



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: A283/2022

Reportable: No
Of Interest to other Judges: No
Not Revised

28/03/2025
Date


Signature

In the matter between:

THE COMPETITION COMMISSION OF SOUTH AFRICA

Appellant

and

STEINHOFF INTERNATIONAL HOLDINGS PTY LIMITED

Respondent

JUDGMENT

FRANCIS-SUBBIAH J:

[1] The appellant, the Competition Commission of South Africa (“Commission”) appeals against the decision of the High Court after being granted leave to appeal by the Supreme Court of Appeal to the full court of this Division. The issue relates to a complaint of alleged collusive price fixing in terms of the Competition Act¹ (“Competition Act”) against the respondent, Steinhoff International Holdings Pty Limited (“Steinhoff”).

[2] Steinhoff brought a review application to the High Court of this Division to set aside the Commission's decision taken on 13 November 2019 in terms of section 50 of the Competition Act to refer the alleged complaint of price fixing to the Competition Tribunal. The High Court, after hearing the parties on condonation for the Commission's late filing of their answering affidavit, dismissed the condonation application and proceeded to consider the merits on review. The facts set out in the Commission's founding affidavit in the complaint referral were attached to Steinhoff's founding affidavit in the review and the documents comprising the record of investigation were also before the High Court. The review was upheld by granting judgment in favour of Steinhoff by setting aside the Commission's decision to refer the complaint against Steinhoff to the Competition Tribunal.

[3] The reason for upholding the substantive review is encapsulated in a single sentence in the following words:

“After having heard the parties and considered the merits of this application I am of the view that the application for review should succeed.”

¹ Competition Act 89 of 1998.

Incomplete reasons

[4] The Commission aggrieved by the High Court's lack of providing complete reasons for its decision, requests this court of appeal to show its displeasure to refer the matter back to the High Court for full reconsideration of the review application. It is trite that in review proceedings a court must specifically find that the grounds of review have been met. The existence of competent grounds of review is a jurisdictional prerequisite that must be established before a review can be granted. It remains a mystery to the parties and the appeal court on what grounds the review was upheld.

[5] Steinhoff argues that the above request of the Commission to send the review application back to the High Court is not competent. Since the remittal to the High Court was not sought when seeking leave to appeal at the Supreme Court of Appeal. It was further emphasised that a court looks at the reasons to understand the effect of an order.² In *Mahlangu and Another v Minister of Labour and Others*,³ the Constitutional Court made it clear that reasons provide a window into the basis of the judgment and it is a valuable tool to highlight the process of reasoning in a transparent way.

[6] Reasons are indispensable to an appeal process. It was pointed out in *Mphahlele v First National Bank of South Africa Limited*⁴ that the failure to provide reasons for a judgment may be a violation of a constitutional duty. The rule of law requires that decision makers should not act arbitrarily and be accountable by furnishing reasons for their decisions. Reasons also provide guidance to the public in respect of similar matters.

[7] In *Von Abo v President of the Republic of South Africa*⁵ it was emphasised that the Constitutional Court exercises a supervisory jurisdiction on confirmation proceedings, and the supervisory task becomes more challenging when well-

² *South African Liquor Traders Association v Chairperson Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 15.

³ [2020] ZACC 24; 2021 (2) SA 54 (CC), 2021 (1) BCLR 1 (CC) at para 13.

⁴ [1999] ZACC 1; 1999 (2) SA 667; 1999 (3) BCLR 253 at para 12.

⁵ [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 46.

reasoned judgments are not provided. In *South African Liquor Traders Association and others v Chairperson, Gauteng Liquor Board and others*,⁶ the Constitutional Court simply requested the Court *a quo* to furnish reasons for its decisions. In *Neotel v Telkom*⁷ the Supreme Court of Appeal had to consider the issue when full reasons were not given and held that the appeal court must integrate the merits of the review. An appeal is against the order and not the reasons for the order.

[8] The appeal is concerned with the correctness of the order and not the lack of complete reasons. Although reasons assist the parties and the appeal court to understand the reasoning behind the order, the appeal court corrects misdirection of law and fact. The incompleteness of reasons cannot stop the appeal court to make a decision on the appeal. Although it remains an undesirable practice not to give full reasons.

