COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 31/CR/May05

In the matter between:

OMNIA FERTILIZER LTD	Applicant
And	
THE COMPETITION COMMISSION	Respondent

In re:

CASE NO: 31/CR/MAY05 AND CASE NO: 45/CR/MAY06

THE COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
And	
SASOL CHEMICAL INDUSTRIES (PTY) LTD	First Respondent
YARA (SOUTH AFRICA) (PTY) LTD	Second Respondent
OMNIA FERTILIZER LTD	Third Respondent
AFRICAN EXPLOSIVES AND CHEMICAL INDUSTRIES LTD	Fourth Respondent
NUTRI-FLO CC	First Intervening Party
NUTRI-FERTILIZER CC	Second Intervening Party

Panel	: D Lewis (Presiding Member), Y Carrim (Tribunal Member), and U Bhoola (Tribunal Member)
Heard on	: 14 February 2008
Decided on	: 07 March 2008
Reasons Issued	: 20 June 2008

REASONS: OMNIA COSTS APPLICATION

1. On 13 February 2008, Omnia Fertilizer Limited ("Omnia") applied for wasted costs to be awarded against the Competition Commission in respect of a consolidation application filed

and subsequently withdrawn by the Commission. On 7 March 2008 the Tribunal dismissed the application. These are the reasons for that decision.

Background to the application

2. Omnia, together with Sasol Chemical Industries, Yara and AECI, is a respondent in a complaint that has been referred to the Tribunal by the Commission on 04 May 2004. The complaint was brought against the respondents by Nutri-Flo CC and essentially concerns allegations of contraventions of sections 4(1)(b), 4(1)(a), 8(c) and 8(d)(ii) of the Competition Act. We refer to this complaint as the Nutri-Flo complaint.[1] Nutri-Flo had been granted leave to intervene in the proceedings before the Tribunal. At more or less the same time the Commission had referred a second complaint, referred to as the Profert complaint,[2] to the Tribunal. The respondents in the Profert complaint are Sasol, Kynoch (Yara) and AECI.

3. Pleadings in the Profert complaint had closed by the end of August 2006 and the matter was set down for 3-17 March 2008. On 5 October 2007 the Commission filed an application to consolidate the Profert and Nutri-Flo Complaints. Pleadings in the Nutri-Flo complaint had not yet closed. The basis of the consolidation application is not relevant for purposes of our discussion save to say that it was opposed by Sasol and Omnia on a number of grounds. The Commission attempted to obtain a hearing for the application during late 2007 but was unsuccessful in this due to the unavailability of the respondents and the Tribunal. The matter was set down for hearing together with a number of other interlocutory matters on 14 February 2008. On 13 February 2008 the Commission withdrew its application for consolidation. The Commission explained that it had done so after the Commissioner realized that a consolidation of the two complaints at this late stage of the Profert timetable could result in a postponement of the Profert matter. The Commission had attempted to set the application down earlier in order to avoid this outcome but had not been successful. In order to avoid the Profert matter being postponed it had withdrawn the application.

4. At the hearing, Omnia sought costs against the Commission arising from the unilateral withdrawal of the consolidation application by the Commission. The Commission opposed

1 31/CR/May05.
2 45/CR/May06. Referred to as the Profert complaint because the complainant in this matter was Profert (Pty) Ltd.

this application but requested further time to submit comprehensive submissions. After having heard Omnia, the Tribunal permitted both the Commission and Omnia to submit written submissions, which were received on 21 February 2008 and 27 February 2008 respectively.

Summary of the submissions

5. Omnia argued that the Commission in launching the consolidation application and withdrawing it at such a late stage had put the respondents to great cost and effort which had been wasted. On the basis of the practice followed in the High Court, the Commission ought to pay the wasted costs of the respondents. The Commission was also well aware that a successful consolidation application could lead to a postponement of the Profert matter because pleadings in the Nutri-Flo complaint had not yet closed. Nevertheless the Commission persisted in bringing the application. The Commission had acted in a cavalier and reckless manner. Furthermore, Omnia had elected to oppose the application for good reasons. In its view a consolidation of the two complaints would have caused prejudice to it because it was not a respondent in the Profert matter and would have had to bear the inconvenience and costs of participating in aspects of a trial that were not relevant to it. Accordingly it sought costs against the Commission such costs to include the costs of two counsel.

