



**THE COMPETITION APPEAL COURT OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 275/CAC/Sep25

276/CAC/Oct25

In the matter between:

**CAPE GATE (PTY) LIMITED**

**Applicant**

and

**THE COMPETITION TRIBUNAL**

**First Respondent**

**E DANIELS (PRESIDING MEMBER)**

**Second Respondent**

**A W WESSELS (TRIBUNAL MEMBER)**

**Third Respondent**

**M MOKUENA (TRIBUNAL MEMBER)**

**Fourth Respondent**

**THE COMPETITION COMMISSION**

**Fifth Respondent**

**And**

In the matter between:

**CAPE GATE (PTY) LIMITED**

**Appellant**

and

**THE COMPETITION COMMISSION**

**First Respondent**

**ARCELOMITTAL OF SOUTH AFRICA**

**Second Respondent**

**COLUMBUS STAINLESS (PTY) LTD**

**Third Respondent**

**SCAW SOUTH AFRICA (PTY) LTD**

**Fourth Respondent**

**Coram: Masipa, Nkosi and Lekhuleni AJJA**

**Heard** 05 March 2026

**Delivered** 01 June 2026

**Neutral citation:** *Cape Gate (Pty) Limited v Competition Tribunal and Others* (276/CAC/Oct25) [2026] ZACAC 3 (5 March 2026)

**Summary: Competition Law** — review under PAJA — inordinate delay in delivery of Tribunal decision — hearing concluded on 28 June 2019 and decision delivered on 18 August 2025 — delay exceeding six years — section 52(2)(a) of the Competition Act requiring proceedings to be conducted as expeditiously as possible and in accordance with principles of natural justice — constitutional obligation under section 237 of the Constitution — whether delay and manner in which decision was produced rendered decision reviewable — inconsistent and inadequate explanations by Tribunal members — role of case management staff in preparation of reasons — whether adjudicative responsibilities were impermissibly abdicated — reliance by Competition Tribunal on post-hearing authorities without affording parties opportunity to address them — procedural fairness — rationality and reasonableness under sections 6(2)(e), 6(2)(f)(ii)(cc) and 6(2)(h) of PAJA — whether cumulative effect of defects rendered decision unlawful — review application upheld — Competition Tribunal decision reviewed and set aside — matter remitted to differently constituted panel of the Tribunal for rehearing — appeal rendered moot following successful review.

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## ORDER

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**A review from:** The decision of the Competition Tribunal:

1. The application for review is upheld.
  2. The decision of the Competition Tribunal dated 18 August 2025 is hereby reviewed and set aside.
  3. The matter is remitted to the Competition Tribunal for hearing before a differently constituted panel.
  4. The hearing must be conducted as expeditiously as possible and in accordance with the requirements of procedural fairness and the rules of natural justice.
  5. Each party is to bear its own costs.
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## JUDGMENT

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**Nkosi AJA**

### Introduction

[1] This matter comes before us as a review application. It is brought by Cape Gate (Pty) Limited (Cape Gate), a primary producer of long steel products involved in the market for, *inter alia*, the purchase of scrap metal from scrap merchants which it utilises as an input in the production of its long steel products. It has its principal place of business at Nobel Boulevard, in Vanderbijlpark, Gauteng.

[2] Cape Gate seeks an order to review and set aside the reasons and order (the decision) of the Competition Tribunal (the Tribunal) in terms of which Cape Gate was found to have contravened s 4(1)(b)(i) of the Competition Act 89 of 1998 (the Act). The application is opposed by the Competition Commission (the Commission), which is cited as the fifth respondent in the application. The Tribunal is cited as the first respondent. The second respondent (Mr Daniels), the third respondent (Mr Wessels),

and the fourth respondent (Ms Mokuena) are Tribunal members who presided over the matter under its auspices. Although they each delivered an explanatory affidavit in response to the issues raised by the applicant in its founding affidavit, they abide the decision of this Court in the matter.

[3] Simultaneously with its review application Cape Gate lodged an appeal to this Court against the decision of the Tribunal. The respondents in the appeal are the Commission (first respondent), Arcelormittal South Africa Ltd (second respondent), Columbus Stainless (Pty) Ltd (third respondent) and Scaw South Africa (Pty) Ltd (fourth respondent). As the parties cited in the appeal differ from those cited in the review application, it would ordinarily have been necessary for this Court to prepare separate judgments in respect of the review and the appeal. However, the appeal was necessarily contingent upon the outcome of the review proceedings, which, in this Court's view, had first to be determined.

[4] In light of the majority finding in favour of Cape Gate in the review application, it is unnecessary for this Court to determine the appeal. However, having reached a different conclusion in the review application, I considered it necessary to prepare a separate judgment in relation to the appeal, particularly to address the additional grounds relied upon by Cape Gate which, properly characterised, are more appropriately matters of appeal than review. This is especially so because those same grounds were conflated by Cape Gate and relied upon both as grounds of review and as grounds of appeal.

[5] Against that backdrop, I proceed first to consider the review application and to set out the basis upon which I respectfully dissent from the majority judgment. Thereafter, I deal separately with Cape Gate's grounds of appeal.

## **The review**

### ***Factual background***

[6] The factual background to the matter, briefly stated, is that on 18 August 2025 the Tribunal delivered its decision in a complaint referral that was brought by the Commission against Cape Gate for its alleged involvement in a buyers' cartel. According to the Commission, the alleged buyers' cartel was made up of Cape Gate

and its competitors, namely, ArcelorMittal South Africa Limited (ArcelorMittal), Columbus Stainless Steel (Pty) Limited ('Columbus') and Scaw South Africa (Pty) Limited ('Scaw') (collectively referred to as 'the scrap consumers'). The Commission's complaint was that the scrap consumers entered into an agreement or engaged in a concerted practice to fix the purchase price of scrap metal in contravention of s 4 (1)(b)(i) of the Act.

[7] ArcelorMittal and Columbus both admitted liability for their conduct and concluded settlement agreements with the Commission. Scaw was the leniency applicant for the purposes of the complaint referral. Cape Gate denied that it contravened the Act, thus remaining the only respondent in the matter. The Commission sought an order declaring that Cape Gate had committed a prohibited practice in contravention of s 4 (1)(b)(i) of the Act. The matter was heard over a number of days between 16 July 2018 and 28 June 2019, with the last day of the hearing being 28 June 2019. However, it took the Tribunal six years and two months to issue its decision in the matter. The decision was issued on 18 August 2025 after numerous enquiries by the parties as to when they could expect it to be issued.

### ***Reasons for the delay in issuing the decision***

[8] After making its finding on the complaint referral, the Tribunal added, at the end of its decision, the reasons for the delay in issuing the decision. Its explanation (contained in paragraph 289 of the decision) was that although a draft decision was prepared sometime between 2019 and 2022, the finalisation of the reasons was put on hold because the members of the Tribunal who heard the matter (the panel) were informed that the parties were engaged in settlement discussions. The reasons were subsequently issued because the Tribunal believed that the settlement negotiations between the parties were not successful.

### **Grounds of review**

#### ***First ground: Mala fides and bias / reasonable suspicion of bias***

[9] Unhappy with the explanation provided by the Tribunal for the delay, Cape Gate brought this application to review and set aside the decision of the Tribunal on numerous grounds. The first ground, which is somewhat convoluted, raises two concerns. The first concern is that contrary to what is said by the panel in the decision,

Cape Gate was never involved in any settlement discussions with the Commission, nor did it advise the Tribunal of any such discussions. Therefore, so it is argued, if this Court accepts that there is no evidence to support the Tribunal's assertion that it was informed of settlement discussions between the parties, then the decision is contaminated by *mala fides* and falls to be reviewed and set aside for that reason.

[10] The second concern is that it is not clear from the panel's explanation as to when the draft reasons were actually prepared. This is in the light of the conflicting statements given by a certain Mr Kameel Pancham (Mr Pancham), an erstwhile employee of the Tribunal, in numerous correspondence with Cape Gate's attorneys. It is further contended that Mr Pancham's statements are all inconsistent with the panel's statement in paragraph 289 of the decision that the draft reasons had been prepared by the time Ms Mokuena and Mr Daniels left the Tribunal in 2019 and 2022, respectively. In conclusion, it is submitted that the decision falls to be reviewed and set aside for reasons of bias, alternatively, reasonable suspicion of bias, as contemplated in s 6(2)(a)(iii) of Promotion of Administrative Justice Act 3 of 2000 (PAJA).

***Second ground: Unconscionable and unreasonable delay***

[11] The second ground of review is threefold, and makes the following contentions: firstly, that a mandatory and material procedure or condition prescribed by an empowering provision, that is, s 52(2)(a) of the Act, was not complied with as contemplated in s 6(2)(b) of the PAJA; secondly, that the delay of six years and two months was so unreasonable that no reasonable decision maker could have exercised the power or performed the function in the manner that the panel did, as contemplated in s 6(2)(h) of PAJA, and; thirdly, that the action was procedurally unfair as contemplated in s 6(2)(c) of PAJA.

[12] It is further contended by Cape Gate that a delay of this magnitude causes inherent prejudice, not merely to the parties, but also to the administration of justice. For this reason, so it is argued, the delay breaches the principle of legality and, therefore, the decision falls to be reviewed and set aside on this ground as well. Furthermore, it is submitted that it is clear from the record that the draft reasons were not in existence prior to 1 July 2022, which is over three years after the hearing of the

matter was concluded. According to Cape Gate, this in itself is an unconscionable delay and the panel members could not, after the lapse of such an inordinate long period of time, have had sufficient recollection of the proved evidence and arguments upon which to base their decision.

***Third ground: Rejection of Cape Gate's argument***

[13] The third grounds of review are said to have arisen from the panel's rejection of the arguments raised by Cape Gate. These include the arguments that: (a) the conduct complained of is not conduct contemplated by s 4(1)(b) of the Act, and; (b) the scrap merchants fixed the prices and dictated the formula to the scrap consumers. It is contended that the panel's rejection of the said arguments was materially influenced by an error of law as contemplated in s 6(2)(d) of PAJA; alternatively, that the panel failed to take into account the relevant considerations as contemplated in s 6(2)(e)(iii) of PAJA; alternatively, that the decision is not rationally connected to the information before the panel as contemplated in s 6(2)(f)(ii)(cc) of PAJA; alternatively, that the reasons and order are so unreasonable that no reasonable person could have made them, as contemplated in s 6(2)(h) of PAJA.

**The Law**

***Whether the Tribunal's delay in issuing its decision amounts to a breach of mandatory provision in s 52(2) of the Act?***

[14] For the sake of convenience, I will deal with the grounds of review in random order, starting with the alleged breach of s 52(2) of the Act. It is contended by Cape Gate that the Tribunal breached its statutory duty by taking more than six years to hand down its decision in the matter. Admittedly, the Tribunal is a creature of statute and, as such, derives its powers from the Act, which also regulates its functions. Section 52(2)(a) of the Act provides that the Tribunal 'must conduct its hearing in public, as expeditiously as possible, and in accordance with the principles of natural justice'.

[15] The section is couched in very clear and unambiguous terms which, literally interpreted, leave no doubt in one's mind that the term 'as expeditiously as possible' is confined to the 'hearings' of the Tribunal. This is also evidenced by the use of the words 'in public' and the phrase 'in accordance with the principle of natural justice',

which relate to the manner in which the Tribunal must conduct its hearings and nothing else. To suggest that failure by the Tribunal to issue its decision within a reasonable period is in contravention of s 52(2)(a) of the Act is stretching the language of that section too much.

### ***Failure to take a decision***

[16] After the end of the hearing before the Tribunal, the period preceding the issuing of its decision is not regulated by the Act but falls within the ambit of PAJA. In particular, s 6(2)(g) makes the administrator's failure to take a decision a ground of review. In the event of such failure, the aggrieved party may seek recourse in terms of s 6(3). Where there is no law that prescribes a period within which the administrator is required to take that decision, s 6(3)(a) entitles an aggrieved person to institute proceedings for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision.

[17] If, on the other hand, a law prescribes a period within which the administrator is required to take that decision, s 6(3)(b) entitles an aggrieved person to institute proceedings for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period. In other words, an aggrieved person will not be precluded by the expiry of the prescribed period to institute proceedings for judicial review of the administrator's failure to take the decision within that period.

[18] In terms of s 8(2) of PAJA, the court in proceedings for judicial review under s 6(3) may grant an order that is just and equitable, including an order:

'(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.'

