CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 58/13
[2013] ZACC 50

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA	Applicant
and	
PIONEER HI-BRED INTERNATIONAL INC	First Respondent
PANNAR SEED (PTY) LTD	Second Respondent
AFRICAN CENTRE FOR BIOSAFETY	Third Respondent

Heard on : 4 November 2013

Decided on : 18 December 2013

JUDGMENT

SKWEYIYA ADCJ (Moseneke ACJ, Cameron J, Dambuza AJ, Jafta J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This is an application for leave to appeal against a costs order granted by the Competition Appeal Court (CAC) against the Competition Commission (Commission). The application raises the scope of the CAC's powers to award costs against the Commission when it litigates in the course of its duties in terms of the Competition Act[1] (Act).

Background

[2] Pioneer Hi-Bred International Inc (Pioneer) and Pannar Seed (Pty) Ltd (Pannar) are companies involved in the hybrid maize seed breeding market. Pioneer and Pannar informed the Commission of their intention to undertake an "intermediate merger"[2] in terms of the Act. In terms of sections 12A and 14 of the Act, the Commission investigated the proposed merger and prohibited it on the grounds that it was likely to give rise to a substantial prevention or lessening of competition in the South African hybrid maize seed market.

[3] Pioneer and Pannar (merging parties) filed a request with the Tribunal in terms of section 16(1)(b) of the Act to reconsider the Commission's decision. The merging parties joined the Commission as a respondent and the Commission defended its decision before the Tribunal. No costs were sought by any of the parties.

[1] 89 of 1998.

[2] An intermediate merger of firms occurs when the value of a proposed merger equals or exceeds R560 million and the annual turnover or asset value of the transferred or target firm is at least R80 million. In terms of Chapter 3 of the Act, firms may not implement an intermediate merger until it has been approved by the Commission.

[4] The Tribunal also prohibited the merger on the same grounds as the Commission had done.[3] It made no order as to costs.

[5] The merging parties appealed the Tribunal's decision to the CAC. In their notice of appeal, the merging parties prayed only for the costs of the appeal to be paid by the Commission. However, in their heads of argument, the merging parties asked that the Commission be ordered to pay their costs in the appeal and in the Tribunal proceedings. The Commission was once more joined as a party to the proceedings and it again defended its decision and that of the Tribunal.

[6] The CAC upheld the merging parties' appeal (judgment on the merits) and approved the merger subject to conditions.[4] The CAC further ordered the Commission to pay the costs of the merging parties (1) in the CAC proceedings and (2) in the Tribunal Proceedings. It gave no reasons for its costs order.

[7] The Commission sought leave to appeal to the Supreme Court of Appeal against the entire judgment and order. The application was dismissed. It then sought leave to appeal in the CAC to the Constitutional Court against the costs order only. The merging parties filed a notice of intention to abide. The CAC granted the Commission leave to appeal to this Court.[5]

[3] *Pioneer Hi-Bred International Inc, Pannar Seed (Pty) Ltd v the Competition Commission*, Case No 81/AM/Dec10, Competition Tribunal, 9 December 2011, unreported.

[4] *Pioneer Hi-Bred International Inc and Another v Competition Commission and Another* [2012] ZACAC 3.

[5] *Competition Commission v Pioneer Hi-Bred International Inc and Others* [2013] ZACAC 1.

[8] Before this Court, the Commission does not challenge the CAC's approval of the merger but only its costs order, which it argues was wrongly awarded. The Commission submits that (1) while the CAC may have the power to award costs against the Commission in its own proceedings, that discretion was wrongly exercised in this case; and (2) the CAC has no power to award costs against the Commission in relation to Tribunal proceedings.

[9] None of the respondents opposed the Commission's application to this Court. The Court thus invited representatives of the Johannesburg Bar Council to make submissions as a friend of the court (*amicus curiae*). On behalf of the *amicus*, Ms Kirsty McLean and Ms Berna Malan filed written submissions and Ms McLean made oral submissions. The Court is grateful to them for their helpful submissions.

