IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CAC Case NO: 177/CAC/JUL19

In the matter between:

COMPETITION COMMISSION OF SOUTH AFRICA	Appellant
and	
BEEFCOR (PTY) LTD	First Respondent
CAPE FRUIT PROCESSORS (PTY) LTD	Second Respondent

Delivered electronically: 03 August 2020

ORDER

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1. The appeal is dismissed.
2. The Commission is to pay the costs of the respondents including the costs of two counsel where employed.

JUDGMENT

FISHER AJA (ROGERS JA and MNGUNI JA concurring)

Introduction

[1] This appeal deals the with the effect of a withdrawal of a complaint before the Competition Tribunal ('the Tribunal'). More particularly, the question to be answered is whether withdrawal of process in the context of the statutory scheme created in terms of the Competition Act[1] ('the Act') serves to put an end to the proceedings on the basis that the complaint cannot be reinstated.

Background

[2] The complaint in question was initiated against the respondents in terms of s 49B(1) of the Act. The respondents were alleged to have entered into a contract not to compete in the market for the processing of wet peels and citrus pulp used in the production of livestock feed. It was contended that such conduct amounted to a division of markets or an allocation of customers in contravention of s 4(1)(*b*)(ii) of the Act. The respondents deny contravening the Act and they both separately opposed the referral.

[3] The case was set down to be heard by the Tribunal for three days, commencing Monday 2 July 2018. The week before the hearing, Mr Mfundo Ngobese a Senior

[1] Act 89 of 1998.

Investigator at the Commission, communicated to the respondents' respective attorneys a desire to engage in settlement negotiations. In response, both attorneys stated that their clients were ready to proceed with the hearing but that they were not averse to discussing settlement on the morning prior to the hearing commencing.

[4] Mr Ngobese, on behalf of the Commission, then announced that he would withdraw the referral in order to 'allow the settlement negotiations a fair chance'. He stated that, in his view, the negotiations were likely to be protracted and could not be completed prior to the hearing. This was followed up almost immediately by the electronic filing of a notice of withdrawal in accordance with the prescribed form (CT8) duly signed by the Commission's Chief Legal Counsel. Mr Ngobese expressed the view in correspondence with the respondents' attorneys that the Commission was entitled to take the decision to withdraw the case on the basis that it could be reinstated at a later stage if settlement negotiations did not bear fruit. He explained that he had opted for withdrawal rather than postponement as he believed that this would provide a better platform for the settlement negotiations.

[5] The respondents' attorneys immediately recorded their objection to this approach and conveyed that, on their understanding, the matter could not be reinstated once withdrawn. They said that their respective clients were ready to proceed with the trial on the Monday. The second respondent's attorneys stated that if the Commission wanted more time, it should apply for a postponement in terms of rule 50(2), not withdraw the proceedings. They even invited Mr Ngobese to withdraw the CT8 notice so that the hearing could proceed. He refused this invitation and remained adamant that the Commission could reinstate a withdrawn referral.

[6] In view of the Commission's stance, the first respondent's attorneys proposed to the Commission that the Tribunal be informed that the complaint had been withdrawn and that the matter be postponed so that the first respondent could pursue its reserved right to seek a costs order. They notified the Commission that they had excused their witnesses and ceased preparation. The second respondent's attorneys wrote to the Tribunal to say that their client was ready to proceed with the case on the Monday. They requested urgent clarity.

[7] Faced with these circumstances, on Friday 29 June 2018 the Tribunal's Head of Case Management (a) notified the parties that in view of the Commission's notice of withdrawal the matter had been removed from the roll; (b) noted that the Commission had not tendered costs and directed the parties' attention to rule 50(3); and (c) stated that if the Commission in future wished to reinstate the matter, it should file an application for reinstatement.

Procedural history after the withdrawal

[8] The contemplated settlement negotiations never took place. Instead, some two months later, the Commission referred a fresh complaint to the Tribunal dealing with the same conduct complained of in the withdrawn referral.

[9] In these new proceedings, the respondents raised the point that s 67(2) of the Act, which provides that a complaint may not be referred to the Tribunal against a firm that has been a respondent in 'completed' proceedings in relation to the same conduct,

precluded the second referral[2]. They argued that proceedings became completed before the Tribunal when they were withdrawn.

