



THE COMPETITION APPEAL COURT OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 274/CAC/Aug25

In the matter between:

NEVILLES TOURS AND LOGISTICS (PTY) LTD

Applicant

and

**THE COMPETITION COMMISSION OF
SOUTH AFRICA**

Respondent

Coram: Manoim JP, Poyo-Dlwati and Lekhuleni AJJA

Heard: 20 May 2026

Delivered: 26 August 2026

Neutral citation: *Nevilles Tours and Logistics (Pty) Ltd v The Competition Commission of South Africa* (274/CACAUG25) [2026] ZACAC 6 (26 AUGUST 2026)

Summary: Competition law – Competition Commission’s decision not to refer a complaint to the Competition Tribunal in terms of s 50(2) of the Competition Act 89 of 1998 – Review for non-referral not to be easily countenanced - The correct procedure to review such decision – The principle of legality the correct pathway to review the Commission’s non-referral decision to the Tribunal – Abuse of dominance in terms of s 8 to be established in excessive pricing and predatory complaints – Desktop investigation by the Commission deficient – Commission not properly investigating the

predatory pricing complaint - Relevant stakeholders not interviewed – Review application upheld.

ORDER

A review of: The decision of the Competition Commission:

1. The Competition Commission's decision not to refer the applicant's complaint to the Competition Tribunal is hereby set aside.
2. The matter is remitted to the Competition Commission's market conduct division for investigations to be conducted by a different, properly appointed inspector/s in terms of s 49B(3) of the Competition Act 89 of 1998 within 90 days from the date of this order.
3. Each party is ordered to pay its own costs.

JUDGMENT

Lekhuleni AJA (Manoim JP and Poyo-Dlwati AJA concurring):

Introduction

[1] This is an application to review and set aside the Competition Commission's (the Commission) decision not to refer the applicant's complaint to the Competition Tribunal (the Tribunal). The applicant seeks an order setting aside the Commission's non-referral decision and remitting the matter to the Commission for investigation by different investigators. In addition, the applicant seeks an order directing the Commission to conduct and complete its investigation within 90 days and to take the necessary consequential steps.

[2] The Commission did not oppose the applicant's application. Instead, the Commission filed a notice to abide by this Court's decision on the relief sought by the applicant. However, the Commission filed an explanatory affidavit and heads of argument to assist this Court in determining the applicant's review application. To properly address the complexity of the issues woven into the applicant's case, we deemed it appropriate to invite and grant permission to an *amicus curiae* to make submissions on the intricate questions raised in this matter. In arriving at our decision and in formulating the reasons that follow, this Court derived considerable benefit from both the heads of argument and the oral submissions advanced by Dr Muvangua, who appeared with Ms Cachalia and Ms Tshabalala on behalf of the *amicus curiae* at the Court's request. To them, this Court owes a significant debt of gratitude.

[3] For clarity and systematic analysis, I propose to structure this judgment as follows. First, I will provide a summary of the applicant's complaint to the Commission. Second, I will set out the Commission's investigation and its ultimate decision not to refer the matter to the Tribunal. Third, I will address the applicant's grounds of review. Fourth, I will consider the preliminary issue concerning whether it

is competent for this Court to entertain the application as a court of first instance notwithstanding a remedy available to the applicant in terms of s 51(1) of the Competition Act 89 of 1998 (the Competition Act). Fifth, I will consider whether the correct standard of review is that provided under PAJA or the principle of legality. Sixth, I will examine whether the Commission's decision complies with the principles of legality. Finally, I will consider the question of costs and conclude by proposing the order I consider appropriate in light of the evidential material presented.

A summary of the applicant's complaint to the Commission

[4] The applicant is one of the interprovincial bus operators. It holds operating permits for city-to-city operations, including routes to Johannesburg, Cape Town, Durban, Pretoria and Mthatha. The applicant is a relatively new entrant in the intercity provincial passenger transportation industry. It expanded and operated services to most major cities from 2022 after acquiring offices and loading bays at Park Station in Braamfontein, Johannesburg.

[5] The applicant filed a complaint with the Commission, which the Commission acknowledged receipt of on 21 August 2024. In that complaint, the applicant requested that the Commission investigate alleged anti-competitive conduct in the long-distance passenger transportation sector that allegedly breached several provisions of the Competition Act. Specifically, the applicant urged the Commission to regulate the industry by establishing a minimum fare of R550 per person for journeys of 650 kilometres or more. The applicant further requested that the Commission prohibit false marketing practices, including the opening of sales for bus services to be combined with others.

[6] The complaint was directed against four respondents. The first respondent was PRASA, an organ of state trading as City to City, with offices at Park Station, Johannesburg. The second respondent was Eagle Liner, also known as Intercity, with offices at Park Station, Johannesburg. The third respondent was Delta Coaches, likewise based at Park Station, Johannesburg. The fourth respondent was Intercape Ferreira Mainliner (Pty) Ltd, trading as Intercape, with its head office in Pretoria West. Each respondent operated luxury bus services from Pretoria, Germiston, Midrand, and Heidelberg to various towns and destinations in the Eastern Cape via the N1

and N3 routes. According to the applicant, the respondents jointly and/or severally possessed market power and were dominant players in the intercity bus operations market in South Africa, as contemplated in s 7 of the Competition Act.