[10] The *amicus* chose to confine its submissions to the abstract point of the scope of the Tribunal and CAC's respective powers to award costs against the Commission, declining to make submissions on the particular grant of costs in this case.

Issues

[11] The issues before this Court are as follows:

(a) Should this Court grant leave to appeal?

(b) Does the CAC have the power to award costs against the Commission on appeal?

(c) Does the CAC have the power to award costs against the Commission in relation to Tribunal proceedings?

(d) Accordingly, did the CAC exercise its discretion to award costs against the Commission in the present matter judicially?

Leave to appeal

[12] Leave to appeal should be granted. Whether the CAC has the power to award costs against the Commission in relation to Tribunal proceedings and the extent of its power in relation to its own proceedings are questions that concern the scope and proper exercise of statutory powers raising a constitutional issue in the principle of legality.[6] This is an issue of importance because it concerns the independence and operation of state institutions charged with functions under the Act that are important to the economy and the general public.[7]

[13] While it is not generally in the interests of justice to grant leave to appeal on questions of costs only,[8] the issues in this case fall within established exceptions. The issues are matters of principle requiring legal interpretation that are neither trivial nor insubstantial[9] – the legal determination of which may impact on the fulfilment of the

[6] *Competition Commission v Loungefoam (Pty) Ltd and Others* [2012] ZACC 15; 2012 (9) BCLR 907 (CC) (*Loungefoam*) at para 16 and *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) (*Senwes*) at para 17.

[7] In *Senwes* above n 6 at para 3 this Court held that the "Act is aimed at promoting and maintaining competition. Some of its objectives are directed at addressing the inequalities and imbalances which were created by the apartheid order." (Footnote omitted.)

[8] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 11.

[9] *Tsosane v Minister of Prisons* 1982 (3) SA 1075 (C) at 1076E-1077B.

purposes of the Act. The Commission has reasonable prospects of success. The interests of justice thus favour the grant of leave to appeal.

The nature of the Commission

[14] It is important to consider the nature of the Commission under the Act, and its capacities, functions and powers in relation to those of the Tribunal and CAC. This may shed light on any possible impact that costs awards could have on their respective abilities to fulfil the purpose of the Act.

[15] The purpose of the Act is to promote and maintain competition in South Africa in order—

> "(a) to promote the efficiency, adaptability and development of the economy;
> (b) to provide consumers with competitive prices and product choices;
> (c) to promote employment and advance the social and economic welfare of South Africans;
> (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."[10]

[16] Section 21 of the Act makes the Commission responsible for a broad range of functions.[11] It is "an independent regulatory authority . . . vested with wide-ranging

[10] Section 2 of the Act.

[11] Section 21 provides:

> "(1) The Competition Commission is responsible to—

powers".[12] Its responsibilities include the implementation of measures to increase market transparency and to develop public awareness of the Act; the review of legislation and public regulations; the authorisation or prohibition of mergers; and the investigation of alleged contraventions of the Act. Its roles are prosecutorial, adjudicative, educative and advisory. In order to execute these responsibilities, the Act emphasises the Commission's independence and impartiality, providing that it must perform its functions "without fear, favour, or prejudice".[13] A degree of autonomy and institutional independence is consonant with its responsibilities.

(a) implement measures to increase market transparency;

(b) implement measures to develop public awareness of the provisions of this Act;

(c) investigate and evaluate alleged contraventions of Chapter 2;

(d) grant or refuse applications for exemption in terms of Chapter 2;

(e) authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3;

(f) negotiate and conclude consent orders in terms of section 63;

(g) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by this Act;

(h) negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;

(i) participate in the proceedings of any regulatory authority;

(j) advise, and receive advice from any regulatory authority;

(k) over time, review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behaviour; and

(l) deal with any other matter referred to it by the Tribunal.

