



THE COMPETITION APPEAL COURT OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no: 270/CAC/Apr25

In the matter between:

AFRICAN RAINBOW CAPITAL (PTY) LTD

Applicant

And

COMPETITION COMMISSION

Respondent

Coram: **Manoim JP, Davis and Potterill AJJA**

Heard 25 March 2026

Delivered 31 March 2026

Neutral citation: *African Rainbow Capital (Pty) Ltd v Competition Commission (270/CAC/APR25) [2026] ZACAC 1 (31 March 2026).*

Summary: review – the Commission's market inquiry powers – sections 43D(2) and 60(2)(c) – divestiture – the Commission's power to order divestiture after a market inquiry – Court declared that only the Competition Tribunal has the power to order divestiture in terms of section 43D(2) of the Competition Act 89 of 1998 (the Competition Act) read with 60(2)(c).

ORDER

A review of: The decision of the Competition Commission:

1. It is declared that only the Competition Tribunal ("Tribunal") and not the Competition Commission ("Commission") has the power to order divestiture in terms of section 43D(2) of the Competition Act 89 of 1998 ("Competition Act") read with 60(2)(c);
 2. If the Commission intends to bring an application in terms of section 43D(2) read with 60(2)(c) of the Competition Act, it must do so –
 - 2.1. within 15 business days of the date of this order; and
 - 2.2. in terms of the draft regulations relating to a divestiture recommendation by the Commission as published in Notice No. 3127 in Government Gazette No. 348184 dated 08 March 2023;
 3. Within 10 business days of the Commission delivering any application in terms of paragraph 2 of this order, the Tribunal must convene a pre- hearing conference to direct a timetable for the hearing of the application, including setting down the hearing dates for the application;
 4. Pending the final determination of any application by the Commission in terms of paragraph 2 of this order, the Applicant is entitled to deal with its shareholdings in Interaction Market Services Holdings Proprietary Limited and Subtropico Limited as it sees fit in its sole discretion; and
 5. The Commission is liable for the applicants costs including the costs of two counsel (senior and junior) on the scale C.
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JUDGMENT

DAVIS AJA (Manoim JP & Potterill AJA)

Introduction

[1] On 25 March 2026, this Court issued the following order:

- '1. It is declared that only the Competition Tribunal ("Tribunal") and not the Competition Commission ("Commission") has the power to order divestiture in terms of section 43D(2) of the Competition Act 89 of 1998 ("Competition Act") read with 60(2)(c);
2. If the Commission intends to bring an application in terms of section 43D(2) read with 60(2)(c) of the Competition Act, it must do so –
 - 2.1. within 15 business days of the date of this order; and
 - 2.2. in terms of the draft regulations relating to a divestiture recommendation by the Commission as published in Notice No. 3127 in Government Gazette No. 348184 dated 08 March 2023;
3. Within 10 business days of the Commission delivering any application in terms of paragraph 2 of this order, the Tribunal must convene a pre- hearing conference to direct a timetable for the hearing of the application, including setting down the hearing dates for the application;
4. Pending the final determination of any application by the Commission in terms of paragraph 2 of this order, the Applicant is entitled to deal with its shareholdings in Interaction Market Services Holdings Proprietary Limited and Subtropico Limited as it sees fit in its sole discretion; and
5. The Commission is liable for the applicants costs including the costs of two counsel (senior and junior) on the scale C.'

[2] The issue of costs was argued before this Court. The reasons for the costs order by this Court are set out as follows.

[3] First, a brief context. The respondent initiated the Fresh Produce Market Inquiry under Chapter 4A of the Competition Act 89 of 1998 (the Act). On 13 January 2025, the respondent issued its final report containing its findings and remedial action.

[4] In its report two sets of remedial action were set out by the respondent. In the first entitled 'Remedial Action for African Rainbow Capital (Pty) Ltd', the respondent set out a Directive which, to the extent relevant to these reasons, is summarized as follows:

'By 13 July 2025 (or further periods of six months at a time granted by the Commission in its sole discretion), ARC must divest its entire shareholding in either Subtropico or the RSA Group. The purchaser of the divested shares must be an HDP, or a firm wholly owned and/or controlled by HDPs. The divestiture must be to a party or parties completely independent of ARC and the existing shareholders of Subtropico or RSA Group;

...

In the event of non-compliance with the remedial action by ARC, the Commission may issue a notice in writing requiring ARC to comply with this remedial action within 20 days. In the event of ARC's non-compliance with this notice, the Commission may apply to the Tribunal to make the remedial action an order of the Tribunal.'

[5] Additionally, the report made provision for the implementation of the remedial action in the following terms:

'The implementation of this remedial action is suspended for a period of 6 (SIX) months following the Effective Date [14 January 2025]. The Commission may, at its own discretion, extend this period for up to 6 (SIX) months at a time, to allow African Rainbow Capital additional time to voluntarily divest its shareholding...'

