



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CRP162Jan22/PIL201Feb22

In the matter between:

CAPE GATE (PTY) LIMITED

Applicant

And

EMFULENI LOCAL MUNICIPALITY

Respondent

Panel:	Mr A Wessels (Presiding Member)
	Prof I Valodia (Tribunal Member)
	Mr G Budlender (Tribunal Member)
Heard on:	17 February 2023
Order Issued on:	03 May 2023
Reasons Issued on:	03 May 2023

ORDER AND REASONS FOR DECISION

Introduction

- [1] On 29 October 2021, Cape Gate (Pty) (Ltd) ("Cape Gate") lodged a complaint with the Competition Commission ("Commission") against Emfuleni Local Municipality ("ELM"), the National Energy Regulator of South Africa ("NERSA") and the Gauteng Provincial Government. The complaint alleges excessive pricing by ELM under section 8(1)(a) of the Competition Act, 89 of 1998, as amended ("the Act").

- [2] On 13 December 2021, the Commission decided not to refer the matter to the Competition Tribunal (“Tribunal”) and issued a Notice of Non-Referral.¹
- [3] On 12 January 2022, Cape Gate self-referred the main application to the Tribunal,² in terms of section 51 of the Act. Cape Gate alleges, *inter alia*, that ELM has charged it excessive prices for the supply of electricity. It seeks an order, *inter alia*, declaring that ELM contravened section 8(1)(a) of the Act.³
- [4] ELM opposes the application. It raised various points *in limine* in its answering affidavit.
- [5] On 7 July 2022, the Tribunal held a pre-hearing. At that time, ELM indicated that it intended to pursue three points *in limine*. The Presiding Member directed that the points *in limine* be heard separately from the merits, and that the parties file heads of argument which address only the *in limine* points.⁴
- [6] When ELM filed its heads of argument, it indicated that it would pursue only one of those points, namely whether the Tribunal has jurisdiction to adjudicate this application where the Electricity Regulation Act 4 of 2006 (“ERA”) has made provision for an investigation upon a complaint of discrimination regarding electricity tariffs, or a complaint that a licensee has failed to abide by its licensing conditions, and the Applicant has not exhausted the remedies which are available to it in terms of those provisions.
- [7] The Tribunal is called upon to determine whether it has jurisdiction over the alleged excessive pricing by ELM.

Regulatory Framework

The Competition Act

- [8] Section 3 of the Act states:

“(1) This Act applies to all economic activity within, or having an effect within, the Republic... (own emphasis, here as elsewhere)

(1A) (a) In so far as this Act applies to an industry or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

¹ Bundle page 43 – 45.

² Bundle page 4.

³ Bundle page 5 – 8.

⁴ Bundle page 706.

(b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1) (h) and 82(1) and (2)."

[9] Excessive pricing is dealt with in section 8 of the Act:

"8. Abuse of dominance prohibited

(1) It is prohibited for a dominant firm to—

(a) charge an excessive price to the detriment of consumers or customers;

.....

(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include

Electricity Regulation Act

[10] Section 4 of the ERA sets out NERSA's powers as follows:

"4. Powers and duties of Regulator

(b) The Regulator may—

(i) mediate disputes between generators, transmitters, distributors, customers or end users;

(ii) undertake investigations and inquiries into the activities of licensees;

(iii) perform any other act incidental to its functions"

[11] Section 32 sets out NERSA's investigatory powers as follows:

"32. Investigations

(1) The Regulator must, in applicable circumstances, at its own instance or on receipt of a complaint or inquiry relating to the generation, transmission, distribution or trading, investigate complaints—

(a) of discrimination regarding tariffs or conditions of access;

(b) if a licensee is involved, of failure to abide by its licensing conditions; or

(2) On receipt of a report under subsection (1), the Regulator may institute a formal investigation.

(3) Upon instituting a formal investigation under subsection (2)—

(a) the Regulator may appoint a person to chair the investigation and as many persons as may be necessary to assist with the investigation;

(b) the person appointed under paragraph (a) and the persons assisting him or her may summon witnesses and conduct the investigation in the prescribed manner.

(4) On completion of the investigation under subsection (3) the person chairing it must his or her written report thereon to the Regulator.

(5) On receipt submit of the report, the Regulator may—

(a) refer the report to the Director of Public Prosecutions of the area concerned;

(b) if a licensee is involved, act on the matter in accordance with section 18(2).