[7] In its complaint to the Commission, the applicant alleged predatory pricing in violation of s 8(1)(d)(iv) of the Competition Act against the respondents. The applicant stated that the fares charged by the respondent firms were extremely low, anti-competitive, and exclusionary. With respect to Intercape, the applicant based its complaint on s 8(1)(a) of the Competition Act and contended that Intercape charges excessive prices for its services, thereby adversely affecting consumers, particularly during periods identified as peak travel times, such as long weekends and the periods surrounding school closures and reopenings.

[8] The applicant stated that any fare charged to passengers for long-distance travel of 600 kilometers or more, priced below R500 excluding agent commissions such as Computicket, constituted predatory pricing. In the applicant's view, such fares were unreasonably low, fell below market levels, and were exclusionary to other operators, particularly new entrants. The applicant illustrated that a competitor operating a single coach on the same route, if compelled to match respondents' fares at approximately R300 per passenger, would incur losses if the coach carried 25 passengers or fewer on that day.

[9] According to the applicant, at times the respondents marketed more than one coach, including sister coaches, departing from the same town within approximately two hours and heading to the same destination. When both coaches failed to attract sufficient passenger numbers, the respondents allegedly consolidated passengers into a single coach. The applicant characterised this practice as 'double dipping', contending that it was anti-competitive and exclusionary.

[10] The allegation is that the respondents, aware that both coaches might not be filled, acted with a preconceived intention to consolidate passengers, thereby misleading the market. The applicant further asserted that this conduct placed competitors at a disadvantage. In particular, a taxi or coach operator without a sister coach on the same route, departing within a reasonable time of the original timetable,

would be unable to compete effectively. If such an operator carried less than 50% of its seat capacity, it would be compelled to operate at a loss, whereas the respondents could mitigate their losses by consolidating passengers into one coach.

[11] The applicant believes the Commission should set minimum and maximum prices for bus tickets in South Africa to prevent margin compression and predatory pricing. In the applicant's view, the lack of price regulation often leads to conflict and criminal activities, including extortion, intimidation, and violence against coaches. This stifles fair competition, as taxi operators complain about predatory prices imposed by bus operators. The applicant therefore urged the Commission, in its complaint, to investigate the alleged excessive and predatory pricing.

The Commission's investigation and its ultimate decision of non-referral

[12] In its explanatory affidavit, the Commission stated that it acknowledged receipt of the applicant's complaint on 21 August 2024 and thereafter engaged not only with the applicant but also with the respondents identified in the complaint. The Commission noted that the decision not to refer the complaint to the Tribunal was made at the screening stage of its investigation. The Screening Unit of the Commission operates as an internal branch within the Advocacy Division, assisting with investigations into prohibited practices. The Screening Unit begins by receiving and evaluating all third-party complaints submitted to the Commission to determine which cases warrant further inquiry and which may be closed without further action. The Unit targets a 90-day turnaround for third-party complaints, although this depends heavily on the level of cooperation received when requesting additional information from those involved.

[13] The Commission noted further that screening fulfils a dual role of centralising the strategic direction of cases and managing the workload of the Commission's main investigative divisions. Complaints that are transferred from the Screening Unit to the Commission's specialist divisions, are those that warrant the Commission's time and resources and necessitate the collection of further information. Such information requires the specialised skills and experience of investigators within the market conduct and cartel divisions. The Commission emphasised that the

Screening Unit's role is to assess whether new complaints raise competition concerns and are likely to succeed.

[14] The Commission emphasised that the screening process enables complaints to be resolved more expeditiously by eliminating matters that do not raise competition concerns, thereby allowing investigators in the market conduct and cartel divisions to focus on issues of greater significance.

[15] Regarding the applicant's complaint, the Commission recorded that it conducted a desktop assessment of the pricing practices of the various bus operators, using data obtained from the Computicket ticketing platform. The Commission compared ticket prices across various bus operators on the Johannesburg-to-Kokstad and Johannesburg-to-Queenstown routes during two periods: the peak period from 15 to 22 April 2025 (which includes Easter weekend) and the off-peak period from 5 to 10 February 2025. Ultimately, the Commission concluded, without making a definitive finding on dominance, that the applicant's complaints did not raise competition concerns warranting referral to the Competition Tribunal for determination.

[16] In reaching its decision not to refer the complaint, the Commission explained that it had considered the following: with respect to the allegation of predatory pricing, the Commission observed that bus operators, including the applicant, employ dynamic pricing strategies. These strategies enable operators to cover operating expenses and achieve profitability by varying fare levels during peak and off-peak periods in response to fluctuations in demand. The Commission followed its 2017 market inquiry,¹ which found that to remain profitable operators of Intercity land transport would raise prices during peak periods to offset off-peak losses, and that flat-rate pricing would not be effective in this market.

[17] In response to the excessive pricing complaint against Intercape, the Commission found that a comparative analysis of fares charged by competing

¹ See Competition Commission of South Africa 'Market Inquiry into the Land Based Public Passenger Transport Sector' available at <https://www.compcom.co.za/wp-content/uploads/2021/04/PTMI-Non-Confidential-14-April-2021-FINAL.pdf> accessed on 19 August 2026.

operators on the same routes during both peak and off-peak periods demonstrated that Intercape did not consistently charge the highest fares and that its profit margins remained within acceptable limits. As to the allegation that Delta Coaches and Eagle Liner failed to adhere to their advertised timetables and consolidated passengers from separate bookings onto a single coach, the Commission concluded that such conduct amounts to a breach of the operators' licensing conditions. It held that this issue fell outside the scope of the Commission's investigative mandate and was a matter to be reported to, and dealt with, by the relevant provincial licensing regulatory authority.