(2) In addition to the functions listed in subsection (1), the Competition Commission may—

(a) report to the Minister on any matter relating to the application of this Act;

(b) enquire into and report to the Minister on any matter concerning the purposes of this Act; and

(c) perform any other function assigned to it in terms of this or any other Act."

[12] *Loungefoam* above n 6 at para 2.

[13] Section 20 of the Act.

[17] The Commission takes on a particular role in merger regulation. It is required to consider whether proposed mergers are "likely to substantially prevent or lessen competition", having regard to a range of factors including public-interest and macro-economic grounds.[14] In merger proceedings, there is seldom an opposing party

[14] Section 12A of the Act provides for the consideration of mergers:

> "(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and—
>
> (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine—
>
> (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
>
> (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or
>
> (b) otherwise determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).
>
> (2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including—
>
> (a) the actual and potential level of import competition in the market;
>
> (b) the ease of entry into the market, including tariff and regulatory barriers;
>
> (c) the level and trends of concentration, and history of collusion, in the market;
>
> (d) the degree of countervailing power in the market;
>
> (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
>
> (f) the nature and extent of vertical integration in the market;
>
> (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
>
> (h) whether the merger will result in the removal of an effective competitor.
>
> (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on—
>
> (a) a particular industrial sector or region;
>
> (b) employment;

or *amicus.* It is for the Commission to consider and investigate the merits of the proposed merger.

[18] The Commission is obliged to consider a range of factors when investigating a merger, most of which will be speculative (for example, the potential impact of a proposed merger) and many of which may be value-laden (for example, whether the merger will be in the public interest). Given this, the likelihood of it reaching a different view to the merging parties, Tribunal or CAC is a risk inherent in the Act. Given the Commission's role in the scheme of the Act, it is important that the interpretation advanced here must allow the Commission sufficient institutional autonomy to reach and defend honest and independent decisions.

The power of the CAC to award costs in its own proceedings

[19] Section 61 of the Act governs the power of the CAC when hearing appeals. It provides:

> "(1) A person affected by a decision of the Competition Tribunal may appeal against, or apply to the Competition Appeal Court to review, that decision in accordance with the Rules of the Competition Appeal Court if, in terms of section 37, the Court has jurisdiction to consider that appeal or review that matter.
>
> (2) The Competition Appeal Court may make an order for the payment of costs against any party in the hearing, or against any person who represented a party in the hearing, according to the requirements of the law and fairness."

> (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
>
> (d) the ability of national industries to compete in international markets."

[20] Section 61(2) makes clear that the CAC does have the power to award costs. It may do this "against any party in the hearing". The Commission does not deny that the CAC may grant costs, nor that the Commission is conceivably a "party" as intended by section 61(2). Its complaint lies against the CAC's exercise of that power in giving content to the qualifier in section 61(2): "according to the requirements of the law and fairness." The *amicus* shares this approach but the Commission and *amicus* articulate the content of the "requirements of the law and fairness" in subtly different ways.

[21] It is correct that section 61(2) in plain language empowers the CAC to make an order of costs against the Commission where it is a party before it. I can see no reason to exclude the Commission from the meaning of "party".[15] This power is, however, qualified by the "requirements of the law and fairness". The central inquiry in each case must be whether, when all the factors have been taken into account, it is in accordance with the requirements of the law and fairness to award costs.

[22] It is important to interpret the meaning of the provision in the context of the Act and the specific functions of the competition authorities. The CAC is given a status similar to that of a High Court[16] and is tasked with the role of reviewing any decision or considering any appeal from the Tribunal on any of its interim, interlocutory or final decisions.[17]

[15] See [31]-[32] below.

[16] Section 36 of the Act.

[17] Id section 37.

[23] The ordinary course is for costs to follow the result. But the Commission is not an ordinary civil litigant. While the Commission is not obliged to participate in CAC proceedings when a private party initiates the appeal, its participation will often be central to the fulfilment of the aims of the Act as there will frequently be no opposing party or *amicus* in appeal proceedings. The Commission's participation will in these cases be important not only to the defence of the public-interest aims under the Act, but will also be of service to the CAC in assisting it to gain a balanced perspective. In the context of similar institutional roles, such as that of a prosecutor, an important principle has emerged that the usual rule that costs follow the result does not ordinarily apply to these state actors.