[19] In essence, the relief under s 6(3) of PAJA is no different from the relief of *mandamus* under the common law. Its primary focus is to deal with the administrator's

failure to take a decision, either within a reasonable period or within the period prescribed in the applicable legislation, whatever the case may be. Once the administrator has taken a decision the ground of review in s 6(2)(g) of PAJA is no longer available to any person who may feel aggrieved by the administrator's delay in taking such decision. For the same reason, the relief in s 8(2) of PAJA is no longer available to such person. Instead, such person may institute proceedings for the judicial review of the administrator's decision on any one or more of the other grounds set out in PAJA, provided that there is sufficient evidence in proof thereof.

[20] In the present case, inasmuch as it was unreasonable for the Tribunal to take more than six years to issue its decision in the matter, it was equally unreasonable for the parties to wait for that whole period without taking any decisive action to compel the Tribunal to take a decision in relation to this matter. If the parties were genuinely concerned about the delay, there ought to have come a time during that period when either one or both of them finally drew the proverbial line in the sand and put the Tribunal on terms to issue its decision within a stipulated period, failing which they would approach the court for relief in terms of s 6(3)(a) of PAJA.

[21] The failure of the parties to approach the court for relief suggests that neither party was prepared to take the risk without knowing whether the decision of the Tribunal would ultimately be issued in its favour. In the circumstances, it is impermissible for Cape Gate to challenge the decision without showing the actual prejudice it suffered by reason of the delay. The remedy of a *mandamus* was always available to Cape Gate to avoid the delay occurring at all, but it elected not to utilise such remedy although it had the necessary capacity and the means that were required to act swiftly once the delay had set in.<sup>1</sup>

### ***Judicial review on other grounds set out in s 6(2) of PAJA***

[22] Once the decision was issued by the Tribunal, the ground of review under s 6(3)(a) of PAJA was no longer available to Cape Gate. It is for this reason that it

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<sup>1</sup>*The Member of the Executive Council for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA paras 30 and 31.

resorted to bring its review application on the other grounds set out in s 6(2) of PAJA, which apply under following circumstances:

- (a) Section 6(2)(a)(iii): where the administrator who took the decision was biased or reasonably suspected of bias;
- (b) Section 6(2)(b): where a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- (c) Section 6(2)(c): where the action was procedurally unfair;
- (d) Section 6(2)(d): where the action was materially influenced by an error of law;
- (e) Section 6(2)(e): where the action was taken: (i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; and
- (f) Section 6(2)(h): where the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

***Whether the decision falls to be reviewed and set aside for non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision as contemplated in s 6(2)(b) of PAJA?***

[23] Regarding Cape Gate's reliance on the ground of review in s 6(2)(b) of PAJA, I have already made a finding in the preceding paragraphs of this judgment that there is nothing in s 52(2)(a) of the Act which suggests that the application of the term 'as expeditiously as possible' extends beyond the end of the actual hearings held by the Tribunal to include the period up to the issuing of its decisions. Therefore, it is inconceivable that s 52(2)(a) of the Act is 'the empowering provision' contemplated in s 6(2)(b) of PAJA.

[24] Be that as it may, it was argued by Mr Campbell SC, who appeared for Cape Gate, that s 237 of the Constitution<sup>2</sup> also provides that: 'All constitutional obligations must be performed diligently and without delay'. Although he acknowledged that the

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<sup>2</sup> Constitution of the Republic of South Africa, 1996.

section applies generally to the performance of constitutional obligations by organs of state, he submitted that the same principle must apply to any public power or function, including the adjudication function of the Tribunal on the basis that it exercises public power under the Act. That may be so, but the fact of the matter is that there is nothing in the Constitution that suggests that an administrative action, once taken, may be set aside on the basis of the delay if such delay is considered unreasonable by the court. Such proposition is tantamount to throwing the baby out with the bath water based on mere suspicion that the dirty water has made the baby sick.

[25] Admittedly, s 237 of the Constitution makes it imperative for all constitutional obligations to be performed diligently and without delay, including those falling outside the scope of s 6(2)(b) of PAJA. For what it is worth, the lengthy delays in the issuing of decisions by the Tribunal have also been a cause for concern for this Court, and it has been vocal in that regard.<sup>3</sup> However, Cape Gate's reliance on s 237 of the Constitution as a ground of review raises the crucial question as to whether the impugned decision should be reviewed and set aside by reason of the lengthy delay in the issuing thereof, and nothing else.

[26] For guidance in its determination of the question posed above, this Court was referred by Ms Lekokotla, who appeared for the Commission, to the SCA decision in *The Member of the Executive Council for the Department of Welfare v Kate*,<sup>4</sup> where the following was held by that Court: '... what is expected of an administration that has justifiable reasons for what appears to be unacceptable delay in carrying out its functions are full and frank explanations that will enable the court to assess their adequacy when determining whether the administration has acted reasonably'. In the present case, an explanation was provided by each member of the panel for the lengthy delay in the issuing of the decision. Except for mere speculation and conjecture, no evidence was adduced by Cape Gate to gainsay their explanation. In the circumstances, I find no basis for this Court to reject their explanation.

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<sup>3</sup> See *Takata South Africa (Pty) Limited v Competition Commission of South Africa and Others* [2025] ZACAC 1; [2025] 2 CPLR 12 (CAC) (16 January 2025 para 6.

<sup>4</sup> Fn 1 above para 10.

[27] Even if I am wrong, and the explanation provided by members of the panel is rejected for whatever reason, that will not necessarily mean that such decision must be reviewed and set aside on that basis. In such instances, it was held by the SCA in *Gqwetha v Transkei Development Corporation Ltd and Others (Gqwetha)*<sup>5</sup> that: '[w]hether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay ...'.

[28] The test espoused in *Gqwetha* was further elucidated by the Constitutional Court (CC) in *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal*,<sup>6</sup> which held that: '... an assessment of a plea of undue delay involves examining: (1) whether the delay is unreasonable or undue (a factual enquiry upon which a value judgment is made in the light of "all the relevant circumstances"); and if so, (2) whether the court's discretion should be exercised to overlook the delay and nevertheless entertain the application'.<sup>7</sup> On the second leg of the test, the CC agreed with the comment made by the SCA in *Gqwetha* that 'the delay cannot be evaluated in a vacuum but must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision'.<sup>8</sup>

[29] Therefore, assuming that the question posed in the first leg of the test espoused in *Gqwetha* is answered in the affirmative, the crucial question for determination by this Court will then lie in the second leg of the test, that is, whether this Court's discretion should be exercised to overlook the delay. In exercising its discretion, this Court must be guided by the caveat sounded by the SCA in *Gqwetha* that the delay must not be evaluated in vacuum. Instead, it must be assessed with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision.

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<sup>5</sup> *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; 2006 (2) SA 603 (SCA) para 24.

<sup>6</sup> *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BVL 333 (CC) para 49.

<sup>7</sup> *Ibid* para 49.

<sup>8</sup> *Ibid* para 52.

[30] In the context of the decision sought to be reviewed and set aside by Cape Gate, this Court is required to undertake a factual enquiry that calls for a value judgment. In doing so, the Court must, *inter alia*, give due consideration to the explanation provided by the three panel members for the delay in order to determine whether that explanation is reasonable. In so doing, the Court must be careful not to confuse the unreasonableness of the conduct which resulted in the delay with the reasonableness of the explanation provided for such conduct. Using this case as an example, the unreasonable delay of six years and two months in the issuing of the decision does not necessarily mean that the explanation provided by the Tribunal and members of the panel for the delay is also unreasonable. That is part of the value judgment that must be made by this Court.

[31] In any event, in the absence of any evidence to gainsay the explanation provided by members of the panel under oath for the delay, this Court is constrained by fairness not to make a negative value judgment against the members of the panel based on the contents of correspondence exchanged between Cape Gate's attorneys and the various officials of the Tribunal. Without condoning the inordinate delay in the issuing of the decision, I do not believe that it is fair or just to reject the explanation provided by members of the panel for the delay on the basis of Cape Gate's suspicions of malice. In my view, this Court ought to exercise its discretion to overlook the delay. A lot of reliance was placed by Cape Gate on the alleged inconsistencies between the explanation provided by the panel and the conflicting statements made by certain officials of the Tribunal. However, except for copies of correspondence and emails, no other evidence by such officials was placed before this Court for its consideration and evaluation.

[32] Using the test espoused in *Gqwetha*, this Court must not evaluate the delay in a vacuum, but with reference to its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision. For all intents and purposes, the only party that may potentially be prejudiced by the lengthy delay in the issuing of the decision is Cape Gate itself. However, except for complaining about the delay, it has not shown any prejudice it suffered as the result of the delay. The possible consequences of setting aside the impugned decision, on the

other hand, may be far-reaching and widespread, with potential to prejudice not only the entire scrap metal industry in the country, but also the administration of justice.

[33] For instance, it is common cause that except for Scaw, which became a leniency applicant in respect of the complaint referral, the other scrap consumers that engaged in the same conduct complained of alongside Cape Gate admitted liability for their actions and concluded settlement agreements with the Commission. The same applies to the implicated scrap merchants. They also admitted liability for their conduct and concluded settlement agreements with the Commission. This left Cape Gate as the only respondent in the relevant complaint referral by the Commission.

[34] Therefore, if this Court was to exercise its discretion to set aside the impugned decision by reason of the lengthy delay in the issuing of the decision and nothing else, it is more than likely that this would potentially cause disgruntlement amongst the other scrap consumers who admitted liability for their conduct and concluded settlement agreements with the Commission. They may perceive the Commission to have failed to hold Cape Gate accountable for its conduct, through no fault of the Commission but due to the ineptitude on the part of the members of the panel.

[35] The other potential consequence of setting aside the impugned decision on account of the delay and nothing else would be the adverse effect it would have on the administration of justice. For instance, if the decision of the Tribunal cannot be faulted in any way in respect of its substantive findings, the object of the Act 'to restrain particular trade practices which undermine a competitive economy', such as price fixing, will be severely undermined to the detriment of the continued and effective administration of the Act.

[36] If Cape Gate believes that the decision of the Tribunal was manifestly wrong and/or unlawful for any reason other than the lengthy delay in the issuing thereof, it should draw solace from the fact that it simultaneously lodged an appeal to this Court against the decision. It is for this reason that I deemed it appropriate to write a judgment on the appeal as well to dispel the impression created by Cape Gate that there is something substantively wrong with the decision.

**Whether the decision falls to be reviewed and set aside for reasons of bias, alternatively reasonable suspicion of bias, as contemplated in s 6 (2)(a)(iii) of PAJA?**

[37] The second ground of review relied on by Cape Gate is s 6(2)(a)(iii) of PAJA, the relevant provisions of which read as follows: 'A court has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias'. Therefore, in order for its application to succeed under this ground, Cape Gate must prove to the satisfaction of this Court that the panel was biased against it, or that it reasonably suspects that the panel was biased against it. Mere speculation and conjecture in that regard will not suffice.

[38] The first concern raised by Cape Gate under this ground is regarding the statement made by the panel in the decision that the parties were engaged in settlement discussions. Cape Gate denies that it was involved in settlement discussions with the Commission at any stage after the hearing of the matter. That much is clear from the correspondence and is also confirmed by the Commission in its answering affidavit. However, to suggest that the panel's statement about the alleged settlement discussions is indicative of the decision being contaminated by *mala fides* without adducing any evidence to that effect is taking the matter too far. To prove its claims in that regard Cape Gate annexed to its application a series of correspondence between its legal representatives and the officials of the Tribunal in the period between November 2019 to April 2025 but has not put up a single affidavit by any of the said officials to prove its claim of malice against the Tribunal.

[39] Apart from the aforesaid statement regarding the alleged settlement discussions, Cape Gate is also disputing the panel's statement as to when, and by whom, the decision was drafted. It argues that the statements made by certain officials of the Tribunal in their correspondence to its attorneys are inconsistent with the statement made by the panel in paragraph 289 of the decision. The one official who features prominently in such correspondence is a certain Mr Kameel Pancham (Mr Pancham), who was employed by the Tribunal in the position of Senior Case Manager. Based on certain statements made by Mr Pancham in his correspondence, Cape Gate is disputing the statement made by the panel in paragraph 289 of the decision that the

draft reasons had been prepared by the time Ms Mokuena and Mr Daniels left the Tribunal in 2019 and 2022, respectively.

[40] In response, the Chairperson of the Tribunal, Ms Blessing Mazwai (Ms Mazwai), delivered an answering affidavit on behalf of the Tribunal in which she apologised unreservedly for the delay in issuing the decision, and explained that the delay was caused by a triad of unforeseen circumstances. The first was the outbreak of Covid and the resultant lockdown by the government; the second was the Tribunal's chronic lack of resources, and the third was that two members of the panel left the Tribunal and were constrained in their participation in the preparation of the reasons. In addition, each member of the panel deposed to an affidavit confirming the contents of Ms Mazwai's affidavit insofar as it relates to him or her.

