THE COMPETION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable/Not reportable

Case no: 263-265/CAC/Nov24

In the review between:

GOOGLE IRELAND LIMITED	Applicant
and	
COMPETITION TRIBUNAL OF SOUTH AFRICA	First Respondent
VILAKAZI, THANDO N O	Second Respondent
WESSELS, ANDREAS N O	Third Respondent
NCUKAITOBI, TEMBEKA N O	Fourth Respondent
LOTTOLAND SOUTH AFRICA PROPRIETARY LIMTED	Fifth Respondent

And in the appeals between:

GOOGLE IRELAND LIMITED	First Appellant
GOOGLE SOUTH AFRICA (PTY) LTD	Second Appellant
and	
LOTTOLAND SOUTH AFRICA (PTY) LTD	Respondent

Coram: **Manoim JP, Nuku JA and Dippenaar AJA**

Heard: 28 March 2025

Delivered: 5 May 2025

Summary: **Competition law –** Decision of the Competition Tribunal not signed by a member of the panel who (a) was, in terms of section 31 (3) of the Competition Act, 89

of 1998, designated by the Chairperson of the Competition Tribunal to preside over the panel's proceedings and (b) was also appointed by the Chairperson of the Competition Tribunal to ensure compliance with the provisions of section 31 (2) which requires that at least one member of the panel is a person who has legal training and experience- Court has jurisdiction to entertain review – decision not properly taken by the panel and accordingly reviewed and set aside - review dispositive of the matter – unnecessary to determine appeals on the merits.

ORDER

On appeal from: The Competition Tribunal:

1 The decision of the Tribunal of 12 November 2024 under case number IR191Mar23 is reviewed and set aside.

2 The fifth respondent in the review application is ordered to pay the applicant's costs on scale C which shall include the costs of two counsel, where employed.

JUDGMENT

Nuku JA (Manoim JP and Dippenaar AJA concurring)

Introduction

[1] Three matters serve before us. The first is the review application brought by Google Ireland Limited (Google) to review and set aside a decision of the Competition Tribunal (the Tribunal) dated 12 November 2024 (the decision) in which Google and Google South Africa (Pty) Ltd (Google SA) were directed to allow Lottoland South Africa (Pty) Ltd (Lottoland) access to Google's Ads Services platform in order to advertise fixed-odds betting on the outcome of lotteries. The second matter is a conditional appeal, also by Google, challenging the decision on its merits but only in

the event of an unsuccessful review. The third is also an appeal by Google SA also challenging the decision on the merits.

[2] Google contends that the manner in which the decision was made was irregular. This is because the decision had not been signed by one of the members of the panel. That member was the only member who met the requirements of section 31(2)*(a)* of the Competition Act 89 of 1989 (Competition Act). That section requires that at least one member of the panel has legal training and experience. Only one member of the panel met this requirement. But since that member had not signed the decision, it meant that it was improperly issued and hence was of no force and effect and must be set aside.

[3] The Competition Tribunal as well as the members of the panel that adjudicated the application whose order is the subject of this review do not oppose the review, have filed no papers at all and did not participate in the proceedings.

[4] Lottoland, in opposing the review application, advances two grounds. The first is that the failure by the third member of the panel to either concur or dissent does not constitute an irregularity because the two members who signed the decision constitute a majority of the members of the panel assigned to hear the matter and, in terms of section 36(6) of the Competition Act, a decision of a majority of the members of a panel in any matter is the decision of the Competition Tribunal.

[5] Lottoland's second ground of opposition relates to the jurisdiction of this Court to hear the review application. The gist of this ground of opposition, which was raised for the first time when Lottoland filed supplementary heads of argument, a day before the hearing, is that Google's attack on the decision means, in effect, that the decision is not a decision of the Competition Tribunal. Moving on from that premise the argument is that this Court only has the power to review decisions of the Competition Tribunal and that absent a decision by the Competition Tribunal, this Court's review power is not engaged.

[6] Prior to the hearing of the matters, the members of the Court requested the parties' legal representatives to make submissions on the applicability of the general principle that was stated in *Schierhout v Union Government (Schierhout)*,[1] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (*New Clicks*),[2] and *Judicial Service Commission and Another v Cape Bar Council and Another (JSC v Cape Bar),*[3] which states that:

'[W]henever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them … for otherwise they would not be acting in accordance with the provisions of the Statute.'

[7] The Court is indebted to counsel for their submissions in this regard. It is necessary to provide the factual background before considering the merits of Google's challenge.