[24] The principle that should inform the CAC's exercise of discretion is that, when the Commission is litigating in the course of fulfilling its statutory duties, it is undesirable for it to be inhibited in the *bona fide* fulfilment of its mandate by the threat of an adverse costs award.[18] This flows from the need to encourage organs of state to make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged

[18] *Nortje and Another v Attorney-General, Cape, and Another* 1995 (2) SA 460 (C) at 485F. This decision affirms the seminal case on costs involving statutory bodies and public officers in *Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216 (*Coetzeestroom*) at 223-4. In *Coetzeestroom,* Innes CJ emphasised that it would be inequitable to mulct an official (the Registrar of Deeds in that case) with costs where his action or attitude, though mistaken, was *bona fide*, emphasising that it would be detrimental to the vigilance required in the public interest of the particular public office.

successfully. This principle would fittingly fall within the requirements of law guiding the exercise of the CAC's discretion, as it is well established in precedent.[19]

[25] The Act's explicit reference to the notion of "fairness" invites the CAC to consider factors not limited to instances of *mala fides* or irregularity on the part of the Commission. The ordinary meaning of "fairness" goes to the idea of treating parties equitably and in an evenhanded way.

[26] The CAC should be alive to any undue financial prejudice that may result from its order, taking into account the inherently limited means of the Commission as a statutory body acting in the public interest, the particularities of the parties before it, and the nature of the proceedings.

[27] In addition, fairness in the light of the Commission's role and in giving effect to the aims of the Act ought to mean that even when the CAC disagrees with the Commission's position or finds its actions to be mistaken, this is not necessarily sufficient to justify an adverse costs order. Considering that the application of the Act is not necessarily static or to be formulaically understood, fairness may require the CAC to be sensitive to creating sufficient space for the Commission to be independent in its decision-making, without the threat of an adverse costs order when the CAC

[19] Id. See also *Fleming v Fleming en 'n Ander* 1989 (2) SA 253 (AD) in which the Appellate Division held that costs should not be awarded against a public officer who carried out his official duties mistakenly but in good faith. In *Deneysville Estates Ltd v Surveyor-General* 1951 (2) SA 68 (C) at 69H, it was held that in the absence of special circumstances, it would not order costs against the Surveyor-General even where he was unsuccessful in litigation but acting *bona fide* and in the course of his duty. In *Omnia Fertilizer Ltd v The Competition Commission in re: The Competition Commission of South Africa v Sasol Chemical Industries (Pty) Ltd and Others* [2009] ZACAC 5 (*Omnia Fertilizer)* at para 18 the CAC itself affirmed this general principle.

reaches a different opinion to it. This consideration must be viewed in the context of the requirement under section 20(3) of the Act that each "organ of state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties."

[28] In the CAC's judgment granting leave to appeal to this Court, the CAC emphasised that the Commission's conduct was much like that of an opposing party, rather than an *amicus*. The CAC noted that it would be difficult to conclude that it would never have the discretion to grant costs against the Commission in its own proceedings, particularly when, as in this case, the Commission "vigorously opposed the appeal, fought tooth and nail to ensure that the merger should be prevented." While it is correct that the CAC does have the requisite discretion to award costs against the Commission, it is contrary to the principles enunciated above that the mere zealous defence of its position should expose the Commission to an adverse costs order. To emphasise the point, the Commission is not acting as a mere opposing party in civil litigation and indeed we require of it, as a public functionary, earnestly and with vigour to pursue its mandate when litigating in the course of its functions. The CAC lost sight of this important factor. Unreasonable, frivolous or vexatious pursuit of a particular stance may, however, justify an order of costs against the Commission.[20] This will depend on the facts of each case.