[10] A month later, the Commission filed an application for reinstatement of the original referral. The outcome of that application is the subject of this appeal. The respondents argued that the bringing of the reinstatement application was merely another way of skinning the proverbial cat and that the same objection held good – i.e. that the proceedings were hit by the provisions of s 67(2).

[11] The Commission argued that proceedings could only be regarded as 'completed' for the purposes of s 67(2) if there had been a determination by the Tribunal. It persisted with the argument that it had the power and prerogative to withdraw and reinstate a referral as it saw fit, subject only to the obligation not to abuse such power.

[12] The Tribunal upheld the Commission's premise that proceedings could only be regarded as completed if they were *res judicata* before the Tribunal.[3] This notwithstanding, the Tribunal dismissed the application. It held that, although it was possible for a referral that had been withdrawn to be reinstated, the Commission had failed to show the requisite changed circumstances to succeed in such an application. It proposed that this requirement of changed circumstances might be met by new evidence coming to light or the case being reassessed by Commission and its

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[2] Section 67(2) reads as follows:

> 'A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct.'

[3] Tribunal decision para 67.

investigators. In the event, it held that the Commission had not given an adequate explanation as to its entitlement to reinstate the case and the application was thus dismissed.

The appeal

[13] The Commission appeals against the dismissal of the application to reinstate the referral and, as part of the appeal, persists in its interpretation of s 67(2).

[14] Central to the inquiry, is the meaning of the word 'completed' in s 67(2). Put differently, should proceedings be regarded as completed for the purpose of the statutory scheme under the Act ('the scheme') when the Commission has chosen to withdraw the complaint?

[15] The word 'completed' in s 67(2) is open to two possible interpretations: either the withdrawal of a complaint completes the case and thus a new complaint on the same cause is precluded; or the withdrawal alone is not enough and the case can only be rendered complete on the Tribunal making a determination of the complaint. On the latter interpretation, the Commission is allowed to re-refer or reinstate a fresh complaint on the same cause to the Tribunal.

[16] The determination of this issue disposes of the appeal.

[17] In *Sappi*, this Court identified the mischief to be addressed by s 67(2) as double jeopardy. An analogy was thus drawn between the scheme and the criminal procedure. The court held as follows:

> The Legislature enacted the relevant provisions to avoid a firm being "tried" twice for the same or substantially the same conduct. Put differently, the aim of the Legislature in introducing s 67(2) was to avoid "double jeopardy".[4]

[4] *Sappi* n 5 at paragraph [41].

[18] The Commission contends that the protections against double jeopardy in s 67(2) do not extend to the withdrawal of proceedings. From a practical perspective it argues that it should be entitled to withdraw a referral at any time during the proceedings before the Tribunal if it sees fit and in so doing not lose the right to bring proceedings again on the same cause.

[19] The underlying purpose of the rule, which is deeply entrenched in the Anglo-American system of jurisprudence and thus in our own,[5] is to limit the abuse of State power. It is useful briefly to trace important aspects of the rule's development in Anglo-American constitutional jurisprudence in order to understand its breadth and application in the rule of law.

The historical development of the rule against double jeopardy

[20] In his *Commentaries*, which greatly influenced the constitutional foundations of the principle, Blackstone recorded:

'... the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence' [6]

[21] In the same vein, in a defining case in relation to the constitutional values underlying the protection against double jeopardy, the US Supreme Court in *Green v US*[7] famously said the following:

'The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state

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[5] These special pleas of former jeopardy were first brought to the former colonies from the English law. The pleas were only later accorded their Roman and Roman Dutch incarnations in our courts. See *R v Manasewitz* 1933 AD 165 where the court explained the basis and ambit of the pleas in terms of Roman and Roman Dutch principles, namely the doctrine of res judicata but affirmed that the basic principles were the same.

[6] Blackstone's Commentaries 335.

[7] *Green v United States* 355 US 184 (1957)

of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[8]

[22] *Green* has had important implications for a question which is often framed, within the vast body of jurisprudence which covers this topic:When can jeopardy be said to 'attach' ?[9] It is generally accepted that, in a constitutional democracy, it is at this point that an accused should be afforded the constitutional protections which inhere in the rule against double jeopardy.