Factual Background

[8] Google is a multinational technology company that provides a wide range of internet-related services and products, including online advertising technologies, search, cloud computing, software, and hardware. One of its product offerings known as "Google Ads" allows advertisers to access tools to create advertisements (ads), bid to display ads and to track the performance of their ads. Through Google Ads, users, including advertisers, can create online ads to reach relevant consumers when they indicate interest in the products and services that Google Ads user offers.

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[1] *Schierhout v Union Government* 1919 AD 30 at 44.

[2] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) (BCLR) 1 (CC) paras 170 & 171.

[3] *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA); 2012 (11) BCLR 1239 (SCA) paras 28 & 29.

[9] Lottoland is a licenced bookmaker that offers fixed-odds bets on the outcome of lotteries and sporting events through its website www.lottoland.co.za. Its operations are geographically confined to South Africa.

[10] In March 2020, Lottoland was certified and allowed access to Google Ads so that it could advertise its services. This, however, lasted for a period of about six months because from September 2020, Google initiated steps to terminate Lottoland's access to Google Ads alleging that Lottoland had contravened Google's internal policies.

[11] An exchange of correspondence ensued between the parties and ultimately Lottoland submitted a complaint to the Competition Commission on 2 December 2022 alleging that the conduct by Google constitutes conduct prohibited under section 8(1)*(c)* and 8*(d)*(ii) of the Competition Act.

[12] On 3 March 2023, Lottoland launched an application to the Tribunal in terms of section 49C of the Competition Act, seeking interim relief that would restore its access to Google Ads for a period of six months or until the finalisation of its complaint, whichever is earlier.

[13] In terms of section 31(1) of the Competition Act, the Chairperson of the Tribunal (the Chairperson) must assign each matter to a panel composed of any three members of the Tribunal. Acting in terms of this section, the Chairperson assigned the hearing of the application to Adv Tembeka Ngcukaitobi SC (Mr Ngcukaitobi), Professor Thando Vilakazi (Prof Vilakazi) and Mr Andreas Wessels (Mr Wessels). The appointment of Mr Ngcukaitobi was in fulfilment of the requirements of subsection 31(2)*(a)* of the Competition Act, which requires the Chairperson, when assigning a matter to a panel, to ensure that at least one member of the panel is a person who has legal training and experience. Mr Ngcukaitobi was also designated, in terms of subsection 31(2)*(c)* of the Competition Act, to preside over the panel's proceedings. It

is common cause that the other two members are economists and not members with legal training and experience.

[14] The application was heard on 19 July 2023 by all three members of the panel, as described above. After requesting and receiving further submissions, the decision, which was only signed by Prof Vilakazi and Mr Wessels, was issued on 12 November 2024. In terms of the decision, Lottoland's access to Google Ads was restored for a period of six months or until the conclusion of a hearing of Lottoland's complaint for as long as Google allowed other users to advertise fixed-odds bets on the outcome of lotteries on Google Ads and subject further to Lottoland's compliance with the terms and conditions imposed by Google.

[15] Noting that the decision was not signed by Mr Ngcukaitobi, on 13 November 2024, Google's legal representatives addressed a letter to the Chairperson advising, *inter alia*, that in issuing a decision that was not signed by a member of the panel appointed in terms of section 31(2)*(a)* of the Competition Act, the Tribunal had acted beyond the powers conferred on it by the Competition Act, and they requested her to withdraw the decision. A copy of this letter was provided to Lottoland's legal representatives.

[16] On 18 November 2024 and in response to the letter from Google's legal representatives, Lottoland's legal representatives addressed a letter to the Chairperson. In this letter they contended that the decision had been properly issued and:

'15. The Reasons and the Order comply <u>with section 31(4)</u>, which requires that a decision must be *"**in writing** and **include reasons** for that decision".*

16. The fact that the Reasons and Order are expressly indicated to be supported by two members of the panel (Professor Vilakazi and Mr Wessels) also meant that, irrespective of what the third member's views might be, the Reasons and Order are that of the Tribunal. That is made clear by section 31(6) of the Act, which states that

*"[a] decision of … **a majority of the members of a panel in any other matter, is the decision of the Tribunal**".*

17. There was accordingly no difficulty in the Reasons and Order being handed down on 12 November 2024 without an indication of whether they reflected the unanimous view of the panel, or merely a majority thereof.

18. Given the time that has passed since the hearing (almost exactly sixteen months ago), the majority of the panel can also hardly be criticised for delivering the Reasons and Order without waiting for an express endorsement or express dissent from the third panel member. Whether or not the third panel member concurs with, or disagrees with, the majority's reasons and order, the fact remains that the majority's decision is that of the Tribunal.

19. Google's request that the Reasons and Order be withdrawn (para 8) is anyway incompetent. The Tribunal, having delivered the Reasons and Order on 12 November 2024, is *functus officio*.'