[9] It is in the interest of justice that a matter reaches finality. I am persuaded that it cannot be in the interests of justice that the matter be re-heard by the High Court, as the Court *a quo* is *functus officio*. On a similar vein nothing stops this court from requesting complete and detailed reasons from the court *a quo* for its decision. Although it did not provide detailed reasons for its finding on the merits, it did in fact make a finding on the merits.

[10] All the jurisdictional and review facts and law have been presented. It is in the present circumstances in the interests of justice for this appeal court to determine the issue to reach finality in respect of the condonation issue, jurisdictional point and the merits on the grounds of appeal.

⁶ *South African Liquor Traders Association v Chairperson Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 15.

⁷ [2017] ZASCA 47.

Condonation

[11] The matter initially appeared in the unopposed motion court on 1 March 2021 and was postponed *sine die* to the opposed motion roll with the Commission ordered to pay the costs of the postponement on an attorney and client scale on an opposed basis. The Commission was ordered to file a condonation application if it desired to file its answering affidavit.

[12] When the matter was heard five months later as an opposed motion on 10 August 2021, all three sets of affidavits, including all the condonation affidavits, were before the court *a quo*. The replying affidavit for condonation of the Commission was filed on 30 March 2021. Under this factual scenario the condonation for the late filing of the answering affidavit was considered. It is trite that a Court exercises a discretion as to whether or not to grant condonation.

[13] The standard for considering an application for condonation is the interests of justice. In *Grootboom v National Prosecuting Authority*⁸ the court considered that the concept “interests of justice” is elastic and incapable of precise definition. It however includes the following considerations namely, the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success and ultimately the particular circumstances of each case will determine which of these factors are relevant.

[14] The Commission argues that the court *a quo* ought to have condoned the late filing of its answering affidavit in respect of public interest on the basis that they carry out a public function. The Commission holds that there is prejudice for not allowing it to defend the matter and that any prejudice could be addressed with a cost order that may have been suffered by Steinhoff.

⁸ [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 22.

[15] The Commission filed the explanation for its delay stating that consultation with counsel commenced in January 2021, further information was requested which was made available on 17 February 2021 and thereafter the draft affidavit was circulated. Senior Counsel was also unavailable at some stage.

[16] The Commission provided a detailed account of its reasons for the delay in their answering affidavit. The Minister of Trade having issued Consumer Protection and National Disaster Management Regulations and Directions required the Commission to urgently investigate excessive pricing of goods and services arising from the impact of the COVID-19 National Lockdown. This related to basic food items, emergency products and services, medical and hygiene supplies, toilet paper, hand sanitizer, facial masks, surgical gloves, cooking oil, bottled water, rice and wheat flour.

[17] After the Consumer Protection Regulations became effective, the Commission received an unprecedented number of complaints. By the end of May 2020, the Commission had received over 1500 complaints having regard to the COVID-19 pandemic. Most of the complaints lodged with the Commission were on an urgent basis and required the immediate attention of the Commission and its legal teams. This had an impact on the progress of other work the Commission was already seized with, including High Court litigation.

[18] During this time the Tribunal prioritized COVID-19 referrals. For example, in an urgent complaint such referrals had to be dealt with within 72 hours. All these submissions were made to the court *a quo* considering the condonation application. Yet none of these issues are canvassed in the court *a quo*'s reasons for dismissing the condonation application.

[19] Clearly the review application was opposed, despite this the matter was set down on the unopposed motion roll. Steinhoff argued that the Commission had not taken any of the steps required in terms of rule 30 as an irregular step in this regard. The Commission was aware of the enrolment for several months and failed to properly explain the Commission's conduct fully throughout all stages of the extensive period of delay. Therefore, Steinhoff says the Court *a quo* was correct in dismissing the application for condonation of the late filing of the answering affidavit in the review application.

[20] In *South African Transport and Allied Workers Union v Conree Transport (Pty) Ltd*⁹ the court held that the degree of lateness cannot be said to be substantial in the context of the explanation advanced, and although the explanation for the delay is not compelling, it was reasonable and acceptable. It does not have to be "extremely cogent" but enough to persuade the court that it would not be reasonable to finally determine the main matter on that basis.

[21] In the present matter we can therefore find that the relevant factors are not individually decisive but are interrelated and must be weighed against each other. In considering the explanation for the delay, a further affidavit was filed explaining the delay due to the urgent engagement with the relating COVID-19 consequences affecting the lateness of the answering affidavit. The prospects of success in the main matter, the importance of the case being in the public interest, addressing any prejudice suffered, the respondent's interests in finality, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice as a whole, and all three affidavits were filed by 30 March 2021 before the court hearing on 10 August 2021. The matter was thus fully ventilated.