[18] The Commission concluded by noting that central to the applicant's pricing complaints was its request that the Commission fix prices for operational routes. The Commission emphasised that it is not within its mandate to fix prices, particularly in an industry where the dynamic pricing model has been recognised as the fairest and most reasonable mechanism for determining fares. Consequently, on 30 May 2025, the Screening Unit recommended that the complaint not be referred. In accordance with section 50 of the Competition Act, the Commission issued a certificate of non-referral, in the form of Notice CC 8, on 10 July 2025. The notice recorded the Commission's conclusion that the complaint did not raise any competition concerns. It is this decision that the applicant impugns in the present review application.

The applicant's main grounds of review

[19] The applicant's grounds of review, discernible from its founding and supplementary affidavits, may be succinctly summarised as follows: The applicant asserted that the Commission misdirected itself, acted with bias, and was reluctant to investigate the complaint with an open and impartial mind. It contended that the Commission was tasked with investigating whether fares below R350 for distances exceeding 700 kilometres from towns such as Mthatha, Kokstad, and Mount Frere constituted predatory pricing and an abuse of dominance as contemplated in s 8(1)(a) of the Competition Act. Notwithstanding, the Commission failed to investigate the complaint and issued a certificate of non-referral.

[20] The applicant further asserted that the Commission neglected to interview managers, drivers, and other relevant personnel from the liquidated companies to

establish the causes of their demise. The applicant also criticised the Commission for failing to consult intercity operators such as Luvalo Brothers Transport or Transit Liner, who, according to the applicant, had suffered similar experiences. The applicant added that the Commission failed to interview members of the taxi industry in Gauteng, the Eastern Cape, and the Western Cape, particularly those engaged in interprovincial long-distance travel. In the applicant's view, the failure to consult the taxi industry, which regards itself as a competitor of interprovincial bus operators, constituted a gross irregularity on the part of the Commission.

[21] The applicant contended that the Commission's view that operators could offset low fares during off-peak periods by charging higher fares during peak periods was flawed, irregular, and without substance. In the applicant's view, this stance ignored the reality that when fares are as low as R350 for a journey of 800 kilometres or more, smaller operators, including the applicant, are compelled to withdraw from competition and cancel services to avoid losses. Once the applicant and other small operators exit the market, the larger operators, such as the respondents, can increase fares, attract more passengers, and operate profitably, thereby benefiting from the absence of competition.

[22] The applicant noted that in some instances, a small operator may cancel a scheduled journey and sell its passengers to a larger operator to avoid losses. This can result in the smaller operator losing customers. The larger operator may ultimately become profitable by gaining additional passengers from the smaller operator that cancelled its journey to avoid financial losses. In addition, the applicant contended that the Commission failed to visit the bus operators' depots to conduct in-house interviews and make the necessary observations as part of its investigation. In the applicant's view, this omission constituted a procedural irregularity. While the applicant acknowledged and welcomed price fluctuations in line with demand, it maintained that minimum prices should be set to avoid prolonged losses, which could exclude small and medium-sized enterprises from the market. The applicant accepted that operators may increase fares during peak periods but argued that such increases should remain within the bounds of reasonableness.

[23] The applicant impugned the Commission's conclusion that the practice of advertising several coaches with different travel times, and thereafter consolidating passengers from separate bookings onto a single coach, was not anti-competitive. The applicant contended that this conclusion was fundamentally flawed. In its view, such conduct constituted a clear breach of operating permits, which are designed to regulate the orderly provision of passenger services. By permitting operators to consolidate passengers from different coaches outside the scope of their licensed routes and times, the Commission's decision effectively condoned unfair competition. The applicant urged the Court to grant the relief sought in the notice of motion.

Should this Court entertain the application as a court of first instance?

[24] The applicant approached this Court, predicated its application on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively on the principle of legality. As foreshadowed above, on 10 July 2025, the Commission issued a notice of non-referral in respect of the applicant's complaint. In that communication, the Commission drew the applicant's attention to s 51(1) of the Competition Act, as amended. In terms of this provision, the Commission advised the applicant that, should it disagree with the non-referral decision, it may itself refer the matter to the Tribunal for consideration. Furthermore, the Commission informed the applicant that, in terms of Rule 14(1)(b) of the Rules for the Conduct of Proceedings in the Tribunal, an applicant has 20 business days from the date on which the Commission issues a notice of non-referral to refer its complaint to the Tribunal.

[25] Notwithstanding, the applicant opted not to refer the matter to the Tribunal but instead to approach this Court for appropriate relief. The question that begs is whether it is competent for this Court to consider the applicant's application notwithstanding the remedy provided for in s 51(1) of the Competition Act. It is this question that I turn to consider in the discussion hereunder. For clarity and precision, s 51(1) and (2) of the Competition Act provide as follows:

'(1) If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure.

(2) A referral to the Competition Tribunal, whether by the Competition Commission in terms of section 50(1) or by the *complainant* in terms of subsection (1), must be in the *prescribe* form.'