[17] Google's legal representatives responded to the letter from Lottoland's legal representatives reiterating their contention regarding the irregularity of the decision and their stance that the Chairperson should act in terms of section 31(3) of the Competition Act and withdraw the decision.

[18] On 21 November 2024, the Chairperson addressed a letter to both parties' legal representatives advising that:

'It is the Tribunal's view that the Reasons for Decision and Order dated 12 November 2024, in respect of the above interim relief proceedings, which have been signed by Tribunal member Professor Thando Vilakazi, with Mr Andreas Wessels concurring, have been properly issued.

…

All three members were present throughout the hearing. Furthermore, after the hearing the three members deliberated on the matter and, based on the evidence presented at the hearing, were of the view that the interim relief application should be granted. In practice, and as usual, one member drafts the reasons and the others provide comment. The Reasons were then drafted by Prof. Vilakazi and commented on by Mr Wessels. No comments were received from Mr Ngcukaitobi.'

[19] Explaining why she could not resort to section 31(3) of the Competition Act, the Chairperson of the Competition Tribunal stated that '[f]or the sake of clarity, Mr Ngcukaitobi did not withdraw, resign, or fall ill. Therefore section 31(3) does not apply. On the contrary, the interim relief proceedings in the above matter were completed by the duly assigned Panel, and a majority decision of the panel has been issued'. She concluded her letter by adopting a stance like that of Lottoland's legal representatives with reference to section 31(4) and 31(6) of the Competition Act.

[20] The battlelines having been drawn, Google launched the present review application together with a conditional appeal. Google SA, which had been joined as a second respondent in the interim relief proceedings, also noted an appeal against the decision. All three matters were heard at the same time on the basis that this Court is required to first adjudicate the review and only adjudicate the appeals in the event of an unsuccessful review. Before dealing with the merits of the review application it is necessary to first deal with Lottoland's challenge to the jurisdiction of this Court to entertain the review application.

Submissions on behalf of Lottoland

[21] The submissions made on behalf of Lottoland started off by sketching out how Lottoland understood the basis of Google's challenge. In this regard Lottoland stated the following:

'Google contends that this court has jurisdiction to hear its review pursuant to section 37(1)*(a)* of the Competition Act. That section provides that this Court may "*review any decision of the Competition Tribunal*". But the premise of Google's review is exactly the opposite. Google's review is predicated on its argument that the impugned decision is not in fact a decision of the Competition Tribunal because it does not carry the express endorsement of Mr Ngcukaitobi. Google submits that the impugned decision is *ultra vires* the Tribunal's powers – and accordingly falls to be set aside under sections 6 (2) (a)(i), 6 (2)(b), 6 (2)(f)(i) and 6 (2)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – and consequently "*has no force* *and effect*". Put simply, Google contends that the two members of the Competition Tribunal hearing the matter (who are both economists) have handed down a decision which purports to be a decision of the Competition Tribunal; but is not in fact such; and that they have accordingly exceeded their lawful powers by delivering the impugned decision, which should therefore be set aside for this reason.'

[22] It was submitted on behalf of Lottoland that on Google's own version, the jurisdictional fact necessary for this Court to exercise the review power conferred upon it by section 37(1)*(a)* of the Competition Act is therefore not present. This Court can review and potentially set aside decisions of the Competition Tribunal which are vitiated by reviewable irregularities; but it has not been given the power to decide whether a decision is in fact a 'decision of the Competition Tribunal', nor to declare invalid a decision which in fact is not a 'decision of the Competition Tribunal'.

[23] It was submitted further that the power to entertain such a challenge, and make the kind of order that Google seeks, is reserved for the high court and that Google could have sought a declarator in that court (as occurred in *Premier Foods v Manoim NO* [4]) as to the validity of the decision, coupled with a review (under Rule 53); but it instead opted to pursue a review before this Court in circumstances where its single ground of review is ultimately predicated on there being no "decision" of the Competition Tribunal, and thus no review jurisdiction of this Court under section 37(1)*(a)* of the Competition Act.

[24] Reference was made to cases dealing with ouster clauses which were said to be analogous in this regard (albeit dealing with a converse situation). By way of an example, this Court was referred to the decision of the Appellate Division in *Minister of Law and Order v Hurley,*[5] where it was held that a provision which provided that a court had no jurisdiction to pronounce on any action taken in terms of a section of the

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[4] *Premier Foods v Manoim NO* [2015] ZASCA 159; 2016 (1) SA 445 (SCA); [2016] 1 All SA 40 (SCA).

[5] *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A); [1986] 2 All SA 428 (A).