[41] Starting with Mr Daniels, he stated in his affidavit that he drafted the reasons and circulated, at least, two versions thereof to the other members of the panel by the end of 2021. This was confirmed by Mr Wessels in his affidavit, who stated that on 28 January 2022 he and Ms Mokuena received a further updated set of reasons from Mr Daniels. Mr Wessels stated that he forwarded the updated draft reasons to Mr Pancham to do further research on the most recent South African jurisprudence/case law of the Tribunal and CAC on the so-called 'characterisation' in cartel matters. He said this was because the law had developed in that area since the hearing of the matter. He also asked Mr Pancham to assess whether the draft reasons prepared by Mr Daniels adequately dealt with all the defences raised by Cape Gate during the hearing of the matter, and whether any information or evidence could be added to each defence.

[42] Mr Daniels further confirmed in his affidavit that on 9 April 2025 he received a telephone call from Ms Mazwai advising him that Cape Gate had enquired about the reasons. She requested him to draft the reasons as soon as possible. She also arranged for the files in relation to the matter to be delivered to him, including the last draft of the reasons. Once he had produced a draft of the reasons, he circulated it to the other members of the panel and to Ms Mazwai. After discussion by the panel, the reasons and order were finalised and issued on 18 August 2025. Regarding the statement that the parties were engaged in settlement discussions, Mr Daniels stated

in his affidavit that sometime in 2020 he was advised by Mr Wessels that the parties were in settlement negotiations and that the matter was going to be settled.

[43] Mr Wessels, in turn, confirmed in his affidavit that he was the one who advised Mr Daniels about the alleged settlement discussions between the parties. He said this information was related to him in an informal discussion he had with a certain Ms Busisiwe Masina (Ms Masina), who was employed by the Tribunal as a case manager at the time. He could not remember the date of such conversation but said it was before Ms Masina's resignation on 25 June 2021. He, in turn, related the information to Mr Daniels. He admitted that, to his knowledge, no formal communication was received by the Tribunal from the parties regarding any settlement discussions.

[44] In contrast to the explanation provided by the three members of the panel in their aforesaid affidavits, some conflicting statements were made by the various officials of the Tribunal, particularly, Mr Pancham, in their correspondence with Cape Gate's attorneys regarding the reasons for the delay. These include, *inter alia*, the following statements made by Mr Pancham:

(a) 16 June 2022: 'I have picked up this matter and am currently finalising a draft to send to the Panel for their final consideration. I hope to have the reasons finalised and released before the end of June';

(b) 1 July 2022: 'I can confirm that the draft reasons and order are with the Panel for finalisation';

(c) 21 November 2022: 'The Panel is still finalising the reasons. I will let you know before they go out. Two of the members are no longer with the Tribunal, thus finalising the reasons is taking longer than usual';

(d) 11 April 2023: 'Apologies for our tardy response. The reasons in this matter are still at a draft stage. The draft has been sent to me with queries/changes from the panel. Thereafter, the reasons will be finalised – I will keep you apprised of the Tribunal's progress in this regard' and;

(e) 31 August 2023: 'Please, note that I have put together a draft of these reasons for the remaining Panel member to settle – hopefully, it won't be too much longer before they are issued.

Kindly note that I am leaving the Tribunal today – please contact @ Jabulani Ngobeni for further assistance on this matter.'

[45] Based on the above statements made by Mr Pancham, it is contended by Cape Gate that the decision of the Tribunal falls to be reviewed and set aside on the basis that it may be contaminated by *mala fides* for two reasons. Firstly, it alleges that the correspondence exchanged between the Tribunal and Cape Gate's attorneys provide no support for the panel's assertion of being informed of 'settlement discussions' between the parties, and; secondly, that the contents of such correspondence are all inconsistent with the statement in paragraph 289 of the decision to the effect that the draft reasons had been prepared by, the latest 2022, when Mr Daniels left the Tribunal.

[46] However, the problem with Cape Gate's contentions is that they are not supported by evidence. Instead, they are based on mere speculation and conjecture. In essence, Cape Gate is seeking to persuade this Court to reject the evidence presented by the three members of the panel on affidavit in favour of the statements made by Mr Pancham in correspondence. This is notwithstanding the fact that the vague terms used by Mr Pancham in his statements make it difficult for one to determine the extent to which he contributed to the draft reasons prepared by Mr Daniels, that is, assuming that he did in the first place. This is in the light of the sworn statements made by all three members of the panel that the draft reasons were prepared by Mr Daniels and, subsequently, handed by Mr Wessels to Mr Pancham for assessment.

[47] Therefore, irrespective of the contribution made by Mr Pancham to the draft reasons, the evidence of the three panel members, which is unchallenged, is that the final draft was prepared by Mr Daniels, who circulated it to the other panel members for further discussion. After discussion by the panel, the order and reasons were finalised by Mr Daniels and issued on 18 August 2025. In other words, the role played by Mr Pancham in preparation of the Tribunal decision was no different from that of a court researcher who provides assistance to a judge by reviewing the draft judgment prepared by such judge. Regardless of the amendments or additions proposed by the researcher to the draft judgment, it would be absurd to suggest that the researcher was responsible for preparing the judgment. The final decision to accept or reject any proposed amendments made by the researcher lies with the judge concerned.

[48] Therefore, in the absence of evidence adduced by Cape Gate in support of its allegation of bias, or a reasonable suspicion of bias, as contemplated in s 6(2)(a)(iii) of PAJA, its application for review on the basis of this ground must, in my view, also fail. Regarding the ground of the alleged unreasonableness of the decision under s 6(2)(h) of PAJA, Cape Gate has not identified any aspect of the Tribunal's reasoning, or the substantive outcome thereof, that was tainted or rendered unreasonable by the delay in the issuing of the decision. The mere fact of the delay or Cape Gate's dissatisfaction with how the Tribunal assessed the evidence does not, in itself, meet the stringent threshold for unreasonableness under s 6(2)(h) of PAJA.

[49] Regarding Cape Gate's review challenge on the basis of procedural unfairness, its contention is that the unfairness arose from the Tribunal's reliance on the post-hearing legal authorities. However, its argument in this respect remains at the level of generality. It asserts, without elaborating, that it would have been able to distinguish such authorities. The problem is that it has not demonstrated how or why the Tribunal's reliance on those authorities led to a material procedural irregularity or substantive unfairness in the decision. Not only that, it has also not identified any instance where the outcome would have been different had it been allowed an opportunity to address the post-hearing authorities concerned. Simply put, Cape Gate has failed to adduce any evidence in support of any of the PAJA grounds it relies on, in support of its application.

***Whether the rejection of Cape Gate's argument by the Tribunal is reviewable on the grounds contended by it?***

[50] To put the third ground relied on by Cape Gate in a proper context, its contention is that the panel rejected its argument that the conduct complained of falls within the exception articulated in s 3(1)(e) of the Act as '*concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose*' in that Cape Gate and others acted pursuant to the Department of Trade, Industry and Competition (the DTIC) and industry initiative to retain scrap metal in South Africa in order to promote growth and jobs. It added that the end of the initiative resulted in the closure of over 100 foundries and the retrenchment of 1200 employees at Scaw.

[51] Cape Gate's complaint is that the panel rejected its argument (at paragraph 163 of the decision) on the basis that the scrap consumers were concerned about price and obtained sufficient volumes of scrap, both of which were said to be commercial objectives. It then takes issue with the manner in which the panel understood its argument because the panel rejected its explanation and took a decision that was not favourable to it. Cape Gate seems to attribute the panel's rejection of its argument to an alleged failure by the panel to consider the 'uncontested evidence' of Mr Herselman.

[52] Interestingly, the same argument is raised by Cape Gate in its appeal against the impugned decision, which means that the same grounds are relied on in respect of both the review and the appeal. Such practice was criticised by this Court in *Takata South Africa (Pty) Limited v Competition Commission of South Africa and Others*,<sup>9</sup> where the following was held by this Court:

'More importantly, we hold that where an appeal and a review are simultaneously brought the complaint in each case must be different, failing which the party should be allowed to institute only the appeal or the review proceeding. It must make an election to that end and be bound by it. To expand: assume the appeal is heard first and is granted, the review would automatically fall away as the decision would have been set aside and corrected. On the other hand, should the appeal fail, the effect is that the decision is found to be correct. It cannot thereafter be reviewed – by applying the review test of rationality or reasonableness – set aside and sent back to the administrative body (which is the normal remedy in a review), or even replaced by the reviewing court, as that court had just found the decision to be correct. In short, it makes no sense and serves no purpose in traversing the grounds raised in an appeal, and if found to be either correct or wanting, re-traverse the same grounds in a review.'

[53] In view of the foregoing, I deliberately refrained from considering the third ground of review relied on by Cape Gate on the basis that it seeks to challenge the panel's rejection of its argument, and because the same argument is raised by Cape Gate in its appeal against the same decision. The right place to raise such argument was in the appeal, hence I deemed it appropriate to prepare a judgment in respect of the appeal as well to deal with such argument.

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<sup>9</sup> *Takata* fn 3 above para 26.

## **Costs**

[54] Ordinarily, the costs of the application would follow the result. This, in the circumstances of this case, would have resulted in the Commission being entitled to its costs of the application. However, had I been writing for the majority I would have ordered that each party pays its own costs of the application. This is because the Commission was equally aware of the inordinate delay in the issuing of the decision by the Tribunal but failed to utilise the remedy of seeking a *mandamus* against the Tribunal even though it had the necessary capacity and the means to do so.

## **Conclusion**

[55] For the reasons set out above, I would have dismissed Cape Gate's review application and ordered each party to its own costs thereof.

## **The appeal**

[56] In light of the conclusion reached by the majority in the review application, it is unnecessary to determine the appeal, as the setting aside of the Tribunal's decision on review effectively disposes of the matter. However, having concluded that the review application ought properly to fail, I consider it prudent, for the sake of completeness, to express my views on the appeal lodged by Cape Gate against the Tribunal's decision as well. What follows should therefore be understood in that context.

[57] Cape Gate appealed to this Court against the whole of the decision of the Tribunal. It simultaneously applied to this Court for an order reviewing and setting aside the decision of the Tribunal on account of the delay of six years and two months it took the Tribunal to issue the decision. The majority of this Court decided to grant the review application, thus rendering it unnecessary to proceed with the determination of the appeal. However, in the light of my dissenting judgment that the review application ought to have been dismissed, I deemed it appropriate to prepare this judgment on appeal for two reasons: firstly, to deal with the grounds of appeal which were conflated by Cape Gate as the grounds of review as well, and; secondly, to dispel Cape Gate's notion that the Tribunal's decision is substantively and manifestly wrong. The appeal was opposed by the Commission.

### **Factual background**

[58] Cape Gate, Arcelormittal, Columbus and Scaw (the scrap consumers) are all involved in the business of purchasing scrap metal from scrap merchants, which they utilise as an input in the upstream market for the production of their steel products. This places the scrap consumers in a horizontal relationship as contemplated in s 4(1) of the Act by virtue of the fact that they are in the same line of business in the market for the purchase of scrap metal and in the upstream market for the production of steel products.

[59] On 21 December 2009, the Commission, acting in terms of section 49B(1) of the Act, initiated a complaint against the scrap consumers and referred it to the Tribunal. The basis of the complaint was that the Commission had found that in the period commencing in or about 1998 until at least 2008 the scrap consumers, being the largest scrap consumers in South Africa, operated as a buyers' cartel. As such, they colluded with the upstream cartel of scrap merchants comprising the large scrap merchants in South Africa, namely, Reclamation Scrap (Reclam), Universal Recyclers (Universal), Ben Jacobs Iron and Steel and Tom Scrap (the scrap merchants).

### **Grounds of appeal**

[60] By way of explanation, Cape Gate has reiterated in its pleadings that except for certain communications it denies participating in, it does not generally dispute the meetings, events and other communications that are referred to by the Commission as the basis of its complaint against Cape Gate. However, it denies that its conduct of participating in any such meetings, events and communications constitutes the alleged infringement of s 4(1)(b)(i) of the Act.