[23] In *Crist v Bretz*,[10] another jurisprudential landmark in the development of the constitutional prescripts of the rule which came some twenty years after *Green*, US Supreme Court explained that the reason for holding that jeopardy attaches when the jury is impanelled and sworn, is that the accused '[has a] valued right to have his trial completed by a particular tribunal'.[11] The court emphasised that the right of the accused to have his trial completed by the first tribunal he encounters is foundational to the rule.

[24] In our law it is specifically enacted that to allow the State to bring another prosecution on the same charge after an accused has pleaded would be unconstitutional.[12]

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[8] Ibid. at pp185-198

[9] In this case Mr Green was indicted and tried in a federal court for first degree murder. The judge instructed the jury that it could find him guilty of either first degree murder or second degree murder. The jury found him guilty of second degree murder and its verdict was silent on the charge of first degree murder. The trial judge accepted the verdict, entered judgment, dismissed the jury and sentenced Mr Green to imprisonment. On appeal, his conviction was reversed and the case was remanded for a new trial. Mr Green was tried again for first degree murder under the original indictment, convicted of first degree murder and sentenced to death notwithstanding his plea of former jeopardy. On appeal the Supreme Court set aside the conviction on the basis that Mr Green has indeed been formally in jeopardy.

[10] 437 US 28 (1978).

[11] Ibid. at 36

[12] Section 35(3)(*m*) decrees that:

'Every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted'.

[25] The enquiry in this case is whether the same constitutional protections are deserved in relation to the procedures under the scheme which are *sui generis* in nature.

[26] It is widely accepted that certain processes under the scheme resemble criminal procedures. In *Competition Commission v Pioneer Foods (Pty) Ltd*[13] this Court aptly expressed the position as follows:

'However, it does not seem to us that it is correct to treat proceedings arising from a complaint being referred to the Tribunal by the Commission as standing on the same footing as a conventional civil suit. First the proceedings are directed at adjudicating on conduct that is prohibited by the Act, in other words, on conduct that the legislature has seen fit to outlaw in the public interest. Second the Commission is representing the public interest and acts as 'claimant cum prosecutor'. The public interest is that interest that all South Africans have in open and unfettered competition in our economy. The Commission is assigned to this task because of the difficulties facing ordinary citizens in pursuing anti-competitive conduct through normal court channels. Third the determination by the Tribunal results, at least when an administrative penalty is imposed, in an order that resembles a fine imposed in criminal proceedings. As we have previously observed the proceedings before the Tribunal are a hybrid between criminal and civil proceedings.' [14] (Emphasis added)

[27] With this in mind, I turn to a comparative examination of the process of withdrawal in criminal procedure and under the scheme, with a view to understanding whether similar constitutional protections which are accorded to an accused as part of the right to a fair trial were intended by the Legislature to apply to the withdrawal under the scheme as part of the right to fair administrative process.

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[13] [2010] ZACAC 2.

[14] Ibid. at para 11. See also *Woodlands Dairy (Pty) Ltd & another v Competition Commission* 2010 (6) SA 108 (SCA) para 10.

Withdrawal of proceedings and double jeopardy

[28] Section 49B of the Act provides for the initiation of a complaint by the Commission and the submission of a complaint by any person. The Commission may, at any time 'after initiating a complaint', refer it to the Tribunal.[15] In terms of the form prescribed (Form CC 1) a concise statement of the conduct as well as the dates on which the conduct occurred are required. A complaint is therefore defined by the facts relied upon.[16] This has similarities to the drawing of a charge against an accused person.

[29] Upon initiating or receiving a complaint, the Commissioner must direct an inspector to investigate the complaint as quickly as practicable. If the investigation reveals that no prohibited practice or abuse has occurred, the Commission may not refer the complaint to the Tribunal. It may then issue a notice of non-referral if the complaint was submitted to it by a third party, in which case the third party may refer the complaint to the Tribunal.[17] This notice of non-referral has similarities to the *nolle prosequi* which may be issued in a criminal proceedings so as to allow for private prosecution.