⁹ [2010] ZALC 31 at para 20.

[22] The court having heard the condonation and review application on 10 August 2021 delivered its judgment on 26 January 2022 dismissing the condonation application and granting relief to Steinhoff as sought in the review application with costs. On the basis set out above, the court *a quo* should have exercised its judicial discretion to have granted condonation. The lateness stands to be condoned.

Background to the review

[23] Steinhoff operates as an investment holding company. It is a shareholder of a company PG Bison Pty Ltd ("PG Bison") where it is deemed to have exercised significant influence and control over it. PG Bison and Sonae Arauco South Africa Pty Ltd ("Sonae") are companies that were active in the market for the supply of wood-based products and fixed the price of these products. They are the largest manufacturers of wood-based panel products which are used to build commodities such as cupboards, furniture, cabinets, kitchens and caskets amongst others. There was a complaint against the alleged prohibited practice.

[24] The Commission's investigations found that from at least 2012 to 2016, the respondents colluded in that they agreed on percentage price increases for wood-based panel products. They further agreed on the timing to effect such price increases. This conduct amounts to price fixing, which contravenes section 4(1)(b)(i) of the Competition Act. During March 2016 the Commission investigated and carried out a raid on PG Bison and interviewed their employees. The investigating team recommended that the Commission refer this matter to the Tribunal for adjudication.

[25] The Commission seeks to find Steinhoff liable for price fixing committed by PG Bison. At the time of the complaint PG Bison's holding company and KAP Industrial Holdings (PTY) Limited ("KAP") was controlled by Steinhoff. It is due to this reason that Steinhoff is joined in the complaint referral.

[26] An understanding of how Steinhoff controlled PG Bison is indicated in the merger completed in December 2011, where Steinhoff held 62% in KAP. And KAP held 100% of the issued share capital of PG Bison. Therefore, when the conduct that is the subject of this dispute began in 2012 Steinhoff had control over PG Bison. The Commission contends that even if this is regarded as indirect control, it is substantial control which suffices for the purposes of the Competition Act. This aspect will be expanded upon later in this judgment.

[27] Following the Commission's investigation and raids, PG Bison applied for immunity in terms of the Commission's Corporate Leniency Policy on 23 March 2018. The Commission informed PG Bison on 3 October 2019 that it will not grant it immunity. In the interim Sonae concluded a settlement agreement with the Commission on 28 March 2019 which was confirmed as a consent order on 6 November 2019.

[28] On 13 November 2019, the Commission referred the complaint to the Tribunal. PG Bison was cited as the first respondent, Steinhoff the second respondent and Sonae, the third respondent. The Commission sought an order declaring the respondents have contravened section 4(1)(b)(i) of the Competition Act and an order declaring PG Bison and Steinhoff to be liable for the payment of an administrative penalty equal to 10% of their annual turnover in terms of section 58(1)(a)(iii) read with section 59 of the Act.

[29] Steinhoff's application in the High Court to review and set aside the Commission's decision to refer the complaint to the Tribunal was based on a legality review. Steinhoff argues that since the complaint referral is based on a contravention of section 4(1)(b)(i) of the Act and since there is no allegation of a contravention of that provision by Steinhoff itself, the Commission's decision to refer a complaint against Steinhoff to the tribunal is *ultra vires*. The Commission's powers under the Act are unlawful because it is an unauthorised

action by the Commission. In the review application Steinhoff challenges the decision of the Commission on three grounds:

- a) The alleged failure to initiate a complaint against Steinhoff during the investigation process.
- b) The failure to allege conduct in contravention of section 4(1) of the Competition Act.
- c) The allegations that Steinhoff controls PG Bison.

[30] The court a quo completely failed to address the above three grounds of review in its decision making.

Initiation

[31] Steinhoff complains that there was a failure by the Commission to initiate a complaint against Steinhoff in terms of section 49(B)(i) of the Act. In respect of a prohibited practice as required by section 49(B)(i) of the Act the Commission has failed to comply with the statutory requirements for the exercise of its powers and performance of its functions. When the Commission refers to the price fixing in paragraph 13 and 16 of the referral affidavit and deals with the conduct in paragraphs 18 to 26 of the referral affidavit, it describes the conduct of PG Bison and Sonae only. There is no reference made to Steinhoff.