[20] In analogous provisions, sections 162(1) and 179(1) of the Labour Relations Act 66 of 1995 provide that cost orders may be made "according to the requirements of the law and fairness" in the Labour Court and Labour Appeal Court. The Supreme Court of Appeal in *Chevron Engineering (Pty) Ltd v Nkambule and Others* 2004 (3) SA 495 (SCA) at para 42 has interpreted this requirement as follows:

> "The proper approach is to take account of the conduct of the parties during the dispute and in the conduct of the litigation. The general approach developed by courts acting in terms of this

The power of the Tribunal to award costs

[29] The Commission argues that the Tribunal has no power to award costs against it. The *amicus*, however, is of the view that the Act and Rules of Procedure of the Tribunal[21] must be read together to permit the Tribunal to award costs against the Commission in appropriate circumstances. The costs power, it argued, is an important tool for the Tribunal to regulate its own proceedings.

[30] Section 57 of the Act provides for the Tribunal's powers to award costs:

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

[31] The Act prescribes that, as a general rule, each party in proceedings before the Tribunal must pay its own costs. In my view the Commission is a "party" before the Tribunal when it appears before it and makes submissions. It would be an unduly

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Act is that costs do not automatically follow the result, unless there are special or exceptional circumstances justifying a costs order. *Mala fides*, unreasonableness and frivolousness have been found to be factors in justifying the imposition of a costs order."

These principles are comparatively useful and are reflected in *Coetzeeroom* above n 5 where it was held that conduct that is *mala fide* or grossly irregular or where brought against a party unreasonably or frivolously may invite a costs award.

[21] Rules for the Conduct of Proceedings in the Competition Tribunal (Rules of Procedure).

narrow use of the term "party" to exclude the Commission when in many instances the Commission will be alone in opposition to merging parties or firms suspected of non-compliance with the Act. This is in harmony with the distinction drawn between a "party" in section 57(1) as compared to a "complainant" in section 57(2),[22] where an exception to the general rule is made.

[32] The reference to section 51(1) in section 57(2) relates to an instance where the Commission elects not to refer a complaint to the Tribunal, in which case a private complainant may refer the complaint directly, without the Commission's participation. The exception in subsection (2) contemplates costs in proceedings in which the Commission is not involved.

[33] The proviso that the general "own costs" rule is "subject to subsection (2) and the Competition Tribunal's rules of procedure" is somewhat ambiguous. While subsection (2) clearly carves out an *exception* to the general rule, the import of the general rule being subject to the "Tribunal's rules of procedure" is less clear.

[34] The Tribunal's Rules of Procedure frame the possibility of a costs award by the Tribunal rather broadly. Rule 58 provides in relevant part:

> "Costs and taxation
>
> (1) Upon making an order under Part 4, the Tribunal may make an order for costs.

[22] Section 1 as read with section 49B(2)(b) of the Act defines a "complainant" as any person who has submitted a complaint or information about an alleged prohibited practice to the Commission. The Commission is necessarily excluded from the definition of a "complainant".

> (2) Where the Tribunal has made an award of costs in terms of section 57, the following provisions apply:
>
> (a) The fees of one representative may be allowed between party and party, unless the Tribunal authorises the fees of additional representatives.
>
> (b) The fees of any additional representative authorised in terms of paragraph (a) must not exceed one half of those of the first representative, unless the Tribunal directs otherwise.
>
> (c) The costs between party and party allowed in terms of an order of the Tribunal, or any agreement between the parties, must be calculated and taxed by the taxing master at the tariff determined by the order or agreement, but if no tariff has been determined, the tariff applicable in the High Court will apply.
>
> (d) Qualifying fees for expert witnesses may not be recovered as costs between party and party unless otherwise directed by the Tribunal during the proceedings".

Part 4, to which rule 58 refers, elaborates general procedural rules for proceedings in the Tribunal.