Internal Security Act 74 of 1982 did not apply where the action was in fact *ultra vires* that section. In such cases, so the argument went, actions had to be *intra vires* in order for the jurisdictional ouster to apply. In the present case, the decision of the Tribunal members has to be *intra vires* in order for this Court to have jurisdiction to review their decision. The logical consequence of Google's argument that the Competition Tribunal members' decision was *ultra vires* (and more particularly contravened what was required by section 31 of the Competition Act) is that there is no 'decision' that is reviewable under section 37(1)*(a)*; and that means that, on Google's own case, this Court's review jurisdiction is not engaged, and its review must fail.

[25] Lottoland, however, emphasised that its submissions do not involve any concession on its part that the decision was not in fact a valid decision of the Tribunal. Reference was made to its main heads of argument, which indicate that its case is that the decision was indeed valid, and *intra vires* the Competition Act, as there was compliance with the requirements of section 31 of the Competition Act. It was suggested that on Lottoland's approach, Google's review does not however get out of the starting stalls, as it is based on incorrect legal conclusions. Because for Google's review to be sustained, the premise underlying it – namely, that Prof Vilakazi and Mr Wessels were acting *ultra vires* when releasing the decision as a decision of the Tribunal – has to be upheld. But in that case, there would not have been a 'decision of the Competition Tribunal' and so this Court could not review it.

Submissions on behalf of Google

[26] As with Lottoland, Google also commenced by summarising what it considered to be Lottoland's objection to this Court's jurisdiction to entertain the review and the following is Google's summary:

'Lottoland contends that this Court lacks jurisdiction to hear the review application. It states that the review application is predicated on an argument that "the impugned decision is not in fact a decision of the Competition Tribunal" as it did not carry Mr Ngcukaitobi's express endorsement and therefore there is no decision before this Court to review.'

[27] It was then submitted that Lottoland misinterprets Google's argument and the law because Google did not argue that the decision 'is not in fact a decision of the Competition Tribunal'. Google explained that its argument is that the decision is *ultra vires* the Competition Tribunal's powers as it failed to comply with section 31 of the Competition Act, more specifically with section 31(2)*(a),* which requires that at least one member of the panel is a person who has legal training and experience when the Tribunal adjudicates the matter.

[28] It was submitted that section 31(2)*(a)* of the Competition Act requires the participation of all three members throughout the adjudication of the matter in terms of section 27 of the Competition Act. In other words, a person with legal training and experience must always be part of the panel that completes the proceedings in the matter – and proceedings are completed when a decision with reasons is issued by the panel in terms of section 52(4) of the Competition Act.

[29] Offering what it termed a 'straightforward answer' to Lottoland's jurisdictional contention that there is 'no decision' that this Court can review in terms of section 37(1)*(a)* of the Competition Act, Google stated that there is a decision of the Competition Tribunal issued in terms of section 52(4) of the Competition Act, but that decision does not comply with section 31(2)*(a)* of the Competition Act. Accordingly, the argument is that the decision is *ultra vires* the Competition Tribunal's powers and is challenged under the Promotion Administrative Justice Act 3 of 2000 (PAJA) and the principle of legality and this Court enjoys jurisdiction to hear reviews brought either in terms of PAJA or the principle of legality.

[30] It was submitted further that, contrary to what Lottoland alleges in its submissions, the review application is not about 'deciding whether a decision is in fact a "decision of the Competition Tribunal" nor to declare invalid a decision which is not in fact a "decision of the Competition Tribunal"'. It is to review and set aside the decision issued by the Competition Tribunal on the grounds that it does not comply with the requirements of section 31 read with section 27 of the Competition Act.

[31] Dealing with section 37(1) of the Competition Act, it was submitted that the text of the provision is clear, and it confers jurisdiction on this Court 'to review any decision of the Competition Tribunal.' A decision by the Competition Tribunal that is unlawful, such as the impugned decision, it was submitted, is liable to be set aside in review proceedings provided for under section 37(1)*(a)* of the Competition Act.

[32] It was submitted that Lottoland has incorrectly framed the premise of the review application because what is being challenged is the irregular and unlawful decision issued by the Tribunal, as the adjudicative body tasked with determination of the interim relief application. It was further contended that Lottoland's interpretation of the law is untenable because challenging an administrative decision on the ground that it is *ultra vires* does not mean that there is no 'decision' that is reviewable under section 37(1)*(a)* of the Competition Act. To the contrary, what this means, as the Constitutional Court confirmed in *Competition Commission of South Africa v Group Five Construction Ltd*
(Group Five),[6] is that the decision is challenged for being unlawful and this Court has jurisdiction to set it aside on review.