[32] There are no further allegations pertaining to conduct on the part of Steinhoff. The conclusion in paragraph 27, limits the allegations of price fixing in contravention of section 49B(i) of the Act to PG Bison and Sonae. Since there is no allegation by the Commission that Steinhoff contravened that section, its decision to refer a complaint against Steinhoff to the Tribunal is *ultra vires* and an unauthorised action in terms of the Competition Act. It is therefore arbitrary and irrational. In addition, Steinhoff submits that the Commission's decision to refer a complaint for price fixing against Steinhoff is not authorised by the Act and is also not rationally related to the purpose for which the power was given.

[33] The Commission states in its answering affidavit that the submission by Steinhoff pertaining to the fact that it was not named in the initiation is based on a misunderstanding of section 49B of the Competition Act. According to section 49B(1), “the Commissioner may initiate a complaint against an alleged prohibited practice”. Hence a complaint does not need to be initiated against a specific firm. It is sufficient that the firm operates within an industry or a market where the prohibited practice takes place.

[34] In this regard the Commission relied upon the decision in *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited*¹⁰ where it held at para 21 the following:

“The initiation must be “against an alleged prohibited practice”. Chapter 2 of the Competition Act sets out the practices prohibited by the Act. Those practices include restrictive horizontal practices, restrictive vertical practices and abuses of a dominant position and price discrimination by a dominant firm. As stated, the conduct in this matter concerns the restrictive horizontal practice of collusive tendering prescribed in section 4(1)(b)(iii). For present purposes, the proscribed practice is an activity in which a “firm” or “party” is engaged. Thus, when the Commissioner initiates a complaint, he or she must self-evidently have in mind some of the firms or parties potentially involved in the prohibited practice concern. But this does not mean that the names of all the firms or parties must be included. This section emphasises “prohibited practices” over firms or parties. There are no formalities required, save for a decision by the commissioner to cause the commencement of an investigation into the alleged prohibited practice. The initial omission of a firm or party at the stage when the complaint is first initiated by the Commission and its subsequent addition to the complaint are not fatal, given the wording of section 49B(1) and the informality of the procedure.”

¹⁰ [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC).

[35] The Commission also submits that a complaint was initiated against Steinhoff as it is envisaged from the investigation record that the Commission initiated a complaint against Steinhoff for the prohibited practice. The record shows that at a meeting, the Commission took a decision to refer Steinhoff to the Tribunal. On 21 May 2019, it was decided that the team should indicate whether there is cause to include Steinhoff in the initiation and referral. Steinhoff is a firm operating within the market where the prohibited practice was discovered. A decision to refer Steinhoff was thus preceded and as this was all that the Act required, there was compliance.

Steinhoff included into the Complaint referral

[36] Steinhoff's second ground of review pertains to the Commission failing to allege conduct in contravention of section 4(1) of the Competition Act, having nothing or no information that alleges that Steinhoff has been involved in prohibited practice of price fixing nor is there a reasonable suspicion. Therefore, its decision to refer a complaint against Steinhoff to the Tribunal is *ultra vires*. The Commission's powers under the Competition Act are unlawful as it is an unauthorised action and has failed to comply with the requirements for the exercise of its powers and performance of its functions.

[37] Steinhoff argues that it is in no way implicated in the conduct of PG Bison or Sonae. Therefore, the Commission has acted *ultra vires* and unlawful in the sense of being unauthorised in terms of the Act. The Commission has failed to comply with the statutory requirements for the exercise of its powers and performance of its functions; the decision is therefore arbitrary and irrational.

[38] Aggrieved by the Commission's inclusion of Steinhoff as a respondent to the complaint referral, Steinhoff argues that this appears to be driven only by a misguided attempt to increase the amount of the administrative penalty that can be collected from Steinhoff and this is grossly unreasonable.

[39] Steinhoff argued that a holding company cannot be held liable for the conduct of a subsidiary without itself being the subject of a valid and lawful complaint for its part in the prohibited practice. On 30 November 2019, the complaint referral was delivered to Steinhoff. The complaint was therefore referred to the Tribunal after PG Bison had instituted its review application on 7 November 2019. Steinhoff says it was added as a respondent by way of an afterthought and on no cognisable factual or legal basis. The complaint referral has subsequently been stayed by agreement in light of PG Bison's pending review application, which if successful will put an end also to the complaint referral.