[35] The CAC in *Omnia Fertilizer* considered whether the reference to the Tribunal's Rules of Procedure in section 57(1) creates an exception to the "own costs" rule.[23] The CAC held that the meaning of the words "subject to" in statutory interpretation—

> "has no a priori meaning. . . . While the phrase is often used in statutory contexts to establish what is dominant and what is subservient, its meaning in a statutory context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by'".[24] (Footnotes omitted.)

[23] *Omnia Fertilizer* above n 19.

[24] Id at para 13.

[36] The CAC held further:

> "On a literal interpretation of the Tribunal Rules, it appears that Rule 58(2)(a)-(j) merely sets the procedure to be followed when seeking a costs order. If the Legislature had intended to include the Commission as being capable of having costs awarded against it, the Act would have so stated. The fact that it did not do so is, in my view, an indication that that is not what it had in mind."[25]

[37] The interpretation in *Omnia Fertilizer* in these respects is correct. The phrase "subject to" in section 57 in reference to the Rules of Procedure curtails the application of the general "own costs" rule to the procedure as set out in the Rules. It does not create an exception. This would defeat the purpose of the general "own costs" rule in section 57. The reference to the Rules of Procedure ought not to be understood as an invitation to the Minister to craft further exceptions beyond section 57(2). The Rules of Procedure should not be understood to give the Tribunal substantive powers contrary to the general scheme of the Act or contrary to the substance of section 57. This understanding respects the hierarchy of legislation as a source of law and affirms the rule of law by not permitting the Minister extensive powers to craft rules beyond the laws which the Legislature has enacted.

[38] The Rules of Procedure provide the Tribunal with tools to regulate its proceedings other than through imposing adverse costs orders.[26] As a creature of statute, the Tribunal's power to regulate its proceedings is circumscribed by the Act.

[25] Id at para 15.

[26] See, for example, rules 45(1) and (2), 47, 52, 53(2) and 55(2) of the Rules of Procedure.

It has no inherent powers to control its own process comparable to those of an ordinary High Court, the Supreme Court of Appeal or this Court as contained in section 173 of the Constitution.

[39] Indeed, rule 58 is capable of being read in a manner that does not extend the Tribunal's costs powers beyond section 57 of the Act. The reference to section 57 in rule 58(2) and the use of "an" order for costs, rather than "any" order for costs, can be understood as an attempt to frame the rules within the confines of section 57.

[40] The purpose of the Act is well served in this reasoning. Considering that the protection of public-interest concerns will seldom be advanced by an opposing party at the Tribunal stage in the majority of cases, a thorough defence of the public interest and the protection of the Commission's decision-making independence necessitates the preservation of the "own costs" rule at the Tribunal stage. The correct interpretation is therefore that the Tribunal has no powers to award costs against the Commission under the Act.

The power of the CAC to award costs in relation to Tribunal proceedings

[41] Section 61(2) of the Act empowers the CAC to award costs "against any party *in the hearing*, or against any person who represented a party *in the hearing*".[27] The Commission sought to interpret the words "in the hearing" (in the singular) as limiting the CAC's powers to granting costs in its own proceedings only. The *amicus* argued

[27] Emphasis added.

that this interpretation is overly restrictive and that, to keep a congruent view of its permissive interpretation of the Tribunal's powers, the CAC ought to be able to award costs in relation to those proceedings.

[42] A reading of the words "in the hearing" to restrict the CAC's costs powers to the proceedings in the CAC only, is congruent with the scheme of the Act. Section 37(1) of the Act confines the functions of the CAC to reviewing and considering appeals from Tribunal decisions.[28] The orders that it may make in terms of section 37(2) are in relation to any order made by the Tribunal: it may confirm, amend, set aside or remit its decisions and no more. Having established that the Tribunal has no power to grant costs outside of the exception to the "own costs" rule in section 57(2) of the Act, it would be contrary to the CAC's position as an appellate court to interpret section 61(2) to include a power to award costs in relation to Tribunal proceedings that the Tribunal itself is not empowered to make.