Submissions of the Parties

ELM

- [12] ELM submitted that the concurrent jurisdiction between the competition authorities and NERSA only came into effect upon the conclusion of a Memorandum of Agreement (“MOA”) between NERSA and the Commission in May 2021.⁵
- [13] ELM further submitted that NERSA is established by the ERA as the custodian and enforcer of the national regulatory framework. Further, in terms of section 32 of ERA, NERSA has been given the power to investigate complaints regarding (i) discrimination of tariffs, or (ii) failure by a licensee to abide by its license conditions.⁶
- [14] ELM submitted that Cape Gate as an end user is bound by the provisions of the ERA, that its excessive pricing complaint falls within NERSA’s investigatory powers, and that Cape Gate ought to have followed those processes before a complaint was lodged before the Tribunal.
- [15] ELM relies in this regard on Section 32(1) of the ERA which, it contends, provides for a compulsory regime of investigation as the first step, to be conducted by NERSA.⁷
- [16] ELM contends that there is a duty on Cape Gate to exhaust other remedies available to it, and that until such time as Cape Gate has referred the matter to NERSA for investigation and exhausted the ERA internal remedies, the main application is prematurely before the

⁵ Bundle p 708-725.

⁶ ELM HOA 731 para [18] and p 732-733 para [23].

⁷ ELM heads of argument; p 3, paras 10, 11; ELM Answering Affidavit, p 15 – 16, paras 41 – 43.

Tribunal.⁸ As Cape Gate has failed to lodge a complaint with NERSA and exhaust the internal procedures set out in section 32 of the ERA, Cape Gate's referral of its complaint to the competition authorities is premature, the matter is thus not properly before the Tribunal, and the Tribunal therefore lacks jurisdiction to hear Cape Gate's complaint.

Cape Gate

- [17] Cape Gate denies that section 32 of the ERA applies to its excessive pricing complaint. It contends that section 32(1) is concerned only with complaints concerning price/tariff discrimination and/or a licensee's failure to abide by its licensing conditions, not with excessive pricing.⁹ It contends that the ERA nowhere requires end-users aggrieved by excessive prices to first lay a complaint with NERSA. It denies that the main application is prematurely before the Tribunal.¹⁰ It submits that the competition authorities have exclusive jurisdiction in terms of Chapter 2 of the Act over a dominant firm allegedly charging a customer excessive prices.¹¹
- [18] Cape Gate further submits that should NERSA have jurisdiction to entertain a complaint of excessive pricing, then NERSA and the competition authorities would have concurrent jurisdiction in this regard as contemplated by section 3(1A)(a) of the Act.¹²
- [19] Cape Gate referred us to section 21(1)(h) read with section 82(2) of the Act. They make provision for the Commission and NERSA to enter into an MOA.¹³ The purpose of the MOA is to establish the manner in which the Commission and NERSA will interact with each other to harmonise and coordinate their exercise of concurrent jurisdiction.¹⁴ Cape Gate contends that the MOA provides for the Commission to retain its exclusive jurisdiction and exercise primary authority over conduct falling under Chapters 2 and 3 of the Act (i.e. alleged prohibited practices).¹⁵
- [20] Cape Gate submits that it is the Commission, and not NERSA, that has jurisdiction to investigate and evaluate complaints of prohibited practices. It states that its complaint of excessive pricing is clearly a complaint of a prohibited practice in terms of Chapter 2 of

⁸ *Ibid* p 734 para [31].

⁹ ELM HOA p 741 para [1.4.1]

¹⁰ *Ibid* p 740 para [1.3.2]

¹¹ *Ibid* p 741 para [1.4.3]

¹² *Ibid*.

¹³ *Ibid* p 710 para [preamble of MOA].

¹⁴ *Ibid*

¹⁵ *Ibid* p 713 para [4.1].

the Act. Accordingly, the Commission has jurisdiction to investigate and evaluate the complaint and the Tribunal has the jurisdiction to adjudicate it.

- [21] Cape Gate accepted, without conceding that NERSA has jurisdiction, that the main application could be dealt with on the assumption that there is concurrent jurisdiction.¹⁶

Analysis

- [22] ELM submitted, in support of its prematurity case, that the main application is concerned with discrimination in tariffs and falls within NERSA's investigatory powers in terms of section 32(1)(a) of ERA. It further contended that section 32(1)(a) of ERA confers on NERSA the power to investigate excessive pricing complaints brought in terms of section 8(1)(a) of the Act.¹⁷ ELM relied upon a passage in Cape Gate's founding affidavit which provided a comparison of electricity charges imposed by ELM with those of its competitors in other municipalities, to argue that this falls squarely within NERSA's power to investigate complaints relating to discriminatory tariffs.¹⁸
- [23] Cape Gate submitted that ELM had mischaracterised the main application. It contended that price discrimination is distinguishable from excessive pricing. In an excessive pricing complaint, the complaint is one of overcharging by a dominant firm which constitutes an abuse of the dominant firm's position. Discrimination, on the other hand, seeks to equalise the prices charged.¹⁹
- [24] The relief sought by Cape Gate in the main application is clear: it is for (*inter alia*) a declarator and consequential relief on the ground that ELM contravened the excessive pricing provisions of the Act. Cape Gate does not seek an order that it has been price discriminated against.
- [25] Tariff discrimination complaints in terms of the ERA must be considered in the context of the different customer categories provided for in terms of section 15(1)(d) of ERA, which provides that "*a licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs: must avoid undue discrimination between customer categories*". Cape Gate does not complain of such discrimination.