6. The Commission argued that the Tribunal was jurisdictionally barred from granting costs against the Commission. Even if the Tribunal was empowered to do so, policy considerations required that a prosecutor acting in the public interest should not be mulcted with costs. In any event this was not an appropriate case for an award of costs against the Commission since it had not acted maliciously or recklessly in the circumstances

7. In response Omnia submitted that having regard to the language of section 57 read together with the rules, the Tribunal was not jurisdictionally barred from awarding costs against the Commission. Moreover South African jurisprudence suggested that costs were usually awarded against the State and regulators. The Competition Appeal Court had in fact awarded costs against the Commission in several matters.[3]

3 See *Sappi Fine Paper (Pty)Ltd v The Competition Commission of South Africa and Another* [Case No. 23/CAC/Sep02]; *Association of Shipping Lines v The Competition Commission of South Africa* [Case No

Position in South African law

8. Before considering the central issue of whether or not we are empowered to grant costs against the Commission we consider the applicable principles in South African law.

9. The general principle in South African civil law is that the State or the government can be held liable for the costs of litigation in which it is engaged.[4]

10. The High Court and Supreme Court of Appeal have awarded costs against the State in proceedings in which applicants have sought a review of or appeal against a decision of a government department or functionary, where litigants have sought to exercise their constitutional rights or have sought damages from the State.[5]

11. In relation to public officers and quasi-judicial bodies or regulators, the general rule is that a court will make no order as to costs if that entity was unsuccessful in its opposition but acted *bona fide*.[6] In *Fleming v Fleming*[7] the Appellate Division confirmed the rule established in *Coetzeestroom* and held that the costs should not be awarded against a public officer who carried out his official duties mistakenly, but in good faith. In *Attorney-General, Eastern Cape v Blom*[8] the court expressed the view, in obiter, that that this rule should not be elevated to a rigid rule which would fetter judicial discretion. Nevertheless, courts are reluctant to award costs against prosecutors or entities which are akin to a prosecutor.[9] In *Nortje v Attorney General, Cape and Another*,[10] a full bench of the Court expressed the view that prima facie it is undesirable to inhibit attorneys-general, and those delegated by them to prosecute, in the bona fide performance of their constitutional duty by the "*spectre of costs being ordered against the state when prosecutions fail, appeals succeed or*

22/CAC/Sep02] and *The Competition Commission v Unilever PLC and Others* [Case No 13/CAC/Jan02].
4 A C Cilliers *Law of Costs* Butterworths (3ed), Chapter 10 and the cases cited at 10-4.
5 Cilliers supra. See also in general *Hangklip Environmental Action Group v MEC For Agriculture, Environmental Affairs and Development Planning, Western Cape, And Others* 2007 (6) SA 65 (C), *Chairpersons' Association v Minister of Arts & Culture and Others* 2007 (5) SA 236 (SCA), *Mc Donald & Others v Minister of Minerals & Energy & Others* 2007 (5) SA 642 (C), *Tantoush v Refugee Appeal Board & Others* 2008 (1) SA 232(T).
6 See *Coetzeestroom Estate & GM Co v Registrar of Deeds* 1902 TS 216. See also Winsen et al *The Civil Practice of the Supreme Court of South Africa 4ed Juta,* 1997 at 723 and the discussion in Cilliers above at para 10.06.
7 Fleming v *Fleming* 1989 (2) SA 253 (A).
8 1988 (4) SA 645 (A).
9 See Winsen et al at 725.
10 1995 (2) SA 460 (C).

applications they resist are granted" (Our emphasis). In the case of an interlocutory application there is even less reason to consider granting a costs order against an attorney-general.[11]

12. Costs are always awarded at the discretion of the judicial officer. In *Blom*, the court confirmed a costs order granted by the trial court against the Attorney-General on the basis that was an exercise of judicial discretion and a court of Appeal will not readily interfere with the exercise of that discretion.