[28] Section 37 of the Act sets out the CAC's functions:

> "(1) The Competition Appeal Court may—
>
> (a) review any decision of the Competition Tribunal; or
>
> (b) consider an appeal arising from the Competition Tribunal in respect of—
>
> (i) any of its final decisions other than a consent order made in terms of section 63; or
>
> (ii) any of its interim or interlocutory decision that may, in terms of the this Act, be taken on appeal.
>
> (2) The Competition Appeal Court may give any judgment or make any order, including an order to—
>
> (a) confirm, amend or set aside a decision or order of the Competition Tribunal; or
>
> (b) remit a matter to the Competition Tribunal for a further hearing on any appropriate terms."

[43] Furthermore, it would defeat the purpose of the limitation on the Tribunal's powers to award costs to read section 61(2) as empowering the CAC to do what the Tribunal may not do. Therefore, insofar as the Tribunal is limited in its powers to award costs, the CAC is similarly limited in its powers to award costs in relation to Tribunal proceedings.

The CAC's costs award

[44] The Commission asks that this Court set aside both aspects of the CAC's award of costs: (1) in relation to Tribunal proceedings; and (2) in relation to the CAC's own proceedings. It is trite law that a court on appeal will be slow to interfere with the court a quo's exercise of discretion to award costs. The CAC's discretion must, however, be exercised judicially, upon consideration of all the facts.

[45] In relation to the first challenge to the CAC's costs award (the costs in the Tribunal proceedings), it is clear from the exposition set out above that the CAC had no power to grant the award. Because the CAC had no discretion, it is not interference for this Court to set this aspect of the costs award aside. The CAC acted beyond its statutory powers. Further to this, it is clear that no parties sought costs in the Tribunal and that the merging parties in the CAC formally limited their plea to the costs of the appeal. This adds to the irregularity of the CAC's award. This aspect of the order must accordingly be set aside.

[46] In relation to the CAC's award of costs in the appeal, it is clear from the above analysis that it had a discretion to do so. But did the CAC exercise this discretion properly? The CAC judgment on the merits is devoid of any reasons for its costs award. While it gives a lengthy exposition of the merits of the merger, it is silent on why it granted the particular costs order. And we can look no further than that judgment for its reasons. Nothing in the judgment indicates *mala fides*, irregularity or unreasonable conduct by the Commission. In this light and in the absence of reasons for the costs order, the inference is inescapable that there was no judicial exercise of the CAC's discretion.

[47] The CAC took a different view from that of the Tribunal. The Commission defended the decision of the Tribunal. The CAC was certainly critical of that stance. This is not sufficient, however, to motivate a costs award against the Commission. If it was zealous in its defence of the public-interest criteria that caused it to prohibit the merger, and no irregularities or causes of unfairness on the facts can be shown, the Commission should not be mulcted with costs in the appeal. Indeed the facts point only to its vigilance in fulfilling its statutory mandate. Accordingly, clear grounds are established for this Court to set aside the CAC's orders of costs in the appeal.[29]

[48] Finally, in its notice of motion in this Court, the Commission prayed that the costs in this Court be the costs in the appeal. Given that there was no opposition in

[29] I am aware that in *Loungefoam* above n 6 and in *Competition Commission v Yara South Africa (Pty) Ltd and Others* [2012] ZACC 14; 2012 (9) BCLR 923 (CC), this Court awarded costs against the Commission as an unsuccessful litigant. In both instances, the judgments reveal that the Commission had acted in a manner that was unreasonable and outside of regular procedure, exposing the respondents to undue costs.

this matter, taking into account the principles enunciated above, it is not appropriate to grant any costs to the Commission in these proceedings.

Order

[49] The following order is made:

1. Leave to appeal is granted.
2. The order of the Competition Appeal Court granting costs against the Competition Commission in the appeal and in the Competition Tribunal proceedings is set aside.
3. There is no order as to costs.

For the Applicant:	Advocate W Trengove SC, Advocate J Wilson and Advocate K Serafino-Dooley instructed by the State Attorney.
Appointed by the Constitutional Court:	Advocate K McLean.