[30] The investigation process under the Commission is unilateral. It requires neither the Tribunal's involvement nor any judicial oversight. In *Loungefoam*[18] the

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[15] Section 50 of the Act provides:

> '(1) At any time after initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal.
> (2) Within one year after a complaint was submitted to it, the Commissioner must—
> (*a*) subject to subs (3), refer the complaint to the Competition Tribunal, if it determines that a prohibited practice has been established; or
> (*b*) in any other case, issue a notice of non-referral to the complainant in the prescribed form.'

[16] See: *Novartis SA (Pty) Ltd v New United Pharmaceutical Distributors (Pty) Ltd (1)* (2001-2002) CPLR 74 (CAC).

[17] Section 51(1) provides:

> '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.'

[18] [2011] ZACAC 4 (6 May 2011).

Commission's powers of investigation were aptly described as 'inextricably linked to the Act's referral system in respect of complaints of anti-competitive conduct'[19] and the court explicitly compared an investigation by the Commission to a criminal investigation.[20] Part B of the Act provides the Commission with a number of powers that are couched in the language of criminal procedure. In fact, the wording of s 47(2) of the Act is almost identical to the wording of s 22(*b*) of the Criminal Procedure Act (CPA). Accordingly, it is clear that the Commission's investigative powers, especially the power to enter and search premises without a warrant, bear a strong resemblance to criminal procedures. No formalities are required for an initiation of the charge, save for a decision by the Commissioner to cause the commencement of an investigation into the alleged prohibited practice.[21] The Commission may add other firms or parties along the way in light the wide casting of s 49B(1)[22] and the informality of the procedure[23]. In *Woodlands Dairy*[24] the Supreme Court of Appeal considered the possibility of the Commission, during the course of its investigations, obtaining information about other firms or parties engaged in the alleged prohibited practice or about other transgressions. The Court held that in such circumstances the

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[19] Ibid. para 46.
[20] Ibid. para 44 and 45.
[21] *Competition Commission v Yara SA (Pty) Ltd* [2013] ZASCA 107; 2013 (6) SA 404 (SCA) at para 21.
[22] Section 49B reads as follows:
(1) The Commissioner may initiate a complaint against an alleged *prohibited practice*.
(2) Any person may—
(*a*) submit information concerning an alleged *prohibited practice* to the Competition Commission, in any manner or form; or
(*b*) submit a complaint against an alleged *prohibited practice* to the Competition Commission, in the *prescribed* form.
(3) Upon initiating or receiving a complaint in terms of this s, 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.
[23] See *Power Construction (West Cape) (Pty) Ltd v Competition Commission of South Africa* [2017] ZACAC 6.
[24] *Woodlands Dairy (Pty) Ltd & another v Competition Commission* 2010 (6) SA 108 (SCA).

Commission 'is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.'[25]

[31] As I have said, this Court in *Sappi* interpreted the purpose of the double jeopardy protection with reference to the potential for abuse of power within the broader process to which a respondent is made subject under the scheme. In finding that the bringing of a fresh complaint after a withdrawal of a defective referral was not competent the Court described the purpose of the protection thus:

'Initiating a "fresh" complaint (which in its own letter dated 8 August 2002 it concedes is the same complaint) amounts to harassment and vexatious investigation, which is no doubt prejudicial to the applicant subjected, as it would be, to multiple investigations on the same issue. This, in my view, cannot be what the Legislature intended. It would, in any event, not be consonant with the spirit of the Constitution'[26]

[32] The referral of the complaint to the Tribunal triggers the exercise of the Tribunal's adjudicative powers. The rules allow the Commission to engage the jurisdiction of the Tribunal by referral of the complaint and to disengage such referral from such jurisdiction by means of withdrawal.[27] This is the Commissions prerogative and is a power which is analogous to the powers of the Director of Public Prosecutions ("DPP") which may under s 6 of the CPA withdraw a criminal matter.[28]

[33] Central to the enquiry as to the meaning of s 67(2) is whether the consequences of a withdrawal under s 67(2) should, on the basis of the respondents'

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[25] Ibid. at para 36; *Loungefoam*) n 18 at para 53.
[26] *Sappi* at para 54.
[27] See Tribunal Rule 50(1) n 7.
[28] Section 6 of the CPA reads as follows in relevant part:

> 'An attorney-general [now the DPP] or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under s 8, may-
> (*a*) before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;
> (*b*) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused shall acquit the accused in respect of that charge. ..'

right to fair administrative process, be commensurate with the operation of withdrawal in the criminal sphere.