13. In summary, costs can be awarded against the State in administrative, constitutional or delictual cases. In cases involving statutory bodies or public officers, courts will not easily award costs if the public officer acted, mistakenly, but in good faith. However this rule is not to be elevated to a rigid rule where judicial discretion is fettered. Courts however are reluctant to award costs against a prosecutor or an entity akin to a prosecutor acting in good faith. In the case of an interlocutory application a court would be even more reluctant to award costs against an attorney-general. The award of costs is always an exercise of judicial discretion, even if it is done in terms of the provisions of a statute.[12]

14. In proceedings of a criminal nature, the basic principle is that in the absence of specific statutory authority a court has no power to order the state represented by the prosecuting authority to pay costs where an accused has been acquitted or the accused to pay costs where he or she has been convicted. [13] Hence in criminal trials each party bears its own costs. The principle at the level of appeal however is different. A court is expressly empowered by sections 310A and 311 of the Criminal Procedure Act, 51 of 1977 to award costs against or in favour of the Attorney General in who seeks to apply for leave to appeal against a decision of a lower court or in the appeal itself.

15. In the event that costs are awarded, the general rule is that costs follow the suit and are awarded on a party-party scale.[14]

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11 At 485 E-F.
12 See *Hangklip* page 86.
13 See Cilliers above at page 12-15.
14 Cilliers *supra*.

English law

16. The position in English law is similar. In *Baxendale-Walker v Law Society*, the court held that

> 16.1. "The principles in relation to an award of costs against a disciplinary body were not in dispute. A regulator brings proceedings in the public interest in the exercise of a public function which it is required to perform. In those circumstances the principles applicable to an award of costs differ from those in relation to private civil litigation. Absent dishonesty or a lack of good faith, a costs order should not be made against such a regulator unless there is good reason to do so. That reason must be more than that the other party has succeeded. In considering an award of costs against a public regulator the court must consider on the one hand the financial prejudice to the particular complainant, weighed against the need to encourage public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial prejudice, if the decision is successfully challenged."[15]

17. The Court in *Baxendale* was relying upon the seminal decision of the *City of Bradford Metropolitan District Council v Booth*.[16] In *City of Bradford the Court* outlined the approach to be taken when deciding to award costs against regulators and states that -

> "26. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) *the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged*."[17] (Our emphasis)

15 2006 EWHC643 at paragraph 43.
16 [2000] COD 338.
17 At para 26.

18. We turn now to consider the scheme set out in the Competition Act.

Jurisdictional Bar

19. Before considering the relevant provisions of the Competition Act it would be instructive to highlight the context in which the competition agencies exercise their functions.

20. While the Competition Tribunal's functions are adjudicative in nature, its powers are expressly provided for in the Competition Act. The Tribunal, unlike the High Court, is a creature of statute and does not enjoy inherent jurisdiction. When the Tribunal is asked to grant a particular order it must first look to see whether it enjoys such powers expressly or by necessary implication in the four corners of the Act.[18] Hence before the Tribunal can make an award of costs, its power to do so must be found in the Act.

21. The Commission is also a creature of statute whose functions are to promote the objectives of the Act and to ensure compliance with the provisions of the Act.[19] It has both investigative and prosecutorial powers. The Commission's merger regulation functions are divided into two. In relation to intermediate mergers the Commission investigates and makes a decision on the merits of the merger. Such decision can be taken on appeal by the merging parties to the Competition Tribunal.[20] In relation to large mergers the Commission investigates and arrives at a recommendation which is referred to the Tribunal for a decision.[21] In relation to anti-competitive conduct, the Commission is tasked with the investigation thereof. Once it determines that a prohibited practice has taken place, it refers this to the Tribunal for a decision. When it prosecutes alleged anti-competitive conduct before the Tribunal, the Commission is akin to a prosecutor in a criminal trial.[22]

22. The Tribunal and the Commission are collectively responsible for the regulation of competition in the South African economy.

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18 See Devenish *Interpretation of Statutes* Juta 1992(Cite) and *Moodley v Minister of Education and culture, House of Delegates* 1989 (3) SA 221 (A).
19 See sections 19- 25 of the Act.
20 Section 14.
21 Section 14A.
22 See *Simelane and Others NNO v Seven –Eleven Corporation SA (Pty) Ltd and Another* [2001-2002] CPLR 13 (SCA).