[26] The purpose of the Competition Act as set out in s 2 of the Act is, among other things, to promote and maintain competition in the Republic in order to promote the efficiency, adaptability and development of the economy. Section 1(2)(a) of the Act enjoins this Court to interpret the Competition Act in a manner that is consistent with the Constitution. Expressed differently, s 1(2)(a) of the Competition Act requires that the Competition Act be interpreted through the prism of the Constitution. This is consistent with the constitutional injunction in s 39(2) of the Constitution, which is to ensure that the interpretation of legislation aligns with the spirit, purport and objects of the Bill of Rights.² In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*,³ the Constitutional Court interpreted s 39(2) to mean, *inter alia*, that all statutes must be interpreted through the prism of the Bill of Rights and that the Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values.

[27] Section 49B(2)(b) of the Competition Act allows any person to submit a complaint concerning an alleged prohibited practice to the Commission in the prescribed form. The Commissioner must, in terms of s 50(2), within one year after submission of the complaint either refer it to the Tribunal, if the Commission determines that a prohibited practice has been established, or issue a notice of non-referral to the complainant. Section 50(4)(a) provides that in a particular case the Commission and the complainant may agree to extend the period allowed in subsection (2). If the Commission has not referred the complaint to the Tribunal or issued a notice of non-referral within the one-year or extended period, the Commission

² Section 39(2) of the Constitution provides that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

³ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC); 2001(1) SA 545 (CC); 2000 (2) SACR 349 (CC) paras 21 and 22.

is deemed to have issued a notice of non-referral upon the expiration of the relevant period.⁴

[28] It is trite that once a complaint is lodged with the Commission, a complainant (the applicant in this case), is not entitled to a hearing before the Commission refers a complaint to the Tribunal. The Tribunal's power to determine a complaint only arises when a complaint is referred to it in terms of the Competition Act. This was confirmed by the Supreme Court of Appeal (the SCA) in *Woodlands Dairy (Pty) Ltd and Another v Competition Commission*,⁵ which held that a complaint referral is a necessary jurisdictional fact for the exercise of the Tribunal's powers in respect of prohibited practices. In this case, after conducting what I will term as its preliminary investigations, the Commission concluded that the complaint did not give rise to any competition issues and issued a total non-referral letter to the applicant.

[29] Instead of referring the matter to the Tribunal in terms of s 51(1) of the Competition Act, the applicant has approached this Court to review the Commission's decision. The Competition Act, however, provides the applicant with a remedy: namely, the referral of its complaint to the Tribunal. The applicant has elected to impugn the Commission's decision in this Court. The question that arises is whether such a course is permissible.

[30] At the hearing of this matter, Mr Gwabeni, who appeared with Mr Mpakati on behalf of the applicant, submitted that the applicant could not reasonably refer the matter to the Tribunal in terms of s 51(1) of the Competition Act. Mr Gwabeni argued that because the complaint had not been properly investigated by the Commission, the applicant would be prejudiced if it referred the complaint to the Tribunal without the benefit of a proper investigation. I am of the view that this proposition has merit. The Commission is a specialist administrative body with investigative, compliance, and enforcement functions.

⁴ Section 50(5) of the Competition Act.

⁵*Woodlands Dairy (Pty) Ltd and Another v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA); [2011] 3 All SA 192 (SCA) para 12.

[31] In *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Another (Simelane)*,⁶ the SCA noted that both the Commission and the Tribunal are creatures of statute, the statute being the Act.⁷ Both bodies must exercise their functions in accordance with the Act. The Commission is independent and subject only to the Constitution and the law.⁸ It must act impartially and perform its functions without fear, favour or prejudice.⁹ Its functions include, amongst others, the investigation and evaluation of alleged prohibited practices listed in Chapter 2 of the Act.¹⁰ The Commission is tasked to refer complaints to the Tribunal where a prohibited practice has been established.¹¹ Having so referred a matter, it is then its duty and right to appear before the Tribunal and participate in its proceedings.¹²

[32] In *Simelane*, the SCA quoted with approval the Tribunal's reasoning in *Norvatis SA (Pty) Ltd and Others v Competition Commission and Others*,¹³ that the function of the Commission is investigative and not subject to review, save in cases of ill faith, oppression, vexation or the like. However, this Court noted in *Competition Commission of South Africa v Computicket (Pty) Ltd*,¹⁴ that a public body such as the Commission is subject to the principle of legality envisaged in ss 1, 7 and 34 of the Constitution and its decisions can be reviewed, albeit in the set of limited circumstances as foreshadowed in the *dictum* of the SCA postulated in *Simelane*.

[33] As a matter of principle, a review of the non-referral of a matter to the Tribunal in a case such as the one before us ought not to be readily countenanced, particularly where, as in the present case, the Act provides a remedy to the applicant. Consistent with the principle of subsidiarity, an applicant should ordinarily not be permitted to bypass the statutory scheme and the procedures expressly contemplated in the Act. However, notwithstanding this *dictum*, I am of the view that this matter stands on a

⁶*Simelane And Others NNO v Seven-Eleven Corporation SA (Pty) Ltd And Another* 2003 (3) SA 64 (SCA); [2003] All SA 82 (SCA) para 12.

⁷Section 19(1)(c) and s 26(1)(d).

⁸Section 20(1)(a) of the Act.

⁹Section 20(1)(b).

¹⁰Section 21(1)(c).

¹¹Section 21(1)(c) and g.

¹²Section 20(1)(g) and s 53(a).

¹³*Norvatis SA (Pty) Ltd and Others v Competition Commission and Others*, (CT 22/CR/B/Jun 01, 2.7.2001 paras 7 and 35 - 61).

