants: Mr S J Du Plessis SC (with him, Mr Kevin Hopkins)

Instructed by: Roestoff & Kruse, Pretoria

For the First Respondent: Mr Gilbert Marcus SC (with him, Isabel Goodman)

Instructed by: Mothle Jooma Sabdia Inc, Pretoria

For the Third Respondent: Mr Wim Trengove SC (with him, Jerome Wilson and Michelle Le roux)

Instructed by: Nortons Inc, Johannesburg

Date of hearing: 7 February 2011

Date of Judgment: 5 July 2011