23. The Competition Appeal Court, while established in terms of section 36 of the Act as a specialist court, enjoys a status similar to that of a High Court. The Competition Appeal Court can review any decision of the Tribunal and consider appeals arising from decisions of the Tribunal.[23] Unlike the Tribunal however, the Court enjoys inherent jurisdiction and, in addition to those set out in the Act, enjoys the powers of a High Court.

24. This distinction between the Tribunal, as a creature of statute, and the Competition Appeal Court, as a High Court can also be found in those provisions of the Act that deal with the orders the two bodies can make. Section 37(2) provides that the Competition Appeal Court *may give any judgment or make any order,* including an order dealing with a decision of the Tribunal or remitting a matter to the Tribunal for further hearing.[24] By contrast, the Tribunal is restricted to the powers and remedies provided for *in terms of this Act*.[25] It cannot make *any* order, it can only make such orders as it empowered to make by the provisions of the Act. The Act sets out the Tribunal's functions and powers in great detail in sections 58, 59 and 60. [26]

25. Such an approach can be found within section 58 itself which sets out the orders that the Tribunal is empowered to make. An initial reading of section 58 might suggest that the Tribunal enjoys the same latitude as the Appeal Court. Section 58 provides –

    25.1 "In addition to its other powers in terms of this Act, the Competition Tribunal may – make an appropriate order in relation to *a prohibited practice*, including…"

26. The words "In *addition to its other powers….the Tribunal may make an appropriate order*" could suggest that the Tribunal has a wide discretion to make any appropriate order. However a closer reading shows that that latitude applies only to prohibited practices. [27] This limiting or restrictive approach is reinforced in the subsequent sub-sections where the legislature enumerates the kinds of remedies it envisaged in section 58(1).

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23 See section 37.
24 See section 37(2).
25 See section 27(1) and section 58.
26 See sections 27(1), 58, 59 and 60. See also our decision in Case No 45/CR/May06.
27 See s57 (1) (a).

27. Hence, our approach to whether or not the Tribunal is empowered to make an award of costs in the circumstances of this case must be guided by two central principles, namely that the Tribunal is a creature of statute and does not enjoy the inherent jurisdiction of a High Court and second that the legislature has sought to circumscribe the powers of the Tribunal to only those that it has set out in the Act.

Scheme under the Act

28. We turn to consider the provisions of the Act that deal with the issue of costs.

29. The Tribunal's power to award costs is regulated by the provisions of section 57 which provides –

> "57. Costs
>
> (1) Subject to subsection (2), and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs.
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> (2) If the Competition Tribunal –
>
> (a) has not made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs to the *respondent*, and against a *complainant* who referred the complaint in terms of section 51(1); or
>
> (b) has made a finding against a *respondent*, the Tribunal member presiding at a hearing may award costs against the *respondent*, and to a *complainant* who referred the complaint in terms of section 51(1)."

30. A textual analysis of section 57 provides us with the following regime. The general principle is that in proceedings before the Tribunal, each party must bear its own costs (section 57(1)). In terms of this section the Tribunal is not empowered to award costs against the Commission or any other party appearing before it. This general rule is qualified by two limitations namely section 57(2) and the "Tribunal's rules of procedure".

31. Section 57(2) contemplates that the Tribunal may award costs against parties appearing before it. This is essentially the first qualification to the general rule that each party must bear its own costs. However section 57(2) has two further internal qualifications, the effect of which is to exclude the Commission from the operation of s57 (2) altogether. Section 57(2) permits the Tribunal to award

costs but only in circumstances as between a complainant and a respondent and only where the complainant and the respondent are the parties to a complaint that has been referred to the Tribunal in terms of section s51(1).