¹⁴*Competition Commission of South Africa v Computicket (Pty) Ltd* [2013] 2 CPLR 383 (CAC).

different footing. As I will demonstrate later in this judgment, the Commission failed to discharge its statutory duty under the Competition Act as it neglected to properly investigate the applicant's complaint.

[34] The Commission dismissed the applicant's complaint at the screening stage after conducting what was ostensibly a cursory desktop investigation, albeit longer than the 90-day period which is usually the target of the screening stage. Such an investigation offends both the principle of legality and the rule of law. In particular, it contravenes the provisions of ss 49B(3) and (4) of the Competition Act, which impose a clear statutory duty upon the Commission to conduct a proper investigation into complaints lodged with it.¹⁵ These provisions enjoin the Commission to gather the necessary information and investigate the complaint as quickly as practicable and determine whether a prohibited practice has been established.

[35] From a reading of the Competition Act, in particular Chapter 2 thereof, the Commission is the only State organ empowered to investigate and police restrictive practices and abuse of market dominance in the South African economy. The Commission is required to investigate and prosecute cases against respondent firms that it believes are guilty of infringing the Competition Act.¹⁶ In doing so, it will initiate investigations and thereafter, depending on the evidence it uncovers in the course of its investigations, refer those firms and the conduct in question for determination by the Tribunal.

[36] It must be stressed that once a complaint is initiated, the Commission must investigate it. This investigative obligation is peremptory. Significantly, the Commission has the machinery necessary to investigate anti-competitive behaviour. The Competition Act sets out the powers and procedures the Commission has for entering and searching premises under a warrant.¹⁷ In certain circumstances, a

¹⁵Section 49B (3) and (4) provides as follows: (3) Upon initiating or receiving a complaint in terms of this section, the commissioner must direct an inspector to investigate the complaint as quickly as practicable. (4) At any time during an investigation, the commissioner may designate one or more persons to assist the inspector.

¹⁶See Kellu L, Unterhalter D and Goodman I *Principles of Competition Law in South Africa* (2022) at 60.

¹⁷See s 46 of the Act.

Commission's inspector may enter and search premises without a warrant, particularly where the inspector believes on reasonable grounds that a warrant would be issued under the Act if applied for and that the delay in first obtaining a warrant would defeat the object or purpose of the entry and search.¹⁸

[37] This machinery is not readily available to an applicant who believes that a dominant firm is engaged in restrictive practices. In the explanatory affidavit and in its heads of argument, the Commission explained that the desktop assessment of the various bus operators' pricing was based on data the Screening Unit obtained from Computicket (a ticketing platform). No further investigation was conducted beyond that. In its Memorandum to the Commissioners (Screening Memorandum), the Screening Unit recommended that the applicant's complaint not be referred to the Tribunal, on the basis that it 'did not give rise to any competition issues'.

[38] Clearly, a proper investigation would have placed the applicant in a position to make an informed decision whether to refer the matter to the Tribunal in terms of s 51(1) of the Act. Put simply, it would have enabled the applicant to evaluate whether a referral was worth pursuing. It is my firm view that a referral to the Tribunal without the benefit of the in-depth investigation envisaged by the Act could prejudice the applicant at the hearing before the Tribunal.

[39] As I see it, the applicant would have been better placed to make an informed decision whether to refer the matter in terms of s 51(1) had it been furnished with the information that a proper investigation would have yielded. Without a thorough investigation, the applicant is deprived of the evidentiary material necessary to assess the viability of a referral in terms of s 51(1).

[40] In my view, the outcome would have been different had the Commission thoroughly investigated the matter and, despite that investigation, the applicant still approached this Court. By undertaking a perfunctory desktop exercise, the Commission failed to comply with its statutory mandate. This failure warrants judicial scrutiny to ensure the Commission remains true to its legislative obligations. On this

¹⁸See s 46 read with s 47(2) of the Act.

basis, I am of the view that the applicant's referral of its application for review to this Court must be condoned. In these circumstances, I believe the applicant cannot be faulted for approaching this Court to vindicate its rights. The review application is therefore properly before us. I now turn to consider whether the correct standard of review is that provided under PAJA or the principle of legality.

PAJA or the principle of legality?

[41] The applicant brought its application and relied on the principle of legality and/or PAJA. The applicant contended that the Commission's decision not to conduct a proper investigation into its complaint and to issue a non-referral is susceptible to review under PAJA. In both *Simelane and Competition Commission of South Africa v Telkom SA Ltd and Another (Telkom)*,¹⁹ matters to which this Court was referred to by the *amicus*, the SCA dealt with a review of the Commission's decision to refer a matter to the Tribunal. In preparing this judgment, we were unable to locate any authority directly on point with the present matter, where a review of the Commission's decision was sought on the basis of a non-referral. Neither did counsel refer us to any such authority. This absence of precedent underscores the novelty of the issue before us.

[42] For clarity, PAJA defines an administrative action as:

'[A]ny decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, *which adversely affects the rights* of any person and which has a direct, *external legal effect*.' (Emphasis added.)

This definition envisages two requirements namely: (a) that a decision must be of an administrative nature and (b) that it must have the capacity to affect legal rights.

¹⁹*Competition Commission of South Africa v Telkom SA Ltd and Another* [2010] 2 All SA 433 (SCA).