[33] To further elucidate the point it was submitted that in *Group Five*, the Constitutional Court clarified that an 'enquiry into the lawful exercise of power – a vires enquiry – asks whether the action is lawful (intra vires) or unlawful'.[7] Accordingly, it was submitted, the question in these review proceedings is whether the impugned decision is lawful or unlawful, or whether the Tribunal acted beyond the scope of the Competition Act and accordingly *ultra vires* the powers conferred on it, in circumstances where it did not comply with section 31(2)*(a)* of the Competition Act.

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[6] *Competition Commission of South Africa v Group Five Construction Limited* [2022] ZACC 36; 2023 (1) BCLR 1 (CC).

[7] Ibid para 109.

[34] Finally it was submitted that the Constitutional Court confirmed that this Court, which has a status similar to that of the high court, has jurisdiction to hear PAJA and legality reviews in terms of the two provisions of the Competition Act,[8] and one of these provisions is section 37(1)*(a)*, which expressly empowers this Court to review any decision of the Competition Tribunal.

Does this Court have jurisdiction to entertain the review application?

[35] It is common cause that Google relies on the provisions of section 37(1)*(a)* of the Competition Act in this application. Section 37(1)*(a)* of the Competition Act provides that [t]he Competition Appeal Court may review any decision of the Competition Tribunal'. The text of the provision confers unqualified jurisdiction to this Court to review any decision of the Tribunal and it does not appear that Lottoland takes issue with this.

[36] What Lottoland does, however, is create an artificial distinction between decisions lawfully taken within the powers conferred by the enabling statute and those that are *ultra vires*. Having made that artificial distinction, Lottoland goes further and suggests that the review jurisdiction conferred by section 37(1)*(a)* of the Competition Act is confined to only those decisions that the Competition Tribunal lawfully takes within the powers conferred by the Competition Act and that it does not have jurisdiction to review those decisions where the Competition Tribunal has not acted in accordance with the provisions of the Competition Act.

[37] The distinction that Lottoland makes between *intra vires* and *ultra vires* decisions of the Tribunal cannot be traced to any provision of the Competition Act and Lottoland could not point to any. The Competition Act only refers to 'decisions', a term that is not defined in the Competition Act.

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[8] Ibid para 132.

[38] I also have some difficulty in understanding the parallels that Lottoland seeks to draw between a provision conferring jurisdiction (section 37(1)(*a*) of the Competition Act) and a provision ousting jurisdiction of the court (Section 29(6) of the Internal Security Act 72 of 1982). It is not apparent to me how the interpretation of a statute that delineates the ambit of excluding a court's jurisdiction can be of assistance in interpreting a statue conferring jurisdiction.

[39] Lottoland could not refer this Court to any authority for the proposition that this Court's jurisdiction to review the decisions of the Competition Tribunal is only limited to circumstances where the Competition Tribunal has acted within its powers as conferred by the Competition Act. To the contrary, and as pointed out on behalf of Google, the Constitutional Court in *Group Five* confirmed that this Court, has jurisdiction to hear PAJA and legality reviews in terms of the provisions of the Competition Act.

[40] Indeed it would be quite remarkable for the lawmakers to deprive this Court, which was created as a specialist court, of what I would consider to be an essential power to supervise the functions of the Competition Tribunal under the Competition Act. By way of an example, section 26(1)*(d)* of the Competition Act requires the Tribunal to exercise its functions in accordance with this Act. On Lottoland's logic, this Court would not have jurisdiction to enquire whether the Competition Tribunal has exercised its functions in accordance with the Competition Act where the Competition Tribunal has exceeded the powers conferred by the Competition Act. The absurdity of this shows that to uphold Lottoland's argument would undermine the whole regime created by the Competition Act as one would end up with a situation where there is no clarity as to which Court, between the high court and this Court, enjoys review jurisdiction in respect of the various functions of the Competition Tribunal. In my view, there is no merit in Lottoland's jurisdiction point and this should be the end of the matter. But Lottoland has also disregarded Google's pleaded case in advancing its jurisdiction point, an aspect to which I turn next.

[41] The relief that Google seeks in the review application is framed in the following terms:

'That the decision of the first respondent (the Tribunal) of 12 November 2024 under case number IR191Mar23 ("Decision"), insofar as it is irregular and inconsistent with section 31 (3) of the Competition Act, No. 89 of 1998 ("**Competition Act**"), be reviewed and set aside in its entirety.'

[42] Clearly what is sought to be set aside is the Tribunal's decision and not its purported decision as Lottoland suggests. Any suggestion by Google that there is no decision is not borne out by the text of the relief sought by Google.