[34] In terms of the CPA, the consequences of the withdrawal differ depending on the stage reached in the proceedings. Section 6 allows the prosecution to withdraw a criminal charge at any time up to the stage of plea with no consequence to the charge. Once the accused has pleaded, however, the jurisdictional landscape changes – if the case is then withdrawn the accused is entitled to an acquittal. This entitlement arises because the accused has been subjected to the jeopardy of the process and is thus entitled to finality. The court has no discretion and the acquittal is a formality. The point reached in the trial at the stage of withdrawal is irrelevant.

[35] A fundamental purpose of the protection is to preclude a prosecutor who is dissatisfied with the way in which a process is unfolding before a particular tribunal from jettisoning the process in favour of a fresh start before a different tribunal or from buying itself more time. Obviously, the procedural power to withdraw a case and start over would be a considerable advantage in litigation. An accused would be considerably disadvantaged by such a facility. Information generated at the trial could reveal strategy and evidence to the general disadvantage of the case of an accused. The ability to start afresh would also have the potential to prolong the threat to a respondent. The expense and continued loss of reputation which could arise from a second process are also important factors. Furthermore, whereas the accused person could only get more time by persuading the trial court to give him or her a postponement, the prosecution could – as an alternative to persuading the court that it was entitled to a postponement – follow the simple expedient of withdrawing the proceedings and starting afresh. There is no doubt that these considerations are fundamental to the right to a fair trial.

[36] As the early constitutional treatment of the rule in Anglo-American jurisprudence shows, a material consideration is the point at which the adjudicating tribunal acquires jurisdiction. It is at this stage that subjection to the process becomes most acute. In a criminal case, this point is reached at the stage of plea. From this point the process is inexorable. If the accused refuses to plead, the court is obliged to enter a plea of not guilty which has the same effect as if it had been pleaded.[29] Once this stage is reached, the accused is entitled to the finality of a verdict purely because he has been in jeopardy.[30]

[37] Under the scheme, the jurisdiction of the Tribunal is acquired on referral of the complaint by the Commission. That is effectively the point at which the respondent is called upon to plead to the case. If the respondent makes no response to the initiating document within the prescribed period (of 20 days) the initiating party becomes entitled, on notice, to make application for an order from the Tribunal as sought in the initiating documents (ie the complaint referral). The Tribunal may then make an appropriate order after it has heard any required evidence concerning the motion.[31] Importantly, the referral process, like the criminal procedure, operates with automaticity once jurisdiction is acquired. If a respondent makes no submission to the jurisdiction of the Tribunal in that he does not respond to an initiating document, the

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[29] Section 109 of the CPA reads as follows:

'Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused and a plea so recorded shall have the same effect as if it had been actually pleaded.'

[30] Section 106(4) of the CPA reads as follows:

'An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.'

[31] Tribunal rule 53 (2) reads as follows:

'On an application in terms of sub-rule (1), the Tribunal may make an appropriate order –
after it has heard any required evidence concerning the motion; and
if it is satisfied that the initiating document was adequately served.

filing of documents becomes completed (subject to condonation) at the time that the period for filing an answer to the referral expires.[32]

[38] Tribunal rule 50(1) allows the initiating party unilaterally to withdraw a case which is before the Tribunal. Form CT8 to the Tribunal rules is the instrument by means of which the withdrawal is effected. It provides for the withdrawal of the 'initiating document', and an option is given for the complete or partial withdrawal of the initiating document, in which latter event, the part withdrawn is required to be specifically identified. A withdrawal may be effected at any time before the Tribunal has determined the matter. Thereafter, parties may not, by agreement, seek to vary the terms of an order of the Tribunal.[33] This is obviously because of the public implications of such an order.