[43] In *Telkom*,²⁰ the SCA noted that the ultimate decision to refer a matter to the Tribunal and the referral itself are of an investigative nature and not an administrative nature. To this end, PAJA does not apply to such a decision. This is so because PAJA requires that a decision be administrative in nature and that it have the capacity to affect legal rights. The court pointed out that the Commission's decision may, however, be set aside on the principle of legality even if it is not reviewable under PAJA. From this authority, it is my firm view that a non-referral of a complaint to the Tribunal does not satisfy the second requirement of affecting legal rights in that the applicant still has a remedy in terms of s 51(1) of the Competition Act.

[44] Therefore, I conclude that the principle of legality is the appropriate procedure for reviewing the Commission's non-referral decision. I now turn to consider the applicant's application on the merits.

Whether the Commission's decision complies with the principle of legality?

[45] The principle of legality is an incident of the rule of law which is one of the founding values of the Constitution.²¹ It is the product of the Constitution and is premised on the idea that administrators and other public actors must act lawfully within the bounds of the Constitution. It requires that all exercises of public power are, at a minimum, lawful and rational.²² In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others*,²³ it was held that it is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. The Court noted that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.

[46] Consistent with these established principles, the Commission is required to exercise its referral powers to the Tribunal in a rational manner. This means that the decision it takes must be substantively and procedurally rational. Rationality review

²⁰Ibid para 11.

²¹*Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 58.

²²*Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC); 2014 (3) BCLR 33 (CC) para 28.

²³*Pharmaceutical Manufacturers Association of South Africa and Another: 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.

concerns the evaluation of the relationship between means and ends: the relationship, connection or link between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other.²⁴ In *Zuma v Democratic Alliance and Others*,²⁵ Navsa ADP stated that a rationality review also covers the process by which the decision is made. The court pointed out that rationality includes an assessment of whether the means, including everything done in the process of taking the decision, links to the end.²⁶ If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.

[47] As discussed above, the Commission investigates and prosecutes complaints, while the Tribunal, on the other hand, determines those complaints that have been referred to it by the Commission or by private parties under s 51(1) of the Act. One of the Commission's most critical functions is the enforcement of ss 4, 5, 8 and 9 of the Competition Act.²⁷ In terms of s 49B(3) of the Act, upon the Commission receiving a complaint, in this case, of a prohibited practice under chapter 2 of the Act, the commissioner must appoint an inspector to investigate it 'as quickly as practicable'. At any time during the investigation, the commissioner may designate one or more persons to assist the inspector.

[48] The inspector is entitled to question people, and they must answer each question truthfully and to the best of that person's ability, unless the answer is self-incriminating.²⁸ Whilst an investigation is in progress, the commissioner is entitled to summon any person for interrogation and may require production of books and documents.²⁹ Powers of entry, search and seizure are conferred by ss 46 to 49 of the Act. After completion of the investigation the Commission must refer the matter to the Tribunal if it determines that a prohibited practice has been established.

²⁴*Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC); 2012 (BCLR) 1297 (CC) para 32.

²⁵*Zuma v Democratic Alliance and Others; Acting Director of Public Prosecutions and Another v Democratic Alliance and Another* 2018 (1) SA 200 (SCA); [2017] 4 All SA 726 (SCA) para 82.

²⁶See also *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) paras 33 and 34.

²⁷Section 4 addresses restrictive horizontal practices; section 5 addresses restrictive vertical practices; section 8 addresses Abuse of dominance; and section 9 addresses Price discrimination.

²⁸See s 49A(2) of the Act.

²⁹See s 49A(a) and (b).

[49] In *Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers and Others*,³⁰ this Court (the CAC) pointed out that although the Act provides for a blend of public and private prosecutions of prohibited practices, the Commission is clearly the legislature's investigator and prosecutor of first choice. Only after it has investigated a complaint and decided not to prosecute may the private complainant do so. The court noted that, in conformance with this scheme, the Act does not allow a complainant to bypass the Commission by holding back some of its complaints, get a non-referral, and then add complaints of which the Commission was never told.

[50] It is common cause that the applicant's complaint was premised on a violation of s 8 of the Act. The applicant's core complaint concerned alleged anti-competitive conduct, including predatory and excessive pricing, by alleged dominant inter-provincial bus operators, which the applicant contends are forcing smaller, compliant operators like itself out of the market. Section 8(1)(a) of the Competition Act prohibits exploitative conduct in the form of excessive pricing. The section prohibits dominant firms from charging an excessive price to the detriment of consumers, while s 8(1)(d)(iv) prohibits dominant firms from selling goods or services at a predatory price.

[51] The Competition Act defines a predatory price as a price for goods or services below the firm's average avoidable cost (AAC) or average variable costs (AVC). Average avoidable costs in terms of the Act means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output. While average variable cost means the sum of all the costs that vary with an identified quantity of a particular product, divided by the total produced quantity of that product.

[52] As foreshadowed above, the applicant predicated its complaint on abuse of dominance envisaged in s 8(1)(a) (excessive pricing) and predatory pricing in terms of s 8(1)(d)(iv) of the Act. Section 8(2) of the Act provides that if there is a *prima facie*

³⁰*Glaxo Wellcome (Pty) Ltd v National Association of Pharmaceutical Wholesalers and Others* [2002] ZACAC 3 paras 26 to 28.

case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable. Section 8(1)(a) must be read with s 8(3), which provides that any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors in s 8(3)(a) to (d).