[61] The reasons for Cape Gate's denial of infringement of s 4(1)(b)(i) of the Act are essentially the same reasons it relied on before the Tribunal. They also constitute its grounds of appeal, and may be summarised as follows:

(a) The actions forming the subject of the Commission's complaint against Cape Gate were all pursuant to an initiative of the DTIC to retain scrap metal in South Africa. This was with a view to promote growth and jobs in the downstream industries operated by the scrap consumers. Therefore, the conduct complained of constitutes

'concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose' as contemplated in s 3(1)(c) of the Act;

(b) The Tribunal erred in its finding that the conduct of the scrap consumers to, firstly, discuss and agree amongst themselves on the adjustments to the pricing formula prior to negotiations with the scrap merchants and, secondly, negotiate jointly with the scrap merchants prior to reaching an agreement with them on adjustments to the pricing formula, constituted conduct contemplated in s 4(1)(b) of the Act;

(c) The Tribunal erred in its finding that the scrap consumers fixed the price of scrap in the period 1998 to 2008 instead of finding that the scrap merchants had done so; and

(d) The Tribunal erred in its finding that the State (in the form of DTIC) and the Commission had not authorised, whether expressly or impliedly, the pricing formula and the negotiations between the scrap merchants (collectively) and the scrap consumers (collectively), together with prior meetings between the scrap merchants on the one hand, and the scrap consumers on the other hand, to agree their respective negotiating positions.

[62] The basis of the Commission's opposition of the appeal is primarily that the Tribunal is the forum of first instance and the primary fact-finding body. As such, so contends the Commission, its findings of fact, including its inferences drawn from the evidence, are not to be interfered with unless the court of appeal is satisfied that the Tribunal has misdirected itself or is clearly wrong in its decisions. And this is to be done for the sole purpose of achieving justice.<sup>10</sup>

[63] The Commission further contends that in the present case, Cape Gate does not identify any misdirection in the Tribunal's application of s 4(1)(b)(i) of the Act to the facts and/or evidence, nor a material factual error. Instead, it advances alternative descriptions of the same conduct and invites this Court to substitute its own characterisation for that of the Tribunal. For the sake of convenience and completeness, I have deemed it appropriate to deal with the issues raised by Cape Gate in the same order they were raised by it as defences before the Tribunal.

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<sup>10</sup> *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* [2021] ZACC 35; [2023] 1 CPLR 2 (CC); 2022 (4) SA 323 (CC) paras 44, 45, 50 and 70.

**Whether the Act does not apply to the conduct complained of?**

[64] The first defence raised by Cape Gate before the Tribunal was that the Act does not apply to the conduct complained of because such conduct was pursuant to a non-commercial, socio-economic goal. However, it was indicated by Mr Campbell SC, who appeared for Cape Gate with Mr Gotz SC, that for the purposes of this appeal Cape Gate's first defence is now subsumed into its fifth defence regarding 'characterisation'.

[65] A closer look at the grounds of appeal, on the other hand, suggests that the first defence has been subsumed into the fourth defence dealing with 'estoppel'. The basis of the latter defence is that the Commission and the DTIC were, at all material times, aware of the conduct complained of but raised no objection to it. Instead, it is contended, they signified their approval of the standard pricing formula by adopting it as a directive in terms of the relevant enabling legislation.

[66] The basis of the first defence, prior to its subsumption, was that the scrap consumers had engaged in the conduct complained of pursuant to the DTIC and the industry initiative to retain scrap in South Africa, as well as to retain jobs in the downstream scrap industry. Regarding the issue of jobs, it was stated by Mr George Frederick Herselman (Mr Herselman), who testified for Cape Gate, that over 100 foundries had closed in this country resulting in many people in the scrap industry losing their jobs. This was supported by the evidence of Mr Laurence Erasmus (Mr Erasmus), who testified for the Commission, that the company he used to work for, namely, Scaw, had retrenched 1,200 employees.

[67] After due consideration of the evidence of Messrs Herselman and Erasmus, the finding of the Tribunal was that the conduct of the scrap consumers clearly had a commercial objective and was not pursuant to a non-commercial, socio-economic goal as contended by Cape Gate. Being the largest consumers of scrap in South Africa, the evidence of Mr Erasmus was that the scrap consumers were very concerned about the price at which they would buy scrap. As firms in a horizontal relationship, they were also concerned about obtaining sufficient volumes of scrap. In conclusion, the Tribunal found that both price and volume were clearly the commercial objectives of the scrap consumers and, as such, fell within the ambit of the Act.

[68] Considering the evidence led before the Tribunal in its totality, it would seem that the evidence of Messrs Herselman and Erasmus must be considered in conjunction with the evidence of Mr Martin. Mr Martin's evidence, briefly stated, was that the conduct which formed the subject of the Commission's complaint against the scrap consumers commenced during or about 2001. That was when an agreement was reached between the merchants and the consumers to develop a pricing formula for scrap metal in inland areas for the purpose of reaching an export achievable price.<sup>11</sup>

[69] In essence, the price formula involved taking a Metal Bulletin price published weekly in Rotterdam for a standard grade in scrap (ESRI 205), multiplying it by a rand/dollar exchange rate for a determined period, and subtracting the fobbing cost<sup>12</sup> and the cost of transport<sup>13</sup> to arrive at a reference price. A discount on the reference price was then negotiated between the merchants and the consumers to make it beneficial for both parties. This was aimed at affording the consumers a competitive international price, while relieving the merchants of the logistical and administrative problems of exporting large quantities of scrap to overseas markets.

[70] It was not until 2003 when the DTIC first got involved in discussions with the role players in the scrap industry to find mechanism to keep the scrap locally.<sup>14</sup> By then, the pricing formula adopted by the scrap merchants and the scrap consumers had already been in existence for, at least, two years. Furthermore, it remained in existence for a further two years after the pricing formula proposed by the DTIC was formally withdrawn. When the DTIC first got involved, it started by convening a meeting of all the users of scrap in South Africa, not just the large scrap merchants and the large scrap consumers, to discuss mechanisms to control the export of scrap from South Africa. This was in line with its metals policy to beneficiate and increase manufacturing locally.<sup>15</sup> It was indicated to the DTIC that the industry had reached an agreement on an export achievable price that was working at that stage to ensure that

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<sup>11</sup> Evidence of Mr David Phillip Martin, the retired CEO of Columbus, in Vol 15 of the record at page 1355 lines 3-6.

<sup>12</sup> The cost of offloading the ships.

<sup>13</sup> From Durban to an inland site.

<sup>14</sup> Vol 15 page 1360 lines 2 – 10.

<sup>15</sup> Vol 15 page 1360 line 17 – page 1361 line 5.

the scrap consumers had sufficient volumes and quality of scrap at a competitive price, but the details of the said agreement were not disclosed to it.

[71] A proposal was then put up by one of the sub-committees at the meeting<sup>16</sup> to stop the export of scrap by offering the scrap merchants an export achievable price. The pricing formula suggested in the proposal (the DTIC pricing formula) was somewhat different from the one that was adopted by the scrap merchants and the scrap consumers back in 2001 (the 2001 pricing formula), although it was based on the same principles.

[72] Among the notable differences between the two pricing formulas are the following:

(a) The 2001 pricing formula was formulated by agreement amongst the five largest scrap merchants in a horizontal relationship, which is a prohibited restrictive practice in terms of s 4(1)(b)(i) of the Act. The DTIC pricing policy, on the other hand, was formulated in broad consultation with all the role players in the scrap metal industry;

(b) The 2001 pricing formula provided for a three-tier system<sup>17</sup> of premiums (discounts) among the different levels of the scrap merchants. No such system was provided for in the DTIC pricing formula. Instead, it was intended to apply uniformly to all levels of the scrap merchants; and

(c) The 2001 pricing formula was exclusionary in its application, as alluded to by Mr Martin in his evidence that: 'we were strongly persuaded by the scrap merchants not to buy outside the five largest scrap merchants, but we reserved our right to secure supplies from the small BEE companies we were buying from at the time'.<sup>18</sup> The DTIC pricing formula, in contrast, was intended to be all inclusive and to apply uniformly to all role players in the scrap metal industry, irrespective of their size.

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<sup>16</sup> 'Sub-committee of the ferrous scrap consumers'.

<sup>17</sup> Vol 15 page 1363 line 12 – page 1365 line 14, in which Mr Martin states that at some point in 2000 the three biggest merchants being Reclam, Universal and Rand Scrap, insisted on the scrap purchasers adhering to a tiering system, in terms of which the three biggest merchants (Reclam, Universal and Rand Scrap) were paid a premium, the tier 2 scrap merchants (being the middle-sized merchants, were paid the normal formula price and the smallest merchants (tier 3), being all the other suppliers of scrap in the market, were paid a price that was discounted from the formula price.

<sup>18</sup> Record Vol 3, pages 253 – 258; Vol 9 page 758.

[73] Apart from the notable differences listed above, there is no evidence that the DTIC had at any stage endorsed the 2001 pricing formula. Except for unsubstantiated claims that the DTIC authorised or condoned the 2001 pricing formula, Cape Gate has not put up any evidence to support such claims. Even if it did, the conduct complained of would still be in contravention of s 4(1)(b)(i) of the Act because the Act is also binding on the DTIC by virtue of it being an entity of the State.<sup>19</sup> Consequently, the defence of *estoppel* against the DTIC cannot succeed because, as stated by the SCA in *TEB Properties CC v The MEC, Department of Health and Social Development, Northwest*,<sup>20</sup> a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance of the doctrine of *estoppel*.

[74] The same applies to the alleged involvement of the Commission in the conduct complained of. Cape Gate has not put up any evidence that the members of the Commission who attended the relevant meetings had actively participated in those meetings. Instead, evidence reveals that they attended as observers.<sup>21</sup> Besides, the meetings they attended were held in relation to the DTIC pricing formula, which was never gazetted until its withdrawal by the then Minister of Trade and Industry (Minister Mpahlwa) in June 2004. This did not affect the continued application of the 2001 pricing formula, which was consistently used by the scrap merchants and the scrap consumers throughout the relevant period until 2006 when Reclaim decided to withdraw from the arrangement.

[75] It was argued by Mr Campbell SC that the non-promulgation of the DTIC policy did not deprive the policy of its legal status as an 'administrative action' as contemplated in s 1 of the PAJA. The authority he relied on for such proposition is the SCA decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (Oudekraal)*,<sup>22</sup> where it was held that an administrative act cannot simply be ignored on the basis that it is invalid. Instead, it remains valid until it is set aside by a court of competent jurisdiction in proceedings for judicial review. However, the correct application of *Oudekraal* is that the steps prescribed in the applicable legislation must

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<sup>19</sup> See s 81 the Act.

<sup>20</sup> *TEB Properties CC v The MEC, Department of Health and Social Development, Northwest* [2011] ZASCA 243; [2012] 1 All SA 479 (SCA) para 35.

<sup>21</sup> Record Vol 3 pages 253 – 258; Vol 9 page 758

<sup>22</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 at 246H-247A.

be complied with and, if necessary, published in the Gazette, before the administrative act concerned may be regarded as having taken effect.

[76] In the present case, it is clear from the evidence that the scrap merchants and the scrap consumers had considered themselves bound by the 2001 pricing formula. They also ensured that it was kept up to date by adjusting it annually by agreement until 2006. There is no evidence that they, at any stage, considered themselves bound by the DTIC pricing formula prior to its withdrawal by the Minister. In the circumstances, I am inclined to agree with Ms Lekokotla, who appeared for the Commission, that the argument advanced by Mr Campbell regarding the validity of the DTIC pricing formula prior to its withdrawal by the Minister cannot be sustained.

[77] In conclusion, I find that the Tribunal was correct in its finding that the Act applies to the conduct complained of.

**Whether the conduct complained of constitutes the fixing of a purchase or selling price as contemplated in s 4(1)(b)(i) of the Act**

[78] The second defence raised by Cape Gate is regarding the correct interpretation of s 4(1)(b)(i) of the Act. In essence, its contentions are that the section does not contemplate the price being fixed more than once. If the transaction price is the result of collusion amongst the scrap merchants, then it is inconceivable, according to Cape Gate, that the same price can be the result of collusion amongst the scrap consumers. It further contends that the impugned conduct arose in the context of vertical negotiations between the scrap merchants and the scrap consumers. Consequently, so it argues, any horizontal consensus among the scrap consumers was ancillary or incidental to, and reasonably required for, the conclusion and implementation of the main lawful vertical arrangement, given that no single scrap consumer could unilaterally implement an industry-wide formula.

[79] In response, the finding of the Tribunal was essentially that it was a fact that the consumers fixed the price collectively with the scrap merchants, and not individually and independently as they were supposed to. The argument raised by Cape Gate that the price was set by the scrap merchants and not by the scrap consumers ignores the collusive process that the scrap consumers followed in negotiating the price of scrap

with the scrap merchants. Based on its assessment of the evidence, the Tribunal found that the scrap consumers operated as a buyers' cartel in negotiating the purchase price of scrap with the scrap merchants collectively, as opposed to individually and independently. In so doing, the scrap consumers were found by the Tribunal to have acted in contravention of s 4(1)(b) of the Act. As the result, the defence raised by Cape Gate regarding the correct interpretation of s 4(1)(b)(i) of the Act did not succeed.