[39] The procedure under the scheme differs from the criminal procedure in that it does not provide for a formal 'acquittal'. Thus, a respondent against whom a case is withdrawn does not have the express right on withdrawal to demand a dismissal of the claim. The question is whether this difference suggests that the Legislature did not intend that a respondent be allowed the same protection on withdrawal.

Discussion

[40] As *Endumeni* [34] emphasised, statutory interpretation should be purposive and contextual. The aim is to identify the mischief that the statute seeks to address.[35]

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[32] Tribunal rule 19 which has the heading 'Completion of Complaint File' reads as follows:

> 'Subject to any order made in terms of Rule 18 or Rule 22, the filing of documents is complete when a Complaint Referral or Answer has not been responded to within the time allowed.'

And Tribunal rule 53(1) reads as follows

> 'If a person served with an initiating document has not filed a response within the prescribed period, the initiating party may apply in accordance with Part 4 – Division E to have the order sought issued against that person by the Tribunal.'

[33] *Competition Commission v Pioneer Foods (Pty) Ltd* (91/CAC/Feb10) [2010] ZACAC 2 (15 October 2010) at para [10].

[34] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[35] Ibid. at para 21.

Section 39(2) of the Constitution requires of courts that they promote the spirit, purport and objects of the Bill of Rights in the interpretive process. If a provision is open to multiple plausible interpretations, then the one that best conforms with the Constitution should be preferred[36]

[41] In *Wary Holdings*[37], the Constitutional Court said the following regarding competing interpretations of a statute:

'This Court has not yet been called upon to deal with the situation where two conflicting interpretations of a statutory provision could both be said to promote the spirit, purport and objects of the Bill of Rights and the decision to be made is whether the one interpretation is to be preferred above the other. It seems to me that it cannot be gainsaid that this Court is required to adopt the interpretation which *better* promotes the spirit, purport and objects of the Bill of Rights. That would, after all, be a more effective '[interpretation] through the prism of the Bill of Rights'.

[42] The Commission is the only organ of State empowered to investigate and police restrictive practices and abuse of market dominance in the South African economy. That it requires extensive powers to enable it to carry out its function is undeniable. It is a venerable public institution which has played and continues to play an essential role in securing the protection and promoting the welfare of the economy and the economic rights of citizens. The importance of its role is brought into sharp focus in times, such as the present, when the economy is reeling from the effects of corruption, poor leadership and the general havoc which the Covid 19 pandemic has brought to the world.

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[36] *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) ; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2010 (6) SA 108 (SCA).*

[37] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC).

[43] In the recent case of *Pickford's*, the Constitutional Court was called upon to determine whether s 67(1)[38] of the Act constituted a procedural time-bar which allowed for condonation in terms of s 58(1)(*c*)(ii) or an absolute substantive time-bar. In weighing the interests of finality against the public's interest in the Commission's ability to police and restrain trade practices which undermine a competitive economy, the Court struck the balance in favour of the public interest. It found that a substantive time bar against the Commission would not be in the interests of justice in that much of the conduct prohibited under the Act was clandestine and thus the Commission was called upon to conduct investigations under circumstances where it would be penalised for the surreptitious nature of the practices and the companies essentially rewarded for such conduct.

[44] In the wake of *Pickford's*, the Commission applied for and was granted leave to file supplementary heads of argument. It argues that a similar weighing up process to that adopted in *Pickford's* must be undertaken in relation to s 67(2) and that, in the balancing of rights as part of the process of determining which of the two interpretations better promotes the spirit, purport and objects of the Bill of Rights, the important public purpose of Commission must be held as paramount.

[45] This argument fails to take account of two considerations. First, the ability of the Commission to prosecute effectively is not materially affected by it not having the right to withdraw and reinstate the same case. Second the constitutional rights implicated in the rule against double jeopardy are of such a fundamental nature that to make inroads into them would not be lightly resorted to by a court.

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[38] Section 67(1) reads as follows: 'A complaint in respect of a *prohibited practice* that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal.'