[40] On the question that the Commission failed to allege conduct in contravention of section 4(1) of the Competition Act, the Commission relies on Steinhoff's controlling stake in PG Bison for implicating it in the conduct of PG Bison. Steinhoff does not deny that the so-called indirect shareholders' interest in PG Bison conferred control. Irrespective of control being direct or indirect Steinhoff is the ultimate beneficial owner of PG Bison and for this reason is brought into the complaint referral.

[41] It was submitted that from 2015 and 2016 the shareholding reduced from 62% to 44% but it still remained the single largest shareholder over KAP with the rest of the shareholding dispersed amongst more than 4000 public shareholders. It was alleged that this on its own presented Steinhoff with the ability to vote the majority of shares at a meeting of shareholders.

[42] In the audited financial statements of June 2014, cross directorships appeared. The minutes of 21 May 2013 show an active interest of the Steinhoff directors in the business of PG Bison. Markus Jooste who was the Chief Executive Officer of Steinhoff at the time was making direct contributions to the strategy of PG Bison.

Section 59 (3A)

[43] On 12 July 2019, section 59(3A) of the Competition Act came into effect. This provision holds a parent firm liable for the contravention of the Competition Act by a subsidiary firm. Steinhoff argues that during the initiation and investigative period of the Competition Commission the Competition Act did not contemplate that liability should be imposed on a non-colluding firm merely because it was the controlling firm of a firm that did collude.

[44] Steinhoff therefore submits that at the time no provision of the Competition Act provided for a holding company to be held liable for the prohibited conduct on the part of one of its subsidiaries on the grounds merely of being a shareholder in the transgressing company. The allegation against Steinhoff is based entirely on the allegation in paragraph 13 of the referral affidavit, that Steinhoff was indirectly involved in the manufacturing of wood-based panel products in South Africa by virtue of its controlling stake in PG Bison. Steinhoff asserts that it has nothing more than an indirect shareholders' interest in PG Bison.

[45] It is advanced that in a relationship between Steinhoff and PG Bison, it constituted a firm as defined in the Act, which includes a person, partnership or a trust. A firm is not the same thing as a company. It may include several companies, provided that there is a sufficient connection between them. When these firms act in law, they are regarded as a single economic entity. In *A- Africa Past Prevention CC v Competition Commission of South Africa*,¹¹, it stated that:

“The expression “includes” clearly widens its meaning to be beyond limited liability companies, partnerships, or trust. It may include sole proprietorships, joint ownerships, and any other actors who carry out economic activity.” (underlying emphasis)

¹¹ [2019] ZACAC 2 at para 40.

[46] Upon reflection this question of inclusion of Steinhoff in the complaint referral for purposes of imposing an administrative penalty on it as a parent company of PG Bison and the issue of control remain pure competition law elements. Steinhoff is responsible for the conduct of PG Bison in competition law. The separate legal entity status as per company law has no material bearing on the relationship between Steinhoff and PG Bison for the purposes of the Competition Act.

[47] The Commission referred to European decisions. In *DaimlerChrysler AG v Commission of the European Communities*¹², the Court held that in a situation of fully owned subsidiaries, the parent and the subsidiary are presumably regarded as a single economic entity. Especially when the parent company exercises decisive influence over the activities of the subsidiary.

[48] In reference to the European Court in *Akzo Nobel NV v Commission of the European Communities*¹³, the court explained that it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company, in order to presume that the parent exercises their decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, produces sufficient evidence to show that its subsidiary acts independently on the market.

[49] The Competition Appeal Court of England and Wales in *Durkan Holdings & Others v Office of Fair Trading*¹⁴ expressed that there are a number of different ways to ask the question in holding a parent company liable. Some of these questions are:

¹² [2007] 4 CMLR 15.

¹³ [2009] ECR I-8237.

¹⁴ [2011] CAT 6 at para 22.

“...did the parent exercise decisive influence over the subsidiary; do the companies concerned determine their own conduct independently on the market or does the subsidiary comply with the instructions that the parent issues; can the parent direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit?”