[80] For the sake of completeness, the relevant provisions of s 4 (1)(b)(i) of the Act read as follows:

**'4. Restrictive horizontal practices prohibited** – (1) An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*, is prohibited if it is between parties in a *horizontal relationship* and if –

- (a) ...
- (b) it involves the following restrictive horizontal practice:
  - (i) directly or indirectly fixing a purchase or selling price or any other trading condition.'

[81] Contrary to what is contended by Cape Gate, the prohibition in s 4(1)(b)(i) of the Act is not restricted to an 'agreement', but also extends to a 'concerted practice' under the following circumstances:

- (a) if it is between parties in a horizontal relationship, and;
- (b) if it involves the 'restrictive horizontal practice' of 'directly' or 'indirectly' fixing a purchase or selling price or any other trading condition.

[82] Therefore, irrespective of who, between the scrap merchants and the scrap consumers, had fixed the price for the sale or purchase of scrap, it is not legally impermissible for both the scrap merchants and the scrap consumers to be found in contravention of s 4(1)(b)(i) of the Act in respect of the same conduct. According to the evidence, during the period 2001 to 2005 a series of discussions and meetings were held amongst the scrap merchants collectively, and the scrap consumers collectively, aimed at agreeing the annual adjustments to the standard pricing formula. Such discussions amounted to the restrictive horizontal practice of directly or indirectly fixing the purchase or selling price of scrap. Therefore, it was legally permissible for the Tribunal to find the scrap consumers to have fixed the purchase price, even though the scrap merchants had admitted to having fixed the selling price.

[83] By the same token, the meetings held by the scrap consumers annually to discuss and agree on the proposals to be made to the merchants in respect of the price adjustments to the standard pricing formula were also hit by the prohibition in s 4(1)(b)(i) of the Act. This is notwithstanding the fact that the final decision on the price adjustment for scrap is said to have been made ultimately by the scrap merchants. The scrap consumers may not have made the final decision on the price adjustment, but their preliminary discussions and meetings had surely played a role in fixing the purchase price of scrap, albeit indirectly.

[84] Regarding Cape Gate's contention that the impugned conduct arose in the context of vertical negotiations between the scrap merchants and the scrap consumers, this does not detract from the fact that the lawfulness of the process leading to the conclusion of the vertical agreement is itself suspect. It appears from the evidence that the process was initiated by the large scrap merchants in a horizontal relationship, who reached an agreement amongst themselves to use a pricing formula to determine the price of scrap. They then approached the large scrap consumers individually and urged them to agree an export achievable price based on the pricing formula they had agreed on, less a premium (discount).

[85] In terms of the pricing formula, the premium would be applied in accordance with a tiering system, whereby the tier 1 suppliers (the three largest scrap merchants) would be paid a premium for their scrap; the tier 2 suppliers would be paid the normal formula price, and; the tier 3 suppliers (who constituted all the other suppliers of scrap in the market) would be paid a price that was discounted from the formula price. The large scrap consumers had, in turn, held their own negotiations to discuss the proposal from the scrap merchants. They reached consensus on their joint response to the scrap merchants' proposal. While the components of the pricing formula remained constant, the values of the components would change periodically and be adjusted annually by way of collective negotiations.

[86] Therefore, while the vertical agreements are generally not prohibited in terms of the Act, the process leading to the conclusion of the vertical agreement between the scrap merchants and the scrap consumers was clearly prohibited in terms of

s 4(1)(b)(i) of the Act. This renders the resultant vertical agreement between the scrap merchants and the scrap consumers the proverbial ‘fruit of a poisoned tree’. Furthermore, bearing in mind that the vertical agreement was entered into between only the five largest scrap merchants and the five largest scrap consumers in the industry, who purportedly set the price of scrap metal unilaterally without the involvement of the other role players in the industry, it can hardly be regarded as the ‘lawful’ main agreement which justified the conclusion of the ancillary horizontal agreement by the scrap consumers.

[87] The exclusionary nature of the vertical agreement was also raised as a concern by the Tribunal in its reasons for decision.<sup>23</sup> In particular, the Tribunal was concerned about the tier 2 and 3 scrap merchants, who were not involved at all in the discussions regarding the prices to be paid by the scrap consumers for their scrap. Neither, for that matter, were the thousands of informal scrap collectors who were not even mentioned during the hearing, as if they do not exist or do not have a voice. Surprisingly, neither Cape Gate in its pleadings, nor its legal representatives in their legal arguments, had bothered to respond to the concerns raised by the Tribunal regarding the exclusionary nature of the vertical agreement.

[88] It was argued by Mr Gortz SC, who appeared for Cape Gate with Mr Campbell, that the European Commission Guidelines,<sup>24</sup> which have been endorsed by this Court, provide that when characterising conduct, one must have regard to: (i) the objectives that it seeks to attain; (ii) the content of the agreement, and; (iii) the economic and legal context of which it forms a part. He pointed out that the principle of characterisation was introduced by the SCA judgment in *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and Others*<sup>25</sup> (ANSAC), where the following was held by that Court:<sup>26</sup>

‘Whichever approach is adopted, the essential enquiry remains the same. It is to establish whether the character of the conduct complained of coincides with the character of the

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<sup>23</sup> Paragraphs 278 – 282 of the Tribunal’s Decision.

<sup>24</sup> The European Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (updated version 1.6.2023) (‘EC Guidelines’).

<sup>25</sup> *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa and Others* 2005 (6) SA 158 SCA; [2005] 3 All SA 1 (SCA) (ANSAC).

<sup>26</sup> ANSAC *ibid* paras 47-49.

prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry. In ordinary language this can be termed “characterising” the conduct – the term used in the United States, which Ansac has adopted. Price-fixing necessarily contemplates collusion in some form between competitors for the supply into the market of their respective goods with the design of eliminating competition in regard to price. That is achieved by the competitors collusively “fixing” their respective prices in some form. (By setting uniform prices, *or by establishing formulae or ratios for the calculation of prices*, or by other means designed to avoid the effect of market competition on their prices.)

But while price-fixing inevitably involves collusive or consensual price determination by competitors, it does not follow that price fixing has necessarily occurred whenever there is an arrangement between competitors that results in their goods reaching the market at a uniform price. The concept of “price-fixing”, both in lay language and in the language that the Act uses, may, for example, be limited to collusive conduct by competitors that is designed to avoid competition, as opposed to conduct that merely has that incidental effect.’ (Emphasis added.)

[89] In other words, the SCA held that it is necessary to characterise the conduct complained of to establish whether it coincides with any of the restrictive horizontal practices listed in s 4(1)(b) of the Act, namely, price fixing, market division or collusive tendering (which are commonly referred to as the ‘*per se* prohibitions’ or the ‘object infringements’). If it does, it is deemed to be unlawful *per se* and no defence can be permitted to justify it.<sup>27</sup> This is unlike the conduct prohibited under s 4(1)(a) of the Act, which provides for a ‘rule-of-reason’ permitting the raising of a defence to justify the conduct complained of.

[90] Since *ANSAC*, the principle of characterisation was also applied by this Court in the cases of *Competition Commission v South African Breweries Limited and Others (SAB)*<sup>28</sup> and *Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission (Dawn)*.<sup>29</sup> In *SAB*, the Commission alleged that SAB and its associated distributors engaged in anti-competitive practices that substantially lessened competition in the downstream beer market by concluding an agreement with its

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<sup>27</sup>*Tourvest Holdings (Pty) Ltd v Competition Commission* 195/CAC/Oct21 (30 June 2022) para 44.

<sup>28</sup>*Competition Commission v South African Breweries Limited and Others* 2015 (3) SA 329 (CAC).

<sup>29</sup>*Dawn Consolidated Holdings (Pty) Ltd and Others v Competition Commission* [2018] 1 CPLR 1 (CAC).

distributors that they would not sell beer in one another's exclusively allocated territories. This Court, however, held that the core of the relationship between the parties was vertical and that treating the market allocation element in the arrangement as a *per se* s 4(1)(b)(ii) violation would mischaracterise a legitimate distribution system.

[91] The principle of characterisation in the context of our law was explained by this Court in *SAB* as follows: 'Characterisation that is required under our legislation is to determine (i) whether the parties are in a horizontal relationship, and if so, (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of s (4)(1)(b)'.<sup>30</sup> It further stated that: 'The purpose of the characterisation principle, in the manner in which we have outlined it, is reflective that the *per se* prohibitions contained in s 4(1)(b) are the most serious legislative prohibitions against a defendant. There is no defence which can be offered if the requirements of the section are met. The animating idea of the characterisation principle is to ensure that s (4)(1)(b) is so construed that only those economic activities in regard to which no defence should be tolerated are held to be within the scope of the prohibition.'<sup>31</sup>

[92] Similarly, in *Dawn* the question for determination by this Court was whether a non-compete clause in a shareholders' agreement contravened s 4(1)(b)(ii) of the Act on the basis that it was a restrictive horizontal practice by which markets were divided. This Court found that in the context of the agreement as a whole there was no evidence that the non-compete clause, properly characterised, amounted to a contravention of s 4(1)(b)(ii) of the Act. It held that the non-compete clause that formed the subject of the complaint was reasonably required for the conclusion and implementation of the shareholders' agreement in that case.<sup>32</sup>

[93] In both cases (*SAB* and *Dawn*), the conduct complained of related to an ancillary horizontal agreement that was incidental to the main vertical agreement, it being admitted by the Commission that the vertical agreement was unobjectionable. As illustrated in the preceding paragraphs of this judgment, the vertical agreement in

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<sup>30</sup> *SAB* fn 28 para 37.

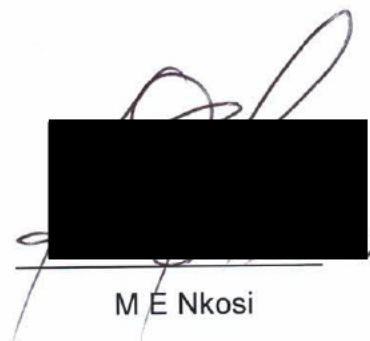
<sup>31</sup> *Ibid.*

<sup>32</sup> *Dawn* fn 29 para 42.

this case is itself objectionable for the reasons set out in the preceding paragraphs. It is on this basis that the facts of this case are clearly distinguishable from the facts in the cases of *SAB* and *Dawn*.

### **Conclusion**

[94] Therefore, for the reasons set out above, I would have found that the Tribunal was correct in its dismissal of all the defences raised by Cape Gate to the Commission's complaint referral. Consequently, I would have confirmed the Tribunal's finding that Cape Gate contravened section 4(1)(b)(i) of the Act by entering into an agreement to fix the purchase price of scrap and dismissed the appeal with costs.



M E Nkosi

Acting Judge of Appeal

Competition Appeal Court of South Africa

## **Masipa AJA & Lekhuleni AJA**

### **Introduction**

[95] We have had the benefit of reading the erudite judgment of our colleague, Nkosi AJA. We are in broad agreement with his exposition of the factual background relevant to this matter, which we adopt for purposes of this judgment. We part ways with him, however, on the application of the law to the facts and the conclusions to be drawn therefrom.

[96] This case serves as a quintessential example of the adage that justice delayed is justice denied. It concerns the review of a decision of the Tribunal delivered on 18 August 2025, following a hearing that concluded on 28 June 2019. The period between the conclusion of argument and the delivery of judgment was therefore approximately six years and one and a half months. That delay is not merely incidental or a background feature of the matter. It lies at the heart of the present review and permeates each of the grounds upon which the applicant seeks to impugn the Tribunal's decision.

[97] The review is brought in terms of section 37(1)(a) of the Act read with PAJA, and, where necessary, read with the principle of legality. The applicant contends that the delay, the manner in which the judgment was produced, the inconsistencies in the explanations for that delay, and the Tribunal's treatment of the evidentiary material cumulatively render the decision unlawful, irrational and unreasonable. The Tribunal and the Commission accept that the delay was inordinate. The Tribunal, nevertheless, contends that delay alone does not vitiate a decision once taken, and that the applicant's complaints fall more properly within the domain of an appeal.

[98] The issue for determination is therefore whether the delay, when considered together with the process that unfolded during that period, gives rise to a reviewable irregularity. That enquiry must be grounded in the evidential material placed before this Court, the applicable statutory and constitutional framework, and the purpose of review proceedings in our law.

## Legal Framework

[99] The starting point of the inquiry should be section 52(1) and 52(2)(a) of the Act which provides as follows:

**'Hearings before Competition Tribunal** – (1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms this Act.  
 (2) Subject to subsections (3) and (4), the Competition Tribunal –  
 (a) must conduct its hearing in public, as expeditiously as possible, and in accordance with the principles of natural justice; and  
 (b) may conduct its hearings informally or in an inquisitorial manner.'