[6] The report then contained a second remedial action entitled, 'Competition Tribunal Recommendation African Rainbow Capital (Pty) Ltd'. In this, the respondent sought, in terms of s 60(2)(c) of the Act, to recommend to the Competition Tribunal that the applicant dispose of its shareholding in one of the two companies in which it held significant shares, that is the RSA group or Subtropico Ltd, on identical peremptory terms as contained in the initial Directive.

[7] On 4 April 2025, the applicant launched a review application before this Court seeking an order that this Court declare that the respondent had acted *ultra vires* under the powers set out in s 43D of the Act in purporting to direct the applicant to divest of its shareholding in either the RSA Group or Subtropico Ltd as contained in the first Directive set out in its report of 13 January 2025.

[8] The application was opposed by the respondent essentially on the basis that it was premised on the fundamental misinterpretation of the respondent's remedial action which, in its view, did not constitute an order compelling divestiture and was not binding. Rather the first Directive was an attempt to persuade the applicant to voluntarily divest shares, in either the RSA Group or Subtropico.

[9] When the parties appeared before this Court, it was conceded that it is only the Tribunal and not the respondent that has the power to order divestiture in terms of s 43D(2) of the Act read with s 60(2)(c) thereof.

[10] To the extent relevant s 43(D) provides thus:

'(1) Subject to the provisions of any law, the Competition Commission may, in relation to each adverse effect on competition, take action to remedy, mitigate or prevent the adverse effect on competition.

(2) The action taken in terms of subsection (1) may include a recommendation by the Competition Commission to the Competition Tribunal in terms of section 60(2)(c), and the Competition Tribunal may make an appropriate order in relation thereto.'

[11] Section 60(2)(c) of the Act, which is central to this dispute in that it regulates divestiture, provides:

'(2) The Competition Tribunal, in addition to or in lieu of making an order under section 58, may make an order directing any firm, or any other person, to sell any shares, interest or assets of the firm if –

...

(c) after a market inquiry conducted in terms of Chapter 4A, the Competition Commission finds that there is an adverse effect on competition in the relevant market and makes a recommendation to the Tribunal that such an order is appropriate.

(3) An order made by the Competition Tribunal in terms of subsection (2), except an order made in terms of section 43D(2), is of no force or effect unless confirmed by the Competition Appeal Court.

(4) An order made in terms of subsection (1) or (2) may set a time for compliance, and any other terms that the Competition Tribunal considers appropriate, having regard to the commercial interests of the party concerned and the purposes of this Act.'

[12] These sections clearly set out the respective powers of the respondent and those of the Tribunal. They make clear that where the respondent identifies divestiture as an appropriate measure to address an adverse effect on competition, it is required to make a recommendation to the Tribunal for a divestiture order. Alone, it has no power to order or entertain a divestiture order as clearly was implicit in its first Directive.

[13] Counsel for the respondent sought to argue that the first Directive had no binding legal power upon the applicant but was merely an attempt to settle the matter on a voluntary basis. However, the respondent's first detailed Directive, as indicated earlier in this judgment, on any plain reading thereof, represented a threat to the applicant, in that in the event that the applicant refused to divest, the respondent would take further steps, including a referral to the Tribunal. Manifestly, the Commission had stepped outside of its second Directive legal lane. It was obliged, in the event that it considered that divestiture was the appropriate remedy, to have expeditiously referred the matter to the Tribunal for the order which it had recommended in its report. That it did not do so caused the applicant to seek relief from this Court, given the particular nature of the first Directive.

[14] The applicant thus sought a cost order in its favour. The Court is aware of the Constitutional Court's finding in *Competition Commission of South Africa v Pioneer Hi- Bred International Inc and Others*:¹

'The principal that should inform the CAC's exercise to discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the bona fide fulfillment of its mandate by the threat of an adverse cost award.'

[15] But in this case the Commission failed to fulfil its statutory duty, which was to make a recommendation for divestiture to the Tribunal if it considered it appropriate, as it manifestly did given the contents of its report. However, it sought to bypass this statutory framework and therefore breached the fundamental principle of legality.

¹ *Competition Commission of South Africa v Pioneer Hi- Bred International Inc and Others* [2013] ZACC 50; 2014(3) BCLR 251 (CC); 2014 (2) SA 480 (CC) para 24.

[16] In the present case it is precisely because the respondent failed to act in terms of s 43D read together with s 60(2)(c) by unambiguously referring its recommendations of divestiture to the Tribunal that the applicant was forced to apply to this Court for relief. Accordingly, it is appropriate, given the order that was granted by this Court confirming the statutory position, that an adverse cost order as set out in the order of this Court should be granted.

D Davis
Acting Judge of Appeal
Competition Appeal Court of South Africa

Appearances

For the applicant: MM le Roux SC & K Turner

Instructed by: Webber Wentzel

For the Respondent: J Motepe SC & N Sakata

Instructed by: Cheadle Thompson & Haysom Inc. Attorneys