[50] These are Competition Law questions and therefore these questions need to be considered in the present matter. They involve the interpretation and application of Chapters 2 and 5 of the Competition Act. They must be dealt with by the Tribunal. It is appropriate to defer to the expertise of the Tribunal on this issue. It is not a matter that should have been resolved by the High Court at this preliminary stage. And for this reason, this is not an *ultra vires* question.

[51] Simply because Steinhoff has coached its review as a legality challenge does not in substance make the complaint a legality issue. The Commission submits that the issue of the review is a pure competition law matter. The decision in *Competition Commission of South Africa v Group Five Construction Ltd*¹⁵ confirms that a pure competition law issue must proceed to the Tribunal and the Competition Appeal Court and not the High Court.

Control

[52] The third ground of review implies that Steinhoff has no control over PG Bison. The Commission disputes this emphatically by referring to specific events. The Johannesburg Stock Exchange on 15 December 2011 made an announcement pertaining to a merger between Steinhoff and KAP. The announcements record that the KAP transaction will result in KAP becoming an 88% subsidiary of Steinhoff. The merger was completed in December 2011. Steinhoff held 62% in KAP and KAP held 100% of the issued share capital in PG Bison.

¹⁵ [2022] ZACC 36; 2023 (1) BCLR 1 (CC).

[53] Therefore, when the conduct that is the subject matter of this dispute began in 2012, Steinhoff had control over PG Bison. Even though this may be regarded as indirect control, it remains substantial control which suffices for the purposes of competition law. During 2012 to 30 June 2016, Steinhoff had an indirect shareholder's interest in PG Bison. The Commission attached annual reports of KAP between 2015 and 2016 that illustrate its self-confirmed shareholding of Steinhoff. The submission that Steinhoff has no control over PG Bison is disputed. It is therefore another reason why the review application should not succeed.

Jurisdiction

[54] The Commission opposed the review on the merits and on the jurisdiction of the High Court to hear the review to the exclusion of the Competition Tribunal. The Commission relied on the Competition Act that confers the general power of review on the Competition Tribunal to review the decisions of the Commission. This view has been affirmed by the Constitutional Court in *Competition Commission of South Africa v Senwes Limited*¹⁶. Section 62(1) grants the Competition Tribunal and the Competition Appeal Court exclusive jurisdiction. Chapters 2-3 and 5 relate to interpretation, application and functions in terms of section 21(1), 27(1) and 37 of the Act.

[55] The Tribunal's main function is to sit in judgment of competition matters. It adjudicates as a court of first instance in competition matters and was established in terms of Section 26 of the Act. This adjudicative role includes determining whether the prohibited practice has taken place and, if so, to determine an appropriate remedy in terms of section 27(1)(a).

[56] The referral decision simply triggers a process affording the respondent an opportunity to answer the referral and to bring witnesses against the

¹⁶ [2012] ZACC 6; 2012 (7) BCLR 667 (CC) at para 25.

allegations. The Commission argues that had the purpose of the Competition Act been as restrictive as company law, focusing on the nature of the juristic entity, rather than the economic activity, it will lead to an entirely frustrating exercise in furthering the purpose and goals of the Competition Act. As entities would structure their legal affairs in a manner in which it is designed to defeat the Act.

[57] The Commission relies on the argument as summarised in *The Competition Commission v Computicket Pty Limited*,¹⁷ by Brant JA, as follows:

“The Commission relied on the proposition that its decision to refer the complaints is only a preliminary step in a continuing administrative process. Proceeding from this premise the Commission argued that this preliminary step should, as a general rule, not be open to a challenge in review proceedings brought prior to the hearing and determination of the complaint proceedings by the Tribunal. In consequence, so the argument went, Computicket had to put up exceptional circumstances that would justify the court entertaining a review in the middle of an ongoing case. In support of this argument the Commission sought to rely on the well established principle that trial proceedings, be it criminal or civil, should only be interrupted by way of a midstream review where there are compelling reasons to do so (see eg *Walhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A) at 120A-B; *S v Mhlungu & others* 1995 (3) SA 867 (CC) at para 58).”

[58] However, Brandt JA held that these administrative review proceedings must commence within a reasonable time after the challenged decision had been communicated to the applicant so as to prevent someone acting upon the supposed validity of the challenged decision. This importance is now borne out in the decision of *Group Five*¹⁸ that the High Court has jurisdiction to review and set aside a referral of the Competition Commission. An issue relating to legality

¹⁷ [2014] ZASCA 185; [2015] 1 CPLR 15 (SCA) at para 21.