[100] This section indicates that the Tribunal is required by section 52(2)(a) of the Act to conduct its proceedings 'as expeditiously as possible' and 'in accordance with the principles of natural justice'. The duty to deal expeditiously with complaints of prohibited practices is baked into the Act. Thus, the prohibitions, against prohibited practices and the institutions that have been established to investigate and adjudicate allegations of such practices, all serve the public interest. Protracted delays or tactical stalling in cartel matters run counter to the public interest. Ensuring that cartel cases are heard and decided without undue delay protects consumer welfare and markets.

[101] Mr Trengove SC, for the Tribunal, contended that the section does not relate to the decision/judgment but is limited to the hearing. Effectively, that it required the Tribunal to conduct its hearings in public and as expeditiously as possible in accordance with the principles of natural justice. He asserted that the procedural principles in the section pertain to the manner in which a hearing is conducted. He contended that there was no room for interpreting the section otherwise. A proposition we disagree with.

[102] Section 52(2)(a) must be interpreted within the normative framework of the Act and the Constitution. The section gives statutory effect to the constitutional duty resting on public bodies to act expeditiously when performing constitutional obligations. The Tribunal exercising public power under the Act, bears a corresponding constitutional obligation to dispense justice efficiently and without unreasonable delay. The delivery of judgments timeously is a hallmark of any adjudicative function.

[103] The principles of natural justice in section 52(2)(a) enjoins the Tribunal with an adjudicative injunction to consider the evidence and submissions from both parties and thereafter to determine the issues before it timeously and expeditiously. The heading to section 52, namely 'Hearing before Competition Tribunal', cannot be understood in a narrow or formalistic sense. A hearing that does not culminate in a decision, or does so only after an unreasonable delay, defeats the objects and purpose of the Act.

[104] The Act does not contemplate the Tribunal as functioning in the same way as would an ordinary court, rigidly confined to an adversarial model of adjudication.<sup>33</sup> Section 52(2)(a) and (b) permits the Tribunal to conduct its hearing informally or in an inquisitorial manner. The rationale behind this provision is to ensure that the Tribunal finalises matters referred to it expeditiously without any hindrances normally present in the normal course of adversarial litigation. In *Goodyear South Africa (Pty) Ltd v Competition Commission and Others*,<sup>34</sup> Nuku JA observed that section 52(2)(a) aims to ensure the prompt conduct of Tribunal proceedings. The court also noted that other provisions of the Act, including section 33,<sup>35</sup> should be interpreted with this important purpose in mind.

[105] Thus, properly construed in its context and purpose, the statutory injunction to conduct its hearing in public, as expeditiously as possible, and in accordance with the principles of natural justice is not confined to the hearing stage alone. It extends to the entire adjudicative function of the Tribunal, including the making, finalisation and delivery of its decision. Any narrower interpretation would undermine the evident purpose of the Act, which contemplates the timely resolution of competition disputes swiftly in the public interest. That obligation must be read in tandem with section 237 of the Constitution, which provides that all constitutional obligations must be performed diligently and without delay. This constitutional obligation applies equally to the

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<sup>33</sup> *Senwes Limited v Competition Commission of South Africa*, Case No 87/CAC/FEB09 at para 40.

<sup>34</sup> *Goodyear South Africa (Pty) Ltd v Competition Commission and Others* Case no: 269/CAC/Mar25 para 25.

<sup>35</sup> Section 33 of the Competition Act provides that 'If, on the expiry of the term of office of a member of the Competition Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only'.

exercise of any public power or the performance of any public function including *quasi-judicial* institutions established under a statute.

[106] The Tribunal, exercising public power under the Act, bears a constitutional obligation to dispense justice efficiently and without unreasonable delay. We conclude therefore that section 52(2)(a) of the Competition Act enjoins the Tribunal in the exercise of its adjudicative function to conduct its decisional function as expeditiously and to make its pronouncements timeously, consistent with the norms and standard issued by the Chief Justice in terms of section 165(6) of the Constitution.

[107] It is our firm view that the expedition demanded by section 52(2)(a) of the Act logically includes the subsequent rendering of decisions, including orders as well as reasons without undue delay. Significantly, any decision of the Tribunal that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, including in the aspect outlined in section 3 of PAJA.

[108] In terms of section 1 of PAJA, “a tribunal” means any independent and impartial tribunal established by national legislation. The Tribunal is not a court of law in the strict sense, but a specialist administrative tribunal established in terms of section 26(1) of the Act. As a tribunal of record exercising public power and performing an adjudicative function under national legislation, its decisions constitute administrative action subject to the requirements of lawfulness, reasonableness and procedural fairness. Both the Commission and the Tribunal are creatures of statute.<sup>36</sup> While not a court of law, the Tribunal performs functions akin to a court in that it has the power to legally determine rights and liabilities. Its decisions, although judicial in nature, are administrative decisions.<sup>37</sup> Additionally, its decisions though administrative in nature, are challenged before a court of appeal it therefore sits at the level of the Magistrates Court. The Tribunal is specifically empowered by section 27(a) of the Act to adjudicate on prohibited practices and to determine whether a prohibited practice has occurred.

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<sup>36</sup> *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA) para 12; 2003 (3) SA 64 (SCA).

<sup>37</sup> *Glaxo Welcome (Pty) Ltd v Terblanche NO and Others* [2001-2002] CPLR 48(CAC) at 54; *African Media Entertainment Limited v Lewin NO and Others* 68/CAC/MAR/07 (19 November 2007) para 27.

As articulated above, in terms of section 52(2)(a) the Tribunal is explicitly enjoined to apply the rule of natural justice.

[109] In exercising its determinative function, the Tribunal is enjoined by the Act to do so in a procedurally fair manner and in accordance with the tenets of natural justice. Its decision must be rational, in the sense that there must be a proper and intelligible connection between the information on which it is based, the reasons furnished, and the conclusion reached. Where that connection is absent, or where the reasons advanced do not justify the outcome, the decision cannot be sustained and falls to be regarded as arbitrary and inconsistent with the requirements of lawful administrative action.<sup>38</sup> In *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*,<sup>39</sup> the Constitutional Court held that rationality is a minimum requirement for the exercise of public power. That requirement extends to the process by which a decision is reached. This includes the entire process including the decision-making process.

[110] In *Khumalo and Another v MEC for Education, KwaZulu-Natal*,<sup>40</sup> the Court emphasised that the delay must be assessed contextually and may render administrative action unlawful where it undermines the integrity of the decision-making process. In our view, a decision reached by a fundamental irregular or unfair process is invalid even if the decision could be defensible on the merits since the lawfulness of a decision is intrinsically linked to the fairness of the process that precedes it.

[111] Section 6(2) of PAJA provides for review where relevant considerations were not taken into account, where there is no rational connection between the reasons and the information before the decision-maker, and where the decision is so unreasonable that no reasonable decision-maker could have taken it.

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<sup>38</sup> *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC) para 62.

<sup>39</sup> *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 85.

<sup>40</sup> *Khumalo* fn 6 above paras 43 & 44.

[112] The purpose of these review grounds, as explained in *Steenkamp NO v Provincial Tender Board, Eastern Cape (Steenkamp)*,<sup>41</sup> and endorsed in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (Allpay)*,<sup>42</sup> is to ensure lawful, reasonable and procedurally fair administrative action and to uphold the rule of law.

### **The delay and its significance**

[113] The delay in this matter is not in dispute. The hearing concluded on 28 June 2019. The Tribunal's decision was delivered on 18 August 2025. The delay is therefore approximately six years and two months. This period is extraordinary and far exceeds what could reasonably be contemplated by the statutory requirement that proceedings be conducted expeditiously.

[114] The significance of such delay lies not merely in its duration, but in its effect on the adjudicative process. Adjudication requires a sustained engagement with the evidence, the submissions and the issues as they presented themselves at the hearing. When there is a significant time lapse between the hearing and the judgment, there is a genuine risk that the reasoning process becomes detached from the arguments and evidence presented at the hearing. That risk in the present matter is borne out by the disconnection between the evidence led, the argument presented vis-à-vis the reasons given by the Tribunal.

### **The evidential basis for the delay**

[115] The explanation for the delay must be assessed with reference to the affidavits of the panel members, the answering affidavit filed on behalf of the Tribunal, and the contemporaneous correspondence exchanged between the parties and the Tribunal over several years. When those sources are considered together, they do not present a coherent or consistent explanation for the delay. As will be demonstrated below, the reasons given by the panel members and the Chairperson of the panel are contradictory and diametrically opposed. To give context to the reasons that follow,

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<sup>41</sup> *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) para 29.

<sup>42</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Social Security Agency and Others* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 30.

we deem it prudent to reproduce the reasons articulated in paragraph 289 of the Tribunal's judgment for the delay in delivering judgment in time. The Tribunal stated as follows:

'The Chairperson of the panel Mr Enver Daniels and Tribunal member Dr Medi Mokuena left the Competition Tribunal ("Tribunal") in 2022 and 2019 respectively due to the expiry of their terms of office. Draft reasons had been prepared at that stage and were being deliberated upon by the panel. During this time the panel was informed by the parties that they were in settlement discussions, and the finalization of reasons was put on hold. For some time, the panel laboured under the belief that the parties were engaged in settlement discussions and may have settled the matter. The parties however were unsuccessful in their post hearing settlement negotiations and recently requested the reasons.'

[116] It must be stressed from the outset that from the objective facts, the excuse raised by the panellist in the decision is false and contradicts the explanation they proffer in their respective explanatory affidavits. Significantly, this excuse is not borne out by the evidence presented before this Court. The applicant and the Commission have repeatedly asked the Tribunal for a judgment on the matter. In response, members of the Tribunal repeatedly assured both the applicant and the Commission that the preparation of the reasons was well underway. The record is replete with email exchanges to that effect, reflecting ongoing communications and assurances that the judgment was in the process of being finalised.

[117] Notably, Mr Daniel's affidavit confirms that a draft judgment was prepared and circulated in November 2020. While this indicates that some progress had been made in formulating the Tribunal's reasoning, it must be viewed in its proper temporal context. The hearing had concluded on 28 June 2019, with the result that the preparation of a draft occurred only in November 2020, approximately seventeen months after argument had been finalised. Even at that stage, the delay was already substantial and inconsistent with the requirement that proceedings be conducted as expeditiously as possible.

[118] Mr Daniels further states that, to the best of his recollection, his participation in the drafting of the reasons effectively ended at that stage. That assertion does not assist in explaining why the judgment was not finalised thereafter, nor does it account

for the prolonged delay that followed until August 2025. The cessation of his involvement in June 2022 likewise provides no explanation for the intervening period. The difficulty is not merely the passage of time, but the absence of a coherent and satisfactory explanation from those entrusted with the adjudication of the matter. The Tribunal members bore a statutory and constitutional obligation to determine the complaint expeditiously. The record does not demonstrate that this obligation was discharged with the diligence required of a specialist adjudicative body exercising public power.

[119] Dr Mokuena's affidavit reveals that she disengaged from the matter shortly after the hearing. No satisfactory explanation is provided for that disengagement, nor is it reconciled with the later reliance on draft reasons as an explanation for delay. Mr Wessels' affidavit confirms further drafting activity, including a draft prepared by Mr Pancham in June 2022. However, it does not explain why the matter remained unresolved for several years thereafter. The answering affidavit of Ms Mazwai does not reconcile these differing accounts or provide a coherent explanation.

[120] In fact, the affidavit of Ms Mazwai is completely at variance with the explanation provided by the three panellists. Her explanation for the delay was that the outbreak of the Covid-19 pandemic coupled with a shortage of personnel in the Tribunal caused the egregious delay. Her explanation is inconsistent with that presented by the panellist, who contends that the delay resulted from the parties' efforts to reach a settlement regarding the matter. This explanation is deficient and lacking in substance. As previously stated, it does not accord with the excuse given by the panel members in paragraph 289 of their judgment. Ms Mazwai's affidavit contains no reference to settlement discussions and paragraph 289 make no reference to the Covid-19 and the shortage of personnel as a cause for delay. Moreover, the role of Mr Pancham, as reflected in both the correspondence and Mr Wessels' affidavit, was substantive. His involvement in drafting the reasons further demonstrates the fragmented nature of the process. When considered together, the affidavits and correspondence reveal that there is no coherent explanation for the delay. The explanation advanced in the Tribunal's reasons is inconsistent with the evidential record.

### **Inconsistency in the Tribunal's explanation and the outsourcing of judicial function to Mr Pancham**

[121] The Tribunal's explanation for the delay, as set out in paragraph 289 of its reasons, quoted above, attributes the delay in part to settlement discussions and to the existence of draft reasons. While the existence of a draft judgment in November 2020 is supported by the evidence, that fact does not explain the prolonged delay that followed.