[43] The founding affidavit is also full of references to the 'decision of the Competition Tribunal' and not even once is it referred to as 'the purported decision'. A few examples will suffice. The starting point is paragraph 1.2 of the founding affidavit, where the deponent states that:

'I am authorised to depose to this affidavit on behalf of the applicant, in support of an application to review the decision of the Competition Tribunal (Tribunal) of 12 November 2024 under case number IR191Mar23 in its entirety. A copy of the Tribunal's decision is attached hereto as Annexure "LN1" ("Decision".)'

[44] Annexure "LN1" is indeed the decision that is sought to be reviewed in this application and the deponent to the founding affidavit describes it as such and not as a purported decision of the Competition Tribunal.

[45] There is also paragraph 5.6 of the founding affidavit, where it is stated that:

'This review focuses on the irregular, and consequently unlawful, absence from the rendering of the Decision of the member of the panel in the Tribunal required in terms of section 31 (2) (a). That provision requires that "*at least one member of the panel is a person who has legal training and experience*." The Decision was rendered by the other two panel members, who do not possess the legal training and experience. Accordingly, the Decision is irregular and should be set aside for its non-compliance with the provisions of section 31 (2) (a), among other reasons.'

[46] The above evidence clearly undermines Lottoland's argument in that it makes it clear that Google challenges the impugned decision based on Mr Ngcukaitobi's absence from the rendering of the impugned decision. Again, there can be no suggestion that these allegations are capable of being read in the manner suggested by Lottoland, namely that Google's ground of review is that there is no decision that was taken by either the panel so appointed or the Competition Tribunal. The spotlight in the review is rather on the alleged irregularity and unlawfulness that was occasioned by Mr Ngcukaitobi's absence from the rendering of the decision.

[47] The last example is to be found in paragraph 6.5 of the founding affidavit where it is stated that:

'On its face, the Decision does not comply with the requirements of section 31 read with section 27 of the Competition Act. The Tribunal has not made a lawful decision and as a result it should be set aside in its entirety.'

[48] All of the above evidence points to the fact that Lottoland's objection to this Court's jurisdiction is devoid of any factual foundation and that should really be the end of the matter. In the end, I am of the view Lottoland's objection to this Court's jurisdiction is unsustainable on both the law and the facts. Next, I consider the merits of the review application.

The merits of the review application

[49] The review application concerns a narrow point, and it is whether the decision is vitiated by Mr Ngcukaitobi's failure to sign it. It is common cause that the matter was properly assigned, in terms of section 31(1) of the Competition Act to a panel of three members and in compliance with the provisions of section 31(2)*(b)* of the Competition Act, which requires that at least one member of the panel to be a person who has legal training and experience.

[50] It is further common cause that the hearing of the application proceeded before a properly constituted panel. Also common cause, is the fact that Mr Ngcukaitobi, being the member who was appointed to ensure compliance with the provisions of section 31(2)*(b)* did not sign the decision sought to be reviewed and neither did he render a separate decision.

[51] Google's approach in bringing the review application was that that Mr Ngcukaitobi's failure to participate in the proceedings until finalised is fatal if one has regard to the mandatory requirements relating to the inclusion of a person with legal training and experience when assigning a matter to the panel. In this regard, Google referred to the provisions of section 31(2)*(b)* read with 31(3) of the Competition Act. The point here was that section 31(3) requires the Chairperson to terminate the proceedings of a panel in the event of the inability by a panel member with legal training and experience to complete the proceedings.

[52] Lottoland characterises Mr Ngcukaitobi's failure to render a decision as being 'exceedingly passive' and contends that it does not matter because the decision of the two other members constitutes a decision of the majority, which in terms of section 36(6) is the decision of the Tribunal.

[53] The parties' approach to the application, however, did not grapple with the primary enquiry – namely – whether the two members of the panel who signed the decision acted in accordance with the provisions of the Competition Act, when they signed the decision without it being signed by Mr Ngcukaitobi.

[54] It was submitted on behalf of Google that the cases that the Court had referred the parties to support's Google's case, that the two members of the panel who signed the decision did not act in accordance with the provisions of the Competition Act when they rendered a decision without Mr Ngcukaitobi. This is because section 31 identifies a number of individuals who are empowered in terms of the Act to decide a matter referred to the Competition Tribunal for adjudication and it is the Competition Tribunal

that makes decisions as one composite body made up of three members. As the three members of the panel did not act in that joint manner they have not acted in accordance with the provisions of the statute, to use the language of Innes CJ in *Schierhout*.