¹⁸ [2022] ZACC 36; 2023 (1) BCLR 1 (CC).

must be brought to the Competition Appeal Court or a High Court having jurisdiction.

[59] The Constitutional Court held that where the review is whether the Commission acted outside its powers both the Competition Appeal Court and the High Court have concurrent jurisdiction.¹⁹ In essence there must be a legality and genuine *ultra vires* challenge to be brought to either the High Court or in the Competition Appeal Court. On this point the Competition Tribunal enjoys no jurisdiction at all where the key issues are not competition law issues.

[60] The facts found in *Group Five* differ from the present matter. In *Group Five* the Commission had already made a decision and then retracted its decision. The court found that such issue gave rise to a question of legality and could therefore be brought to a High Court having jurisdiction or the Competition Appeal Court. The jurisdiction of the Competition Tribunal was completely ousted due to it not being on an equal status as the High Court and the Competition Appeal Court. In *Steinhoff* however, the factual matrix translates to a pure competition law issue. It therefore must be decided in the Competition Tribunal having the required exclusive jurisdiction. An appeal for a competition law issue lies with the Competition Appeal Court.²⁰

[61] In *Baloyi v Public Protector*²¹ the court held that an assessment of jurisdiction must be based on an applicant's pleadings and the question will be to determine what claim the pleadings properly interpreted reveal.

¹⁹ Id at para 124.

²⁰ Id.

²¹ *Baloyi v Public Protector* [2020] ZACC 27; 2022 (3) SA 321 (CC); 2021 (2) BCLR 101 (CC) at para 33 and 49.; *Competition Commission of South Africa v Group Five Construction Ltd* Competition Commission of South Africa versus group Five construction limited [2022] ZACC 36; 2023 (1) BCLR 1 (CC).at paras 29 and 30.

[62] The Commission submitted that the price fixing between the first and third respondents is egregious and a serious contravention of the Competition Act. This type of collusive conduct is harmful to the consumer as it denies them competitive prices. Such an agreement is characteristically disharmonious to competition and is a serious contravention of the Competition Act. The present matter does not constitute a true *ultra vires* challenge as applied in the *Group Five* judgment. It concerns questions clearly characteristic of competition law that cannot be decided outside of the competition forum.

[63] The reviewing court *a quo* in its judgment at paragraph 24 held:

“I have had the liberty of hearing the parties on the review application and therefore I'm able to consider the merits in order to determine whether the Commission has reasonable prospects of success. I am of the view that there are no reasonable prospects of success and therefore it would not be in the interest of justice to grant condonation.”

However, no reasons are given as to why the court *a quo* found there are no prospects of success.

[64] In these circumstances the review application is completely misplaced and should be dismissed. The referral to the Tribunal should not have been preempted at a preliminary stage. The facts particular in this matter are Competition Law issues. Costs should follow the result as there are no reasons advanced to deviate from the principle of costs in review applications. The costs of the application for leave to appeal in the Supreme Court of Appeal and the High Court are cost in the appeal.

[65] The following order is made:

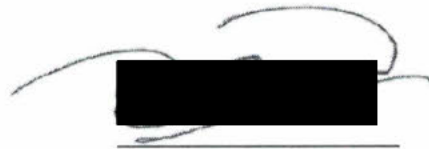
65.1 The appeal is upheld including costs of two counsel where so employed on Scale B and C respectively.

65.2 The decision of the court *a quo* on condonation is hereby set aside. It is substituted with the Commission's application for condonation is granted with the Commission bearing the cost of the condonation application.



R Francis-Subbiah, J
Gauteng Division of the High Court
Pretoria

I agree,



J Nyathi, J
Gauteng Division of the High Court
Pretoria

I agree.



A Africa, AJ
Gauteng Division of the High Court
Pretoria

Counsel for the Appellant : Adv Eduard Fagan SC
Adv Schalk Willem Burger

Instructed by : Werksmans Attorneys

Counsel for the Respondent : Adv Thembeke Ngcukaitobi SC
Adv Isabella Kentridge

Instructed by: Adv Katlego Monareng
Ndzabandzaba Attorneys Inc

Heard on : 4 September 2024

Judgment delivered on : 28 March 2025

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 15H00 on **28 March 2025.**