[122] Notably, from the reading of the record particularly the email correspondence, and the affidavit of Mr Wessels, it is apparent that the panellist outsourced their adjudicative responsibility to the case manager, particularly Mr Pancham. The affidavit of Mr Wessels reveals that Mr Pancham was tasked to assess if the draft reasons prepared by Mr Daniels adequately dealt with all the defences raised by the applicant during the hearing and to advise the Tribunal regarding evidence in relation to each defence raised by the applicant.

[123] What compounds the difficulty is that Mr Pancham was not involved in this matter when it was heard. Mr Pancham was delegated with the daunting task of assessing the evidence and to include his research in the draft reasons, and to advise the panel regarding the evidence in relation to each defence raised by Cape Gate on the draft judgment. Pursuant thereto, on 26 June 2022, Mr Pancham sent an updated draft of the reasons to the panel.

[124] On 13 July 2022, Mr Wessels sent Mr Pancham comments on the draft that Mr Pancham had prepared. In that communication, he requested amendments to the sequence and flow in which the issues were presented, indicating that the revised draft would thereafter be placed before the panel for a further consideration of the substance. Significantly, however, Mr Wessels does not state in his affidavit that such a second substantive consideration by the panel ever in fact occurred. There is no clear averment that the panel members themselves revisited, interrogated, or independently engaged with the substance of the draft already produced by Mr Pancham. That omission is troubling.

[125] The preparation of reasons in a contested adjudicative matter is not a mechanical exercise in editing structure or presentation. It lies at the heart of the adjudicative function. Reasons demonstrate that the decision-maker has applied its mind to the evidence, the submissions and the issues requiring determination. Where a draft embodying substantive reasoning is produced by a person who is not a member of the panel, and there is no satisfactory indication that the panel thereafter undertook its own substantive reconsideration, serious concerns arise regarding the discharge of the statutory duty entrusted to the panel members.

[126] In our view, the delegation to Mr Pancham of a function that could properly and lawfully only be performed by the panel members was irregular and prejudicial to the litigants before the Tribunal. Mr Pancham was not a member of the Tribunal panel seized with the matter. However valuable administrative or research assistance may be, the adjudicative responsibility to evaluate the issues, determine the dispute, and formulate reasons for the decision could not be outsourced. To permit otherwise would undermine both the integrity of the process and the confidence that litigants are entitled to place in a tribunal established by statute to decide their rights and obligations.

[127] Mr Pancham's involvement went beyond administrative assistance. The correspondence demonstrates that he was tasked with substantive work in relation to the preparation of the Tribunal's reasons, notwithstanding his own indication to Mr Wessels that he found the matter to be highly complex. Yet, despite that expressed concern, he was expected to undertake the drafting exercise. The inference is difficult to avoid that responsibilities resting with the panel members themselves were, at least in material part, delegated to Mr Pancham. That conclusion is reinforced by the email dated 31 August 2023, in which Mr Pancham wrote to the applicant's attorney in the following terms:

'Please note that I have put together a draft of these reasons for the remaining panel members to settle – hopefully it won't be too much longer before they are issued. Kindly note that I am leaving the Tribunal today – please contact @Jabulani Ngobeni for further assistance on this matter'.

[128] As foreshadowed above, the contemporaneous correspondence reflects ongoing engagement, repeated follow-ups and repeated assurances that the judgment was being finalised. It contains no reference to settlement discussions as a cause for delay. Far from providing clarity, the explanation ultimately advanced by the Tribunal is scant and thin. It does not meaningfully account for the prolonged period between the circulation of drafts and the eventual delivery of judgment, nor does it reconcile the differing versions advanced by those involved in the process. The explanations provided over time are inconsistent and do not present a coherent account. The explanation does not account for the period between 2020 and 2025. This lack of coherence undermines rationality under section 6(2)(f)(ii)(cc) of PAJA.

[129] It was submitted that no affidavit was obtained from Mr Pancham and that adverse inferences should therefore not be drawn from the correspondence in which he featured. The minority judgment appears to lend support to that contention. With respect, the submission cannot prevail. The correspondence relied upon by the applicant was introduced through sworn affidavits deposed to by persons from Cape Gate who dealt directly with Mr Pancham and to whom the communications were addressed. The authenticity, receipt and contents of those communications were therefore placed before the Court on oath. That evidence was admissible and probative of the process that unfolded within the Tribunal during the period of delay. The suggestion that Cape Gate's argument on Mr Pancham's role in drafting the tribunal's reasons is based on conjecture and supposition cannot be correct. The fact that Mr Pancham himself did not depose to an affidavit does not deprive the correspondence of evidential value, particularly where the communications speak directly to the chronology, the drafting process and the role he was asked to perform.

[130] The point must also be considered even-handedly. The Tribunal itself relied on the role allegedly played by Ms Masina, the initial case manager, including the assertion that she informed Mr Wessels that the parties were engaged in settlement discussions. Yet no confirmatory affidavit from Ms Masina was placed before this Court. If the absence of an affidavit from Mr Pancham is to be treated as disabling, the same difficulty would necessarily arise in relation to reliance placed on Ms Masina. The respondents cannot invoke a standard selectively. The criticism regarding the absence of an affidavit from Mr Pancham must therefore be viewed in its proper

context. The evidential question is whether the material placed before the Court is sufficiently reliable and probative to permit findings on the issues raised. In this matter, the correspondence, read together with the affidavits and the broader record, plainly meets that standard.

### **Failure to engage with material evidence**

[131] The right to just administrative action in section 33 of the Constitution, guarantees every person administrative action that is lawful, reasonable, and procedurally fair. An excessive delay in issuing a decision violates the requirements of lawfulness, reasonableness and fairness. Unreasonable delays cause inherent prejudice. As the applicant notes, the fundamental prejudice caused by extreme delay is the erosion of the adjudicator's own recollection and engagement with the evidence and the argument. After many years, even the most diligent tribunal member will struggle to recall the nuances of the witness's testimony, the demeanor of witnesses, or the fine points of complex economic evidence. An inordinate delay in issuing a decision fatally compromises the adjudicative process because the decision makers forget or misremember key facts, arguments and nuances in the case.

[132] We do not intend to address the totality of the prejudice suffered by the applicant as a result of the delay, as evidenced by the record; however, we hold that the following is pertinent. The applicant notes that the Tribunal's decision fails to reflect critical evidence and arguments that were presented during the hearing in 2019. The applicant also contends that the inference that must be drawn is that due to the unreasonable delay, the Tribunal, lost its proper recollection of the evidence and issues that had served before it. This argument, in our view, holds substantial merit.

[133] The applicant contends that the Tribunal failed properly to engage with material aspects of the evidence, particularly the evidence of Mr Martin. The applicant further notes that considerable time was spent during cross-examination that the scrap merchants dictated the pricing formular to the scrap consumers (including the applicant). According to the applicant, that evidence was of central importance. Yet it was neither meaningfully summarised in the Tribunal's reasons nor do those reasons reflect any appreciation of its significance, whether in relation to the applicant's third defence or to the characterisation enquiry raised in its fifth defence. The applicant

accordingly submits that the proper inference is that, by reason of the inordinate delay, the panel members lost sight of the nuances of that evidence and the significance it bore for the issues requiring determination.

[134] This ground concerns process, not correctness. Mr Martin's evidence established that pricing was initiated by merchants and that consumers responded within that framework. It also established that merchants retained bargaining power as they demanded an export parity price.

[135] As discussed above, the Tribunal relied on aspects of this evidence but failed to engage with its implications for the characterisation of the conduct. The Tribunal also failed to consider the evidence of Mr Martin under cross-examination. This constitutes a failure to take into account relevant considerations under section 6(2)(e)(iii) of PAJA and undermines rationality. The primary concern is that these circumstances arose as a result of an unlawful delay in delivering the judgment. In *AllPay*, the court stressed that defects in the decision-making process render the decision invalid.

### **Prejudice and fairness**

[136] The issue of prejudice must be assessed in the light of the applicant's pleaded case, the evidential material before this Court, and the nature of review proceedings. It is not sufficient to approach the enquiry by asking whether the outcome might have been different. The proper enquiry is whether the process by which the decision was reached was fair, lawful and consistent with constitutional standards. In this regard, the applicant has identified specific forms of prejudice arising both from the inordinate delay and from the manner in which the Tribunal ultimately produced its decision.

[137] A central aspect of that prejudice arises from the Tribunal's reliance on authorities that post-date the hearing. As appears from paragraphs 70 to 75 of the Tribunal's decision and the accompanying footnotes, the Tribunal relied on legal authorities that were not part of the record when the hearing concluded in June 2019. While it is not ordinarily impermissible for a decision-maker to have regard to developments in the law when finalising a judgment, the circumstances of this case

are exceptional. The delay between the hearing and the delivery of the judgment exceeded six years. During that period, the legal landscape evolved.

[138] Furthermore, the delay was acknowledged by Mr Wessels who asked Mr Pancham to do further research on the most recent South African jurisprudence of the Tribunal and CAC on the so-called characterisation in cartel matters since the law had developed in that area since the hearing of the matter. Importantly, in its ruling, the Tribunal referred to a decision of the European Commission of 14 July 2020, decided after the hearing of this matter before the Tribunal. The parties were not afforded an opportunity to address the import of that this decision vis-à-vis this matter or the other cases the Tribunal relied upon in its reasoning. In the circumstance of this case, fairness and justice demanded that such an opportunity be afforded. The failure to do so constitutes procedural unfairness.

[139] It is perhaps apposite to remind ourselves that the Tribunal as a creature of statute is explicitly enjoined by section 52(2)(a) of the Act to conduct its proceedings in accordance with the principles of natural justice, which demands that a party be heard before an adverse decision is made against him. In *Du Preez and Another v Truth and Reconciliation Commission*,<sup>43</sup> Corbett CJ, as then was, stated:

‘The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly . . . The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not.’

[140] The court went on to say that fairness will very often require that a person who may be adversely affected by the decision be afforded an opportunity to make representations on his or her own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its reconsideration or modification, or in some instances both.<sup>44</sup> In the present matter, the process that culminated in the impugned decision was fundamentally flawed and prejudicial, particularly to the applicant. In the circumstances of this case, fairness

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<sup>43</sup> *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231G-H; see also *Chairman: Board On Tariffs and Trade and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) para 14.

<sup>44</sup> *Du Preez* fn 43 at 232B–C.

required that the parties be invited to comment on the authorities upon which the Tribunal ultimately relied, where those authorities were decided only after the hearing had concluded. Had that course been followed, the parties would have been afforded an opportunity to address the relevance of those decisions, to distinguish them where appropriate, and to make submissions on their proper application to the facts of the present matter.

[141] The prejudice is further evident in the erosion of the connection between the hearing and the judgment. The evidence was led in 2018 and 2019. The reasoning process, as demonstrated by the affidavits and the decision of the panel members as well as the contemporaneous correspondence, did not proceed in a continuous or coherent manner. It was fragmented, interrupted and ultimately reconstructed over several years. The applicant was entitled to have its case determined through a process that reflected a sustained and contemporaneous engagement with the evidence and submissions presented at the hearing.

[142] The applicant and the Commission had the right to have the dispute decided in a fair manner before an independent Tribunal as envisaged in section 34 of the Constitution. That entitlement was not met. The Tribunal failed to conduct its proceedings consistent with the principle of natural justice which constitute a review ground in terms of section 6(2)(b) of PAJA.

[143] Prejudice in review proceedings is not confined to outcome-based harm. As explained in *Steenkamp*,<sup>45</sup> and endorsed in *AllPay*,<sup>46</sup> the purpose of public law remedies is to ensure lawful and fair administrative action and to uphold the rule of law. The focus is therefore on the integrity of the process. The applicant was entitled to administrative action that was lawful, reasonable and procedurally fair. The process in this matter fell short of that standard. A further difficulty arises from the Tribunal's failure, through the answering affidavit of Ms Mazwai, to engage with paragraphs 5 and 6 of the applicant's supplementary founding affidavit. There, the applicant alleged that it was now common cause that the reason furnished in paragraph 289 of the

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<sup>45</sup>*Steenkamp* fn 41 above para 29.

<sup>46</sup>*Allpay* fn 42 above para 30.

Tribunal's reasons was false because the panel members had never been informed by the parties that settlement discussions were under way. The applicant further alleged that, in advancing that reason, the panel members acted either in reckless or deliberate disregard of the truth, and that the conduct implicated section 6(2)(e)(v) and (vi) of PAJA. Those are serious allegations. They called for a direct and substantive response.