[46] As to the first consideration, the powers of the Commission in relation to the investigation and prosecution of complaints are wide enough to meet the Act's purpose. The Commission's argument that there would be a failure of justice if a respondent were allowed to escape accountability on what appears to be a technicality, loses sight of the fact that, in the proper course, the Commission as a specialist administrative body is called upon to apply its expertise in considering the merits of the case in relation to whether withdrawal would be a proper course. These powers and functions are analogous to those of the DPP to institute and withdraw proceedings as it sees fit. The Commission, like the DPP is required to evaluate the evidence gleaned from the investigative process and take a decision as to whether there should be a referral of the complaint to the Tribunal.

[47] The Constitution requires that the powers of referral and withdrawal be exercised rationally.[39] Thus, if the statutory scheme operates as it is meant to, there is little, if any, scope for injustice in the form of a guilty respondent not being brought to book. A decision to withdraw will be taken after careful analysis by the Commission of the evidence and the weighing up of the prospects of success on the complaint; if the matter is persisted with, there will be a determination on the merits of that complaint by the Tribunal. In either event, the purpose of the scheme is met.

[48] The Commission's ability to amend its referral is relatively extensive. The procedure under the scheme allows for postponement for further investigation and the adding of respondents as the case develops. This flexibility serves the function and

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[39] See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17.

purpose of the Commission and allows it to build its case organically should this be necessary. The inquiry contemplated by the Tribunal as to whether there is new evidence or a re-evaluation of the case such as would allow for a change in the case can and should take place in the context of an application to amend.[40] The principles pertaining to amendment take account of prejudice whilst still allowing substantial latitude for development of the prosecution. It is fitting that, at this stage of the process, the Tribunal being now seized with the case should have some oversight in relation to the development of the prosecution.

[49] As to the second consideration, on the Commission's interpretation, the scope for the abuse of power is manifest. Such an interpretation allows the Commission unilaterally to 'postpone' cases which it has referred to the Tribunal at a time of its choosing and for a period of its choosing, irrespective of the prejudice which may be occasioned to the respondent. The Commission argues, however that, on its interpretation of s 67(2), a respondent would not be without a remedy in that the courts could be approached for relief under the doctrine of abuse of power. It seems to me that this would be of little comfort to a respondent who contends that he is being subjected to harassment and abuse by repeated prosecutions. After all, were it accepted that the Commission is allowed the facility of withdrawal with impunity, a respondent would be hard pressed to prevent its use by the Commission. To my mind, the broad nature of the powers which the Commission already has militates against the construction contended for by it. Such powers have now also been considerably extended by the decision in *Pickford's*.

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[40] See *Sappi* n 5 at para 54.

[50] The concept of seeking a postponement from an adjudicative body is well known. If one of the parties, in complaint proceedings before the Tribunal, requires further time, it can apply to the Tribunal for an extension of time or, in the case of proceeding set down for a specified date, a postponement. Applications for postponements are common in the Tribunal's proceedings. Familiar considerations apply. If the Commission for any reason considers that it should not be required to proceed with a case on a specified date, it is right and proper that it should satisfy the Tribunal that there is a case for postponement. A respondent in the proceedings is similarly placed. If the postponement is justified, it will be granted; if it is not justified, it will be refused, and this is as it should be, because the Tribunal is entitled to regulate its own processes. It is not only unnecessary, but amounts to irrational differentiation, that one party (a powerful State organ) should have the unilateral alternative of a withdrawal and reinstatement while the other party (a private entity) does not.

[51] From a general perspective, it is telling that the Commission is silent as why it should be afforded this procedural power. On the face of it such a power appears disproportionate, superfluous and unconstitutional. The double jeopardy protection in s 67(2) would be of limited value to a respondent if it allowed for repeated harassment in the context of all that the process entails.

[52] A further consideration militating against the Commission's interpretation is that the notion of 'reinstating' a withdrawn complaint referral finds no mention in the Act or the Tribunal's rules. The Tribunal did not explain the source of its power to reinstate withdrawn proceedings. One would have expected such a procedure to have been expressly regulated if it was envisaged.

[53] To my mind, s 67(2) must be interpreted broadly and as a constitutional protection which is analogous to that created under s 106(4) of the CPA.[41] The word 'completed' in its ordinary and natural meaning can be applied to proceedings which have come to an end in one way or another – whether following a trial on the merits, a consent order or an abandonment of the proceedings by way of withdrawal.