[55] A further point made by Google regarding Lottoland's reliance on section 31(6) of the Competition Act was that *JSC v Cape Bar* is also relevant if the Court considers paragraph 34 as well. There the SCA dismissed precisely the deadlock breaking argument that Lottoland raises here about section 31(6) of the Competition Act.

[56] Reference was also made to para 35 of *JSC v Cape Bar* where reference is made to careful design of the body. An analogy was drawn with this matter that the Competition Act has carefully designed a panel that includes a person with legal training and experience and if the view of the person with legal training and experience is not reflected in the decision by the body, then it is a decision that has not validly been taken, because the panel is not properly constituted.

[57] In sum, the submission on behalf of Google was that where the Competition Act empowers three members of a panel to deal with a matter, it requires them to act jointly and their failure to do so means that they have not acted in accordance with the Competition Act.

[58] Counsel for Lottoland acknowledged the general principle that requires members of a body to act jointly but argued that this is not an immutable principle. He submitted that *JSC v Cape Bar* was decided correctly but is distinguishable on the facts to the present matter in that the President of the SCA , in JSC v Cape Bar, was just not at the meeting whilst what we have here is Mr Ngcukaitobi, who was never not there, but was just not doing anything. He further submitted that it is debatable whether there are some similarities between section 178(6) of the Constitution and section 31(6) of the Competition Act.

[59] In dealing with *New Clicks* and *Schierhout*, Lottoland's counsel pointed to the fact that in both cases it was found, after having had regard to the statutory provisions in question, that the members of the bodies concerned did not have to act jointly. The implication thereof for this matter was that the argument reverted to section 31(6) of the Competition Act that the two-member decision, as a decision of the majority, is the decision of the Competition Tribunal.

[60] It is perhaps convenient to start with Lottoland's point about section 31(6) of the Competition Act. As correctly pointed out on behalf of Google, this provision is concerned only with a deadlock breaking mechanism of an otherwise properly constituted three-member panel and nothing more. That this must be so is made clear by the provisions of section 31(3) of the Competition Act dealing with the inability of a member of a panel to conclude the proceedings. In this regard, the Chairperson can either terminate the proceedings where the member unable to conclude the proceedings is the one with legal training and experience, or direct that the matter proceeds before the remaining two members subject to the requirements of section 31(2)*(a)* of the Competition Act. It is thus clear that the interpretation of section 31(6) advanced by Lottoland would render the provisions of section 31(3) nugatory.

[61] The application that Lottoland had brought before the Tribunal was assigned to a panel of three members. That panel, on the available evidence, acted jointly up to a point when it deliberated on the outcome of the application. When the reasons for the decision were circulated, it is common cause that no comments were received from Mr Ngcukaitobi and there is no explanation for his failure to do so.

[62] Can it be said then that Mr Ngcukaitobi participated in the proceedings until they were finalised? Google answers this question in the negative; suggesting that the proceedings are only finalised on publication of written reasons for the order in terms of section 52(4) of the Competition Act.

[63] Lottoland answers the question differently, submitting that it does not matter if Mr Ngcukaitobi did not participate in the proceedings until they were finalised. This is because he did not withdraw, resign, become ill or die. Instead, he simply did not comment on the draft reasons when they were forwarded to him and that does not mean that the other two cannot arrive at a decision. This is because there is nothing in the Competition Act that says that you should need a consent or a dissent or that the other member has to express his or her views.

[64] Lottoland's argument is thus that section 31 does not say that the majority cannot go ahead and that a decision of the majority of the Tribunal is then not a decision of the Tribunal. Section 31 does not say all members must decide and it does not say that there has to be a concurrence or a dissent.

[65] Accepting Lottoland's last proposition would be to jettison the age old established principle discussed above that requires members of statutory bodies to act jointly unless the statute provides otherwise.

[66] The answer to the above question is clear. Mr Ngcukaitobi did not participate in the proceedings until their conclusion and as a result of his failure, the panel was unable to act jointly in discharging its functions. There is no explanation for his failure and the provisions of the Competition Act make no provision for the remaining members of the panel to proceed in the absence of one of the panel members.

[67] The two members of the panel that rendered the decision did not do so in accordance with the provisions of the Competition Act and as such the decision falls to be reviewed and set aside.

Remittal or substitution

[68] The Competition Act confers the power to consider applications in terms of section 49C of the Competition Act on the Tribunal. That the Tribunal has not done that

which it was supposed to do means that, absent exceptional circumstances, it should be afforded the opportunity to right its wrongs.

[69] It was, however, submitted on behalf of Google that this Court should not remit the matter back to the Tribunal but should determine the application. Reference in this regard was made to section 37(2) of the Competition Act, which empowers this Court to give any judgment or make any order, including an order to '(a) confirm, amend or set aside a decision or order of the Competition Tribunal; or (b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms'.