[53] Mr Van Rooyen, who appeared for the Commission, asserted that because the Screening Unit focused on the merits of the applicant's complaint, the Commission's memorandum does not expressly define the market or reach a final view on dominance; instead, the Screening Unit evaluated the complaint on its merits to assess whether the allegations made by the applicant amounted to excessive or predatory pricing.

[54] To succeed on a complaint under section 8, the complainant must establish that the respondent firm or firms are dominant and that they have committed an abuse as set out in the Act. However, I consider it appropriate for the Commission at the screening stage, where it concludes that a complaint lacks merit, to determine either that the respondent firm is not dominant, without deciding whether the conduct complained of constitutes an abuse, or that even if the firm is dominant the conduct in question does not amount to an abuse as defined in section 8 of the Act. In this case, however, the Commission did neither.³¹

[55] The applicant contended that the respondents charge unsustainably low fares, often below cost, with the deliberate purpose of driving competitors from the market, particularly on the Johannesburg–Kokstad and Johannesburg–Queenstown routes. For example, the applicant explained that when fares drop to R350 for journeys of 800 kilometers or more, the applicant and other SMME operators are

³¹Section 7 of the Act codifies the circumstances in which a firm may be held to be dominant. In terms of s 7 of the Act, a firm is deemed dominant if it has more than 45 percent of the market share in the market in which it operates. The presumption of dominance in this regard is irrefutable. A firm with a market share of between 35 percent and 45 percent is presumed to be dominant. However, the firm can rebut this presumption by adducing evidence that it does not have market power. A firm with a market share of less than 35 percent in the relevant market in which it operates is presumed not to be dominant. However, the Commission or a private complainant can rebut this presumption by adducing evidence of market power. Market power is often described as the power to control prices: that is, to increase prices above the competitive level.

sometimes compelled to withdraw from competition and cancel trips to avoid losses. Once the applicant exits the market, the alleged dominant operators, such as Eagle Liner/Intercity, typically raise their fares. They then attract more passengers, become profitable, benefit from customers who would otherwise have chosen the applicant, and capitalise on the absence of competition. The applicant contends that this pattern of below-cost pricing followed by fare increases constitutes exclusionary conduct designed to eliminate competitors, particularly small firms, and subsequently to exploit market power.

[56] It is my firm view that the applicant's complaint of predatory pricing ought to have been properly investigated, particularly when one considers the findings of the 2017 Market Inquiry, which suggested the existence of predatory pricing in the relevant market. That inquiry highlighted precisely the type of exclusionary conduct alleged by the applicant in this matter. Against that backdrop, the Commission's decision to non-refer the complaint at the screening stage, without a thorough investigation, is difficult to reconcile with the outcome of its own market inquiry.

[57] The applicant further stated that the respondents, Intercape, in particular, charge what the applicant believed are exploitative and excessive fares during peak travel periods, such as school holidays and long weekends, to the prejudice of consumers. The applicant illustrated this with a specific example: bus tickets for R2 500 to R2 770 on a trip from Johannesburg to Cape Town during 4-7 February 2025. The applicant also attached a Computicket price screenshot showing prices between R2,700 and R3,000 from Johannesburg to Cape Town on 1 February 2025, which, according to the applicant, were more expensive than flight tickets.

[58] What compounds the difficulty in the investigation of the Commission is that the applicant also levelled complaints of alleged predation in terms of s 8(1)(d)(iv) of the Competition Act against PRASA/Autopax, Eagle Liner, and Delta Coaches. In addition, the applicant alleged that Delta and Eagle Liner advertised several coaches to the same destination at different times but would combine passengers from separate bookings onto one coach to avoid running multiple under-filled coaches, enabling offending bus operators to price much lower than others who abide by the times they advertise. The applicant submitted that this practice places smaller operators like itself

at a structural disadvantage, because a competitor without such sister coaches would be forced to travel with half or fewer passengers at a loss.

[59] To this end, the applicant provided an example of how this practice operates: a dominant operator may advertise three departure times (e.g., 8h00, 8h20, and 8h40) and, when each coach has only about 17 passengers, combine all 51 passengers into one coach and postpone departure to 8h40. An SMME operator without three coaches can only advertise one departure time and would be obliged to depart with only 17 passengers, operating at a loss, while the dominant operator's combined coach departs with 36 passengers and is profitable.

[60] It is common cause that Delta Coaches did not respond at all to the Commission's request for information on this accusation. Notwithstanding, the Commission concluded that Delta pricing does not give rise to competition concerns. In its explanatory affidavit, the Commission stated that the absence of Delta's response did not impact the Commission's conclusion on the predatory pricing or false advertising complaints against Delta. In particular, the Commission noted that bus operators' licenses specify the routes, starting points, times, and designated stops they must follow. Operators are required to adhere strictly to these details. According to the Commission, failure to comply with assigned locations or schedules is a breach of license terms and should be handled by the Regulator, not the Commission, because it is not a competition issue.

[61] The compounding difficulty is that the Commission reached its conclusion regarding Delta's pricing without any data or input from Delta. To this end, I share the views expressed by the *amicus* that Delta's non-response was not a peripheral matter. It was a complete absence of evidence regarding one of the named respondents. The Commission could not conduct a predatory pricing analysis of a specific respondent without any data or contribution from that respondent. In the absence of Delta's cost data, the Commission could neither determine nor apply the AAC-AVC test to Delta.