32. Respondent is defined in section 1(xxix) of the Act as a *firm* against whom a complaint of a *prohibited practice* has been initiated in terms of *this Act.* In terms of section 49B of the Act a complaint can be initiated by a complainant under s49B (2) (b) or the Commission in terms of s49B (1). While the word complaint is not defined in the Act, the word "complainant" used in section 57(2) is and means a person who has submitted a complaint in terms of section 49B(2)(b). A complainant in 49B (2) is not the Commission. A referral in terms of section 51(1) is a referral to the Tribunal by a complainant (which does not include the Commission) after the Commission has issued or deemed to have issued a notice of non-referral. [28] Such a prosecution is akin to a private prosecution in civil law. It is the complainant, acting in its own interests and not the Commission acting in the public interest, who brings the matter before the Tribunal.

33. These then are the only circumstances in which the Tribunal is permitted by the Competition Act to make an award of costs, namely where a complainant has referred the matter to the Tribunal in terms of section 51(1) and the proceedings of which are akin to a private prosecution. The Tribunal is accordingly jurisdictionally barred from awarding costs against the Commission and any other party appearing before it in any other circumstances.

34. Omnia argues that the Tribunal is empowered to make an award of costs against the Commission on the basis of the second qualification contained in section 57(1), namely "subject to the Competition Tribunal's rules of procedure". It argues that the words "subject to the rules" render the statutory provisions subordinate to the rules and we must look to the Tribunal's rules to see what the actual position is in relation to costs against the Commission. In drafting section 57(1) in the way that it did, Parliament was granting the Tribunal the power, through its rules, to expand the scope of section 57. Since rule 50(3) contemplates that an award of costs can be made against a party withdrawing an application[29] and rule 58(1) provides that the Tribunal may make any order for costs under

28 See the provisions of section 51(1) of the Act.
29 See rule 50(3).

Part 4,[30] this allows the Tribunal to make an award of costs against the Commission for withdrawing the consolidation application. Omnia argues further that this Tribunal has contemplated that it enjoyed the jurisdiction to award costs against the Commission, as expressed in *SAA Amendment* decision[31] and has in fact awarded costs against a party in *Paarl Post Web Printers (Pty)Ltd v CTP Holdings Ltd and Another.*[32]

35. Omnia's approach to the interpretation of section 57 is novel indeed and if taken to its logical conclusion will undermine the fundamental tenet of our legal system namely that of the separation of powers. It is trite law that rules or regulations (in which rules are promulgated) are subordinate to the statute they are made in terms of and cannot be interpreted to extend the powers granted in a statute. [33]

36. In *Moodley v Minister of Education and Culture, House of Delegates 1989 (3) SA 221 (A)* the Court sets out the proper approach to this issue:

    36.1. "It is not permissible to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former." [34]

37. Regulations, which are promulgated by the Minister and not drafted by Parliament, cannot be treated as an aid to interpretation of the Act, and cannot be used to enlarge the meaning of the provisions of the Act.[35] The fundamental principle ignored by Omnia, when it tenders its argument, is that Parliament, cannot delegate its own law making function. At best it can clothe – through its law making function - a statutory body or a minister with duties and functions. In doing this it must itself adhere to the principle of the separation of powers provided for in the Constitution. Parliament, even if it had sought to do as Omnia suggests, cannot permit the meaning and scope of a statute to be enlarged upon by rules and

30 See rule 58(1). Part 4 includes rules 14 to 43. The Commission's application was brought under rule 42.
31 *The Competition Commission v South African Airways (Pty) Ltd [Case No. 18/CR/Mar01] Amendment Decision.*
32 Case No. 47/IR/A/Jun00.
33 See Devenish *Interpretation of Statutes* Juta 1992.
34 See *Moodley* at 233 D-F.
35 See *Moodley* at 233.

regulations promulgated by the executive. [36]

38. While rules 50(3) and 57(1) cannot be used to interpret the ambit of section 57, the converse is possible. When we look at *rules* 50(3) and 57(1) we consider these through the lens of *section* 57(1) and (2). Rule 50(3) and 57(1) apply only in the event that the Tribunal exercises its discretion in terms of section 57(2). Moreover, the words "subject to the Tribunal's rules of procedure", read in their context seem to place further limitations, albeit of a procedural nature, on the Tribunal's power to award costs.