[70] We were referred to a decision of this Court in *Glaxo Welcome (Pty) Ltd and Others v Terblanche N O and Others* (*Glaxo Welcome)*,[9] where it was stated that:

'An analysis of the reported cases illustrates that the reviewing court will itself correct the decision of the tribunal or functionary and substitute its own decision where the result is a foregone conclusion …; where further delay may cause undue prejudice …; where the tribunal or functionary has exhibited bias or incompetence which would render it unfair to re-expose a party to the same jurisdiction …; where the court finds itself to be in as good a position as the tribunal or functionary. Here the Courts will, despite the fact that they are usurping the functions of another, nonetheless act if fairness so dictates ….'

[71] It was submitted that there has been a considerable delay in the filing of the interim relief application by Lottoland, a delay of approximately 29 months since the restriction of Lottoland's access to Google Ads, and a further delay of approximately 16 months after date of the hearing. It was further submitted that this Court is well-placed to determine the merits of the interim relief application because of the appeals that are simultaneously serving before this Court with the review application. Lottoland did not particularly address the question of remittal or substitution.

[72] The outcome in respect of the application for the interim relief is by no means a foregone conclusion and counsel for Google did not suggest so. The emphasis from

[9] *Glaxo Welcome (Pty) Ltd and Others v Terblanche N O and Others* [2001-2002] CPLR 48 (CAC).

what I gathered from the argument was on the delay by Lottoland in bringing the application, the delay by the Tribunal in rendering a decision, as well as the fact that this Court is well-placed to determine the application because the papers are before us.

[73] I accept that there has been a delay both in the bringing of the application by Lottoland as well as the delay by the Tribunal to render a decision. What Google has not addressed, however, is the prejudice that would be caused by a further delay if the matter is remitted. In my view, it does not suffice to merely point out the past delay without placing before the court the facts tending to show undue prejudice that would be caused by a further delay. This leaves the only other consideration – this Court being well-placed to determine the application, an aspect I turn to next.

[74] The difficulty with granting a substitution order goes back to the architecture of the Competition Act. The Tribunal includes members with expertise in economics and law. It is the Tribunal of first instance and the decisions it makes are a product of a mix of that expertise. In as much as this Court has the benefit of all the papers, it does not have the benefit of expertise in economics. That, in my view, renders it undesirable for this Court to consider the application for an interim relief as a forum of first instance.

[75] There may well be cases where the diverse views of the members of the Tribunal have been expressed from which this Court would derive some benefit, in which cases it would be well-placed to determine that matter, but in my view, this is not one of those cases.

[76] I am mindful of the fact that the interim interdict has endured for a period close to its six months' duration, but I am not persuaded that that should justify the substitution order. Neither party argued for a remittal. Such a remedy would be wholly impractical given the brief period left in which the order will still be in effect. Nor is it clear that a panel to hear the matter could even be constituted to hear it in this period let alone make a decision. Remittal would simply create more problems for all involved.

The outcome in the review application renders it unnecessary for this Court to consider the appeals. Finally, I turn to the issue of costs.

Costs

[77] Both counsel agreed that, if successful, costs should be awarded on scale C and should include costs of two counsel, where employed.

[78] Lottoland's counsel further submitted that Lottoland should not be mulcted with costs if the review application succeeds. This was because, so it was argued, Lottoland would be the big losers in the sense that the review has been occasioned by an irregularity that was committed by the Tribunal.

[79] The response on behalf of Google was that Lottoland chose to oppose the review when it had a choice to abide this Court's decision. It was further argued that Lottoland moreover went further to challenge the jurisdiction of this Court to entertain the review.

[80] I am of the view that the costs should follow the result because, even though the review was occasioned by the conduct of the Competition Tribunal, Google made it clear in its notice of motion that it would only seek costs against those of the respondents who opposed the review application. Having been forewarned, Lottoland elected to take the risk and now that the risk has eventuated, Lottoland cannot be heard to complain.

Order

[81] In the result the following order is made:

1 The decision of the Tribunal of 12 November 2024 under case number IR191Mar23 is reviewed and set aside;

2 The fifth respondent in the review application is ordered to pay the applicant's costs on scale C, which shall include the costs of two counsel, where employed.

L G Nuku

Judge of Appeal

Competition Appeal Court of South Africa

Appearances

For the applicant/appellants:	M M Le Roux SC and N Sakata
Instructed by:	Baker McKenzie Inc, Sandton
For the fifth respondent:	P Farlam SC and L Kelly
Instructed by:	Dingley Marshall Lewin Inc, Cape Town