[62] The Commission's decision not to exercise its coercive powers to compel a response, or to simply accept the non-response as it did, is a procedural failure that

goes to the rationality of its decision on Delta. The Commission does not allege to have issued summons for interrogation to Delta or to have conducted search and seizures as mandated by ss 46, 47 and 49A of the Act. The Commission did not provide any explanation and did not advance any argument whatsoever for how a conclusion on Delta's pricing conduct could be reached in the absence of any data from Delta. This gross failure on the part of the Commission renders the conclusion of non-referral irrational.

[63] Troublingly, the PRASA-aligned operators whose pricing is most directly at issue did not provide granular cost data or a breakdown of their expenses. They provided only average monthly passenger and fare data and declined to furnish per-trip cost and profit information, stating that PRASA does not compile its data in that manner. The Commission accepted this response without seeking further information or invoking any coercive power available to it to compel PRASA to produce the required evidence. A finding that pricing is not predatory, made in the absence of any cost data from the alleged predator, lacks the necessary factual foundation. In my view, this is a gross irregularity that vitiates the Commission's ultimate decision.

[64] Another difficulty in the Commission's perfunctory investigation is that it confined its alleged investigations to operators still active in the market. It made no effort whatsoever to identify or interview operators that had ceased trading, whether through liquidation, withdrawal, or financial distress. The applicant specifically requested that the Commission interview personnel from interprovincial bus operators that had been liquidated since approximately 2020, in order to ascertain what role predatory pricing may have played in their demise. The Commission declined to do so as it did not regard such interview as necessary.

[65] Similarly, the Commission failed to interview other SMME intercity operators active on the relevant routes, including Luvalo Brothers Transport and Transit Liner, whose operational experience was invaluable in determining the applicant's complaint. Nor did the Commission engage with the taxi industry operating on interprovincial routes in Gauteng, the Eastern Cape, and the Western Cape. These operators, who regard themselves as competitors of interprovincial bus operators, may have had independent evidence of anti-competitive conduct. By excluding

and/or neglecting to interview these affected parties, the Commission undermined its statutory mandate to conduct an in-depth investigation to curb prohibited practices.

[66] It must be stressed that these are precisely the operators who, during the Commission's own Market Inquiry in 2017, raised concerns about below-cost pricing. Notwithstanding this, the Commission declined to interview them, taking the view that such engagement was unnecessary. This stance is difficult to reconcile with the Commission's subsequent finding in the 2021 Online Intermediation Platform Market Inquiry (OIPTMI), where it acknowledged that bus operators had raised concerns about dominant operators charging significantly low prices. It found that evidence of low pricing by Autopax was suggestive of anti-competitive behaviour by Autopax, given its financial performance.

[67] The operators who were ostensibly affected by the alleged conduct and did not survive it were the most directly relevant witnesses available for interview. Their exclusion from the investigative process deprived the Commission of crucial evidence and undermined the rationality of its ultimate non-referral decision. The Commission's failure to interview such witnesses reflects not only a superficial investigation but a failure to carry out its mandate. In my view, this constitutes a fundamental investigative failure. It reflects a closed mind and a superficial approach inconsistent with the Commission's statutory obligations under s 49B(3) of the Act.

[68] In these circumstances, the non-referral decision cannot be said to be rationally connected to the purpose for which the investigative power was conferred. As previously stated, rationality includes an assessment of whether the means, including everything done in the process of taking the decision, links to the end. Both the process by which the decision is made, and the decision itself must be rational. In my view, the process that the Commission undertook to reach its decision was fundamentally flawed, and it ultimately contaminated its ultimate decision not to refer the matter to the Tribunal.

Conclusion

[69] From the above discussion, it is evident that the investigation by the Commission was inadequate and perfunctory and did not meet the threshold for investigation as contemplated in the Competition Act. The Commission did not exercise its investigative powers mandated by the Act. Furthermore, dominance was not assessed. This is a prerequisite for any finding under s 8(1). In the premises, I hold the view that the matter should be remitted to the Commission's market conduct division for investigation to be conducted by a different inspector or inspectors appointed in terms of s 49B(3).

Costs

[70] Section 61 of the Competition Act provides that 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. The ordinary course is for costs to follow the result. But the Commission is not an ordinary civil litigant. The Act's explicit reference to the notion of fairness invites this Court 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 even-handed way.

[71] In *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others*,³² the Constitutional Court noted that 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. The Court noted that this Court 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. The Court also stressed that 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 this Court disagrees with the Commission's position or

³²*Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* 2014 (2) SA 480 (CC); 2014 (3) BCLR 251 (CC) para 23.

finds its actions to be mistaken, this is not necessarily sufficient to justify an adverse costs order.

[72] In this case, the Commission filed a notice to abide and did not oppose the applicant's application. The Commission also filed an explanatory affidavit and heads of argument which were of assistance to the court in forming a balanced perspective on the applicant's grounds of review. Consequently, I am of the view that each party must pay its own costs.

Order

[73] In the result, the following order is made:

1. The Competition Commission's decision not to refer the applicant's complaint to the Competition Tribunal is hereby set aside.
2. The matter is remitted to the Competition Commission's market conduct division for investigations to be conducted by a different, properly appointed inspector/s in terms of s 49B(3) of the Competition Act 89 of 1998 within 90 days from the date of this order.
3. Each party is ordered to pay its own costs.


—  —

J D Lekhuleni

Acting Judge of Appeal
Competition Appeal Court of South Africa

Appearances

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