[144] Ms Mazwai does not clearly engage these allegations, and none was forthcoming from the panel members. The absence of any meaningful engagement with those allegations materially imperils the Tribunal's attempt to justify the impugned explanation. It is trite that if the respondent's affidavit in answer to the applicant's founding affidavit fails to admit or deny or confess and avoid, allegations in the applicant's application, the court will for purposes of the application, accept the applicant's application as correct.<sup>47</sup> Thus, those allegations must be accepted.

### **Reasonableness**

[145] The cumulative effect of the defects identified above must be assessed under section 6(2)(h) and 6(2)(b) of PAJA. The enquiry is not whether this Court would have reached a different conclusion, but whether the decision falls within the range of decisions that a reasonable decision-maker could have reached on the material before it. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,<sup>48</sup> the Constitutional Court held that the question is whether the decision is one that a reasonable decision-maker could have reached. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,<sup>49</sup> the Court articulated the same standard.

[146] In the present matter, the enquiry into reasonableness cannot be divorced from the process by which the decision was reached. The extraordinary delay, the absence of a coherent and evidence-based explanation for that delay, the fragmented nature of the adjudicative process, the inconsistencies in the explanations provided by the panel members, and the failure to engage with material aspects of the evidence must

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<sup>47</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635A.

<sup>48</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 44.

<sup>49</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) para 110.

be considered cumulatively. These are not isolated defects. They are systemic and interrelated. Significantly, they go to the heart of this application.

[147] When these defects are considered together, they lead to the conclusion that the decision falls outside the range of decisions that a reasonable decision-maker could have reached. The defect lies not merely in the outcome, but in the process by which that outcome was produced. The reasoning process was not coherent, continuous or properly anchored in the evidential record as it stood at the time of the hearing. The Tribunal denied the applicant the opportunity to make further submissions on the new cases that was decide after the hearing.

[148] The applicant also relied on *Prime African Security (Pty) Ltd v Eskom Holdings SOC Ltd*,<sup>50</sup> in which the Court emphasised that administrative decisions must be based on a coherent and rational process. The present matter illustrates the absence of such coherence. The reasoning evolved over time, was interrupted and reconstructed, and ultimately did not reflect a process that can be characterised as rational in the sense required by the Constitution and PAJA.

### **Consequences and institutional accountability**

[149] It was suggested that setting aside the decision may have broader consequences for the scrap metal industry or may give rise to perceptions that the Commission has failed to hold the applicant accountable. That contention cannot be sustained on the evidential material before this Court. No evidence was led to demonstrate that the setting aside of the decision would have any adverse impact on the industry. The parties who elected to settle are not before this Court, and their reasons for doing so are unknown. It would therefore be speculative to attribute any particular consequence to the relief sought.

[150] The conduct that formed the subject of the complaint occurred many years ago. It is not ongoing conduct. The Tribunal itself recognised that the conduct was historic. Other participants in the market elected to settle their cases, and the relevant merchants have been sanctioned. In those circumstances, there is no basis to

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<sup>50</sup> *Prime African Security (Pty) Ltd v Eskom Holdings SOC Ltd* [2026] ZAWCHC 15 (23 January 2026).

conclude that setting aside the decision will have any ongoing impact on the industry. Additionally, the Tribunal relied on authorities and material that post-dated the hearing without affording the parties an opportunity to address them. This implicates not only procedural fairness in the abstract, but the rules of natural justice themselves. As explained above, where a decision-maker proposes to rely on material in reaching an adverse decision, fairness ordinarily requires that the affected party be given an opportunity to be heard on that material, to make submissions regarding its relevance, and to distinguish it from the facts of the case at hand. Cape Gate was afforded no such opportunity. In circumstances of an inordinate delay and evolving jurisprudence, that omission constitutes a material procedural irregularity.

[151] The real concern in this matter lies with the administration of justice. The delay of the Tribunal in giving judgment is so egregious that it cannot be deprecated strongly enough. It is incontestable that the delay of six years amounts to a serious dereliction of duty warranting censure. To this end, we share the views expressed by Mr Campbell that the Tribunal members who delayed the ruling for over six years undermine the dignity and effectiveness of the Tribunal as an institution, as a result, at odds with the rule of law requirement that institutions maintain integrity and effectiveness. In addition, the fact that some of the Tribunal members left the Tribunal is irrelevant and inexcusable. Their continued participation was authorised under section 33 of the Competition Act.<sup>51</sup> They were seized with the matter and had a legal and ethical duty to deliver their judgment promptly, without unreasonable delay.

[152] Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. That provision applies directly to the Tribunal. The delay in this matter, which exceeds six years, is manifestly inconsistent with that obligation. In *Takata South Africa (Pty) Ltd v Competition Commission*,<sup>52</sup> this Court expressed concern regarding delays of 18 months. We stress that the delay in the present matter is of a wholly different magnitude. It represents a serious failure in the administration of justice.

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<sup>51</sup> *Goodyear* fn 34 above para 28.

<sup>52</sup> *Takata* fn 3 above para 18.

[153] As recognised in *MEC for the Department of Welfare v Kate*<sup>53</sup> and *Mabanga v MEC for Welfare, Eastern Cape and Another*,<sup>54</sup> systemic delay undermines public confidence in the administration of justice. Courts are enjoined to ensure that administrative bodies comply with their constitutional obligations.

[154] In these circumstances, setting aside the decision serves an important constitutional purpose. It reinforces the obligation of administrative bodies to act diligently, rationally and fairly, and signals that failures in the administration of justice will have consequences.

### **Conclusion**

[155] The delay in this matter is extraordinary. The explanations for that delay are inconsistent and unsupported by the record. There are no grounds of substance whatsoever to persuade this Court to overlook the delay. As adumbrated above, the explanation given by the panel members regarding the delay lacks merit and is wanting. The adjudicative process was fragmented and reconstructed. The applicant was prejudiced by the failure to afford it an opportunity to address developments in the law. The cumulative effect of these defects renders the decision unlawful, irrational and unreasonable. It must, therefore, be set aside.

[156] Finally, we have noted the argument by Mr Trengove, and Ms Lekokotla, counsel for the Competition Commission, that the applicant's sole remedy lay in applying to court to compel the Tribunal to make a decision once it became clear that there was an unreasonable delay. It was also contended that to the extent that the Tribunal has given judgment, its decision can no longer be reviewed on the ground of delay. We do not agree with this proposition. This matter stands on a different footing. The unconscionable delay of six years in giving judgment in this matter should not be compartmentalised but must be assessed in a holistic manner.

[157] It is incontrovertible that it had serious consequences for the evaluation of the evidence that was led at the hearing of the matter. As articulated above, the relevant

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<sup>53</sup> *Kate* fn 1 above.

<sup>54</sup> *Mabanga v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 359 (SE) at 662H–I.

evidence, particularly that of Mr Martin, presented by the applicant at the hearing, was not properly considered by the Tribunal. Furthermore, the Tribunal's failure to adhere to the tenets of natural justice violated the applicant's right to procedural fairness. Cumulatively, the delay of this magnitude contaminated the ultimate decision that was made. The unreasonable delay of six years in giving judgment, allied with indifference to truth, is unlawful and offensive to the Constitution.

[158] As correctly pointed out by Mr Campbell, it would send a perilous message that an organ of state could violate the Constitution, as the panel members did in this case, yet face no consequences because the final decision appears superficially 'correct'. This will effectively incentivise disregard for constitutional duties, knowing that as long as the ultimate outcome passes muster, the deep flaws in the process can be ignored. Such an approach is foreign to our law and inconsistent with the Constitution. We stress that allowing an unlawful decision to stand would itself be a violation of the rule of law, even if the decision maker's goal or outcome was otherwise laudable. Consequently, the decision of the Tribunal falls to be reviewed and set aside.

### **Remedy**

[159] The remaining question is the just and equitable remedy. The respondents submit that, if the decision is reviewed and set aside, the matter should be remitted to the Tribunal. The applicant contended that remittal would serve no useful purpose. The proper approach is that articulated in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*,<sup>55</sup> where the Constitutional Court held that remittal to the decision-maker is ordinarily the default position, but a court retains a discretion to depart from that course where exceptional circumstances exist and where justice and equity so require.

[160] The enquiry into remedy begins only once unlawfulness has been established. At that stage, the court must fashion a remedy that is just and equitable in all the circumstances. That remedial enquiry is broader than a mechanistic choice between remittal and final substitution. It requires a careful balancing of legality, fairness,

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<sup>55</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC); 2015 (10) BCLR 199 (CC) paras 47-50.

practicality, the extent of the delay, the prejudice suffered by affected parties, the public interest, and the need to respect the functions entrusted by statute to the original decision-maker. Those principles were reaffirmed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*,<sup>56</sup> where the Constitutional Court emphasised that once unlawfulness is found, a court must craft a just and equitable remedy that balances the competing interests implicated by the case. Depending on the circumstances, that may include setting aside administrative action, suspending the order of invalidity, temporarily preserving legal consequences, remitting the matter for reconsideration, or granting substituted relief. The remedy must be responsive to the facts and directed to achieving practical justice.

[161] In the present matter, the delay was excessive and the explanation for it unsatisfactory. The adjudicative process was marked by fragmentation, inconsistent explanations and procedural unfairness. Those considerations strongly support the setting aside of the impugned decision. They also underscore the importance of ensuring future compliance by the Tribunal with its constitutional and statutory obligations of expedition, fairness and rationality. However, the question whether the matter should be remitted is distinct from the question whether the impugned decision is reviewable. The Competition Act entrusts the adjudication of referred complaints to the Tribunal as the specialist forum created for that purpose. This Court must therefore be cautious not to usurp that statutory function absent compelling justification.

[162] While the conduct is historic and the litigation has already been protracted; it cannot be said that remittal would necessarily serve no purpose. The balancing exercise required by *Buffalo City* and *Trencon* favours a remedy that both vindicates legality and preserves the institutional role assigned by the legislature. The appropriate course is for the matter to be reconsidered by the Tribunal in a lawful manner, with due regard to procedural fairness and the need for expedition. That reconsideration must occur before a differently constituted panel. It must proceed as expeditiously as possible. If the Tribunal intends to rely on any material, authority or consideration not previously ventilated with the parties, it must ensure compliance with the rules of

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<sup>56</sup> *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC); 2019 (6) BCLR 661 (CC).

natural justice by affording the parties a fair opportunity to address such material, including the opportunity to distinguish it from the facts of the present matter.

[163] In all the circumstances, and having balanced legality, fairness, practicality, delay, prejudice, the public interest and the statutory role of the Tribunal, the just and equitable remedy is to review and set aside the impugned decision and to remit the matter to the Tribunal for reconsideration before a differently constituted panel.

[164] In light of the conclusion we have reached in the review application, we consider it unnecessary to determine the appeal. The effect of the order reviewing and setting aside the Tribunal's decision is that the impugned decision no longer exists in law. There is accordingly no extant order capable of sustaining an appeal. An appeal lies against an existing and operative order. Where review and appeal proceedings are instituted concurrently in relation to the same decision, the successful review and setting aside of that decision ordinarily renders the appeal moot. This position was correctly accepted by all counsel during argument. In the circumstances, it is neither necessary nor competent for this Court to consider the appeal further.

### **Costs**

[165] The matter raises significant institutional issues concerning the functioning of the Tribunal. The delay is not attributable to the parties. In these circumstances, it is appropriate that each party bear its own costs.

### **Order**

[166] The following order is made:

- 1 The application for review is upheld.
- 2 The decision of the Competition Tribunal dated 18 August 2025 is reviewed and set aside.
- 3 The matter is remitted to the Competition Tribunal for hearing before a differently constituted panel.
- 4 The hearing must be conducted as expeditiously as possible and in accordance with the requirements of procedural fairness and the rules of natural justice.
- 5 Each party is to bear its own costs.



MBS Masipa

Acting Judge of Appeal  
Competition Appeal Court of South Africa



P.P.

JD Lekhuleni

Acting Judge of Appeal  
Competition Appeal Court of South Africa

## Appearances

### *In re Review*

Counsel for the Applicant: J Campbell SC & A Gotz SC  
Instructed by: Fairbridges Wertheim Becker  
Attorneys, Sandton.

Counsel for the First to fourth Respondents: W Trengrove SC & P M Pillay  
Instructed by: Cheadle Thompson & Haysom Inc,  
Rosebank.

Counsel for the Fifth Respondent: B Lekokotla & N Sakata  
Instructed by: Malatji & Co Attorneys.

### *In re Appeal*

Counsel for the Appellant: J Campbell SC & A Gotz SC  
Instructed by: Fairbridges Wertheim Becker  
Attorneys, Sandton.

Counsel for the First Respondent: B Lekokotla & N Sakata  
Instructed by: Malatji & Co Attorneys.