Further aspects to consider

[54] Two further important anomalies which would arise if the procedure were to operate as contended for by the Commission and Tribunal bear mention. They too relate to unfairness and lack of finality.

[55] As noted above, the unfairness of allowing one party simply to stop the proceedings with impunity and thereby circumvent the balancing of rights which inheres in the postponement process is not taken account of in the Tribunal's judgment. In this case the Commission opted for the withdrawal procedure on the basis that it preferred not to apply for postponement. The existence of such an option would not constitute fair process.

[56] Furthermore, the Commission's interpretation of s 67(2) would lead to difficulty in determining when the cut-off date is reached in relation to the time bar laid down in s 67(1). In light of the decision in *Pickford's,* this may not be of substantive weight, but it is still important for the purposes of applying the law as to a procedural time bar and specifically, the question of condonation.

Conclusion

[57] In summary, jeopardy attaches at the time the Tribunal acquires jurisdiction which is the time of the delivery (service and filing) of the initiating documents (the complaint referral). Withdrawal of these documents as provided for in CT8 must be

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[41] See n 30.

construed to have the effect that the proceedings are brought to an end, ie 'completed' as contemplated in s 67(2), and thus cannot be reinstated or referred again to the Tribunal. In essence, on withdrawal, the respondent should be allowed the certainty of knowing that the Commission regards the case as completed.

[58] The interpretation of s 67(2) cannot be affected by the particular facts of this case. I merely observe that the problem for the Commission in this case is not a problem created by the interpretation I regard as correct. It is a problem created by the fact that the Commission stubbornly persisted in standing by its withdrawal of the proceedings despite the fact that neither of the respondents was willing to have the case postponed and despite the fact that at least one of the respondents invited the Commission to retract its withdrawal. Had the Commission done so, it could either have proceeded with the case on the Monday or, if it could justify same, applied for a postponement. The meaning of the section should not be twisted in order to extricate the Commission from the hole which it dug for itself. If the scheme is properly followed, there are in truth not two competing constitutional considerations. The Commission has only need in this case to invoke the importance of its public functions because it seemingly took a wrong view of the legislative scheme.

[59] If the Commission misapprehended the meaning of s 67(2), its remedy, as in the case of most aberrations in administrative process, may be self-review in relation to the Commission's decision to withdraw. I express no view as to whether self-review in the present case would have any prospects of success.

[60] I thus uphold the Tribunal's order, but for different reasons.

Costs

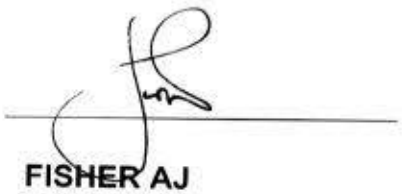
[61] The first respondent sought punitive costs on the basis of an argument that the decision to withdraw was made in bad faith and in a bid to avoid having to deal with a

postponement for which it apparently had no grounds. The second respondent pressed only for costs on the same scale as those awarded the first respondent. I cannot find on the correspondence between the parties that there was such bad faith. The correspondence points to error rather than guile. In the circumstances I am not disposed to grant costs on a punitive scale. Where two counsel were employed in this matter I see no reason to deny the costs of both counsel.

Order

[62] I thus order as follows:

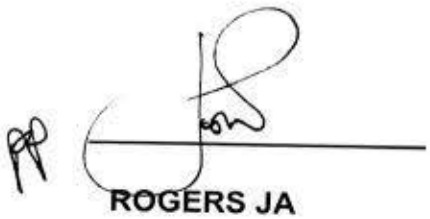
1. The appeal is dismissed;
2. The Commission is to pay the costs of the respondents including the costs of two counsel where employed.



FISHER AJ

Acting Judge of appeal

Concurring:



ROGERS JA

Judge of appeal

MNGUNI JA

Judge of appeal

Appearances

For the appellant	: Adv V S Notshe SC.
Instructed by	: The Competition Commission of South Africa.
For the first respondent	: Adv G Marriott.
Instructed by	: Manley Manley Inc.
For the second respondent	: Adv M Le Roux.
Instructed by	: Werksmans Attorneys.

Hearing date: 29 May 2020

Supplementary heads delivered: 10 July and 15 July 2020

Delivered: 03 August 2020