¹⁶ Transcript p 55, lines 2 -15.

¹⁷ Transcript p 23, lines 16 – 25, p 24, lines 1 -22.

¹⁸ Transcript p 24, lines 22 – 25, p 25, lines 1 – 17.

¹⁹ Transcript p 47, lines 1 -25, p48, lines 1 - 6.

- [26] For purposes of deciding whether the Tribunal has jurisdiction to hear Cape Gate's excessive pricing complaint, we do not have to determine whether the ERA gives NERSA the power to deal with complaints of excessive (as opposed to discriminatory) pricing, since if NERSA does have that power, there is concurrent jurisdiction, as we explain below.
- [27] There is nothing in the ERA or the MOA that obliges a complainant first to exhaust remedies under the ERA before lodging a complaint with the competition authorities in terms of the Act.
- [28] Further, the remedies provided under the ERA are not an internal remedy – they are not a review by the body (ELM) which made the decision which is complained of, or by a body which in terms of the ELM's governing legislation has appellate jurisdiction in respect of the ELM's conduct.
- [29] ELM contended that the use of the words "*revise and reduce*" in prayer 2 of the Notice of Motion means that Cape Gate seeks judicial review of ELM's pricing decisions. In our view, this is not correct. What Cape Gate asks the Tribunal to do is exercise its statutory power to prevent a prohibited practice in terms of the Act. It has now been authoritatively established that the Tribunal does not have the power of judicial review.²⁰
- [30] A further argument raised by ELM is that Cape Gate's reference in the main application to an Electricity Supply Agreement ("ESA") allegedly concluded between it and ELM's predecessor gives rise to a contractual dispute, in respect of which the High Court has jurisdiction. Cape Gate repeats that its complaint is one of excessive pricing under the Act, that it refers to the ESA merely as evidence of what has been charged. Cape Gate is in our view correct in this regard.
- [31] ELM's counsel also contended that the High Court has inherent jurisdiction to adjudicate complaints brought in terms of section 8 of the Act.²¹ He argued that while the competition authorities are creatures of statute, established to deal with matters set out in Chapters 2 and 3 of the Act, the jurisdiction of the High Court is not ousted.²²

²⁰ *Competition Commission of South Africa v Group Five Construction Ltd* 2023 (1) BCLR 1 (CC) paras 118, 122, 126, 139.

²¹ Transcript p 14, lines 11 - 22.

²² Transcript p 14, lines 22-25, p 16, lines 1-8.

- [32] The High Court has no jurisdiction to deal with complaints of excessive pricing under the Act. Where a civil court is faced with an issue concerning conduct that is prohibited in terms of the Act, that court is not permitted to consider that issue on its merits, and must refer the issue to the Tribunal for consideration on the merits.²³
- [33] Cape Gate submits that the Tribunal has exclusive jurisdiction to decide the main application, alternatively that there is concurrent jurisdiction with NERSA. It relies upon the decision of the Supreme Court of Appeal (“SCA”) decision in *Competition Commission of South Africa v Telkom*,²⁴ where the Commission had referred to the Tribunal a complaint against Telkom for allegedly contravening section 8 of the Act, including through excessive pricing. The issues before the SCA included whether the competition authorities were vested with jurisdiction over Telkom’s conduct in circumstances where Telkom argued that such conduct was authorised in terms of the Telecommunications Act, and that ICASA as the sector-regulator is vested with exclusive jurisdiction over its conduct.
- [34] The SCA rejected Telkom’s contention that ICASA had exclusive jurisdiction. It stated that “[t]he *Competition Act* applies to all economic activity within or having an effect within South Africa. It provides for wide powers and general remedies more effective than the limited ones given by the *Telecommunications Act*. There is no room for the implication of exclusive jurisdiction vested in ICASA contended for. The authorising legislative and other provisions Telkom relied upon did not oust the jurisdiction of the Commission and the Tribunal but could well give rise to defences to the complaints referred. The competition authorities not only have the required jurisdiction but are also the appropriate authorities to deal with the complaint referred.”²⁵ Further, “[d]etermining whether a matter involves a contravention of Chapter 2 may be complex and technical. The Tribunal should not be lightly deprived of the authority to decide whether the complaints referred to it involve such contraventions.”²⁶
- [35] In *Siyakhuphuka Investment Holdings v Transnet*,²⁷ the CAC applied the SCA’s decision in *Telkom* on the application of section 3(1), and stated as follows in relation to the Tribunal’s powers in a self-referral: “[t]he mere referral of a complaint triggers the exercise of the Tribunal’s adjudicative powers and the Tribunal is obliged to conduct a hearing into the matter with the object of determining whether a prohibited practice has indeed