39. In conclusion, the effect of section 57, read with the rules of the Tribunal, is to effectively bar this Tribunal from awarding costs against the Commission or any other party appearing before it except in the context of a section 51(1) referral. When the Tribunal exercises its discretion in that context, it must do so in accordance with its own rules of procedure. The section cannot be interpreted to mean otherwise. Nor can the words "subject to the Tribunal's procedures" – which clearly place a *procedural* limitation on the Tribunal's power to award costs – be interpreted to expand the *substantive* powers of the Tribunal. [37]

40. It is of course entirely possible that costs, in principle, can be awarded against the Commission by the Competition Appeal Court. The Court after all enjoys inherent jurisdiction. The scheme under the Act in fact combines elements of both the South African criminal and civil law framework by requiring each party to bear its own costs as a first principle (criminal trial), permitting cost awards in proceedings akin to private prosecutions (referrals in terms of section 51(1)) and permitting costs against the Commission at the level of appeal. The policy considerations underpinning the scheme are self-evident. The Commission, as regulator and prosecutor, is not discouraged from discharging its duties under the Competition Act by the spectre of costs being awarded against it. Nor is a respondent discouraged from mounting a comprehensive defence against the charges leveled against it by the spectre of costs being awarded against it in the event that it is found guilty. It is this scheme that Omnia has failed to appreciate. If we found that the Commission could be mulcted with costs, then by necessary implication, we would need to

36 See in Devenish *Interpretation of Statutes* Juta 1992 page 113 paragraph 8.
37 See also the approach of the court in CAC Anglo judgment: *Anglo South Africa Capital (Pty) Ltd and others v Industrial Development Corporation South Africa [2003] 1 CPLR 10 (CAC).*

find that a respondent in the position of Omnia could also be mulcted with costs. This is clearly not what was intended by section 57(1).

41. However, if the Commission seeks to challenge a decision of the Tribunal, its exuberance is clipped by the spectre of a costs award against it if it loses at that level. Hence it is cautioned to properly consider its prospects of success before embarking on a course of appeal or review.[38]

42. This leaves us to deal with Omnia's contention that this Tribunal has previously contemplated that it was empowered to grant costs against the Commission and that it had granted costs against a party in *Paarl Post Web Printers (Pty) Ltd v CTP Holdings Ltd and Another*. We do not have any insights into what was argued before the Tribunal in that case or what factors it had regard to, but that case is clearly distinguishable from this one. In the *Paarl* case the complainant had sought interim relief from the Tribunal in relation to the conduct of the respondent in terms of section 49C. Interim relief applications are analogous to interim interdict proceedings in the High Court. Such an application is available only to a complainant, as defined in the Act,[39] usually in circumstances of urgency and in order to prevent irreparable damage to it while the Commission is still in the process of investigating a complaint. The Commission is not a party to such proceedings and the section is not available to it. The parties in an interim relied application are none other than a complainant and a respondent, the same parties that would appear before the Tribunal if the complainant had sought final relief from the Tribunal in terms of section 51(1).

43. We share the concerns expressed by the Tribunal in the *SAA* case. However, our inability to award costs against the Commission can hardly be seen to provide the Commission with *encouragement* to conduct itself in a reckless manner. Section 57(1) applies to both the Commission and a respondent. Each party contemplated in section 57(1) enjoys the benefit of conducting its case before us without being restricted by the spectre of an adverse costs order from this Tribunal. However, our finding in this matter should not be interpreted to mean that the Commission, or any other party for that matter, has carte blanche in proceedings before this Tribunal. The Tribunal has a wide discretion in

38 This would apply to a respondent as well.
39 See the provisions of section 49C and definition of complainant.

the conduct of its proceedings and has available to it any number of remedies through which it can communicate its displeasure with the conduct of the Commission or any other party, if so warranted.

44. The application is accordingly dismissed.

_____ **20 June 2008**

Y Carrim **Date**

Presiding Member

Concurring: D Lewis and U Bhoola

Tribunal Researcher : J Ngobeni

For Omnia : Adv Owen Rogers SC with Adv Paul Farlam (Instructed by Webber Wentzel Bowens)

For the Commission : Adv MSM Brassey SC with Adv O Mooki (Instructed by Cheadle Thompson & Haysom Inc)