²³ Section 65 (2)(b).

²⁴ (623/2009) [2009] ZASCA 155; [2010] 2 All SA 433 (SCA) (27 November 2009) (“Telkom”).

²⁵ *Ibid* para [35].

²⁶ *Ibid* para [37].

²⁷ (158/CAC/Nov17) [2018] ZACAC 4 (3 July 2018)

*occurred. If a prohibited practice is established, then the Tribunal may impose a remedy it deems appropriate, choosing from a number of remedies listed in the Competition Act.”*²⁸

- [36] The Tribunal plainly has jurisdiction in respect of the conduct complained of in the main application.
- [37] Although conceding that the Act creates a system of concurrent jurisdiction, ELM contended that there is no concurrency with regard to the present matter, on the basis that concurrency only commenced in 2021 on conclusion of the MOA between the Commission and NERSA.²⁹
- [38] This is plainly incorrect. Concurrency arises from the Act, not from the conclusion of the MOA. What is more, the MOA itself states that it is not intended to be a legally enforceable document and merely seeks to describe the nature and co-operative intentions of the parties thereto and to suggest guidelines for co-operation, with the result that nothing shall diminish the full autonomy of either party or constrain either party from discharging its statutory functions.³⁰
- [39] The establishment of concurrency by the Act was confirmed by the SCA in the *Telkom* matter as follows: “[c]oncurrent jurisdiction exists only where the other regulatory authority has the competence to adjudicate the competition aspects of the conduct. Section 3(1A)(a) establishes concurrent jurisdiction ‘in so far as’ the Competition Act may be applicable to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, and which authority has jurisdiction in respect of the conduct regulated in terms of Chapter 2 and 3 of the Competition Act.”³¹
- [40] The Tribunal held in *Venter v Law Society of the Cape of Good Hope*³² that where there is concurrent jurisdiction, the Tribunal will have authority, unless there is an express provision ousting the Tribunal’s jurisdiction. It held that “*concurrent jurisdiction suggests an authority has jurisdiction over a sphere of activity but shares it with another and hence the term concurrency. It does not suggest jurisdiction is ousted by the one in favour of the other – quite the contrary. Secondly, the Act makes it clear that concurrency exists in respect of a regulatory authority which has jurisdiction in respect of the conduct regulated*

²⁸ Ibid para [37].

²⁹ Transcript p10, lines 8 -25, p 34 lines 8 -11, p 61 lines 19 – 25, p 62 lines 1-12, p 65 lines 14 – 19.

³⁰ Bundle p 724 [20.1].

³¹ Telkom at para 28.

³² Case No: 24/CR/Mar12(014688).

in terms of Chapters 2 and 3 of the Act. There is nothing in the Attorneys Act which grants such a competition competence to law societies, the mere fact that societies may regulate their members does not mean that they regulate the conduct referred to in Chapters 2 and 3 of the Act. But even if they do have such authority, concurrent jurisdiction does not mean such authority is ousted, absent some express intention to do so”.³³

Conclusion

[41] We find that it is beyond doubt that the Tribunal has jurisdiction with regard to this complaint of excessive pricing. The assertion that Cape Gate was required to pursue an “internal remedy” through a complaint to NERSA is without foundation. Accordingly, ELM’s point *in limine* is dismissed.

[42] In light of the above, we make the order that follows.

³³ Ibid paras 19 and 21.

ORDER

1. The Respondent's point *in limine* is dismissed; and
2. Costs will be costs in the cause.

Signed by: Geoff Budlender
Signed at: 2023-05-03 17:18:53 +02:00
Reason: Witnessing Geoff Budlender

Geoff Budlender

03 May 2023

Mr Geoff Budlender

Date

Prof Imraan Valodia and Mr Andreas Wessels concurring

Tribunal Case Managers:

Matshidiso Tseki and Theodora Michaletos

For the Applicant:

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