COMPETITION APPEAL COURT OF SOUTH AFRICA

Case 192/CACFeb21

In the matter between:

CROSS FIRE MANAGEMENT (PTY) LTD Appellant

and

THE COMPETITION COMMISSION OF SOUTH AFRICA Respondent

Coram: Rogers JA and Fisher and Unterhalter AJJA

Heard: 10 December 2021

Delivered: 10 February 2022

ORDER

On appeal from the Competition Tribunal:

1. The application for condonation is dismissed.
2. The appeal succeeds.
3 Paragraphs 2 and 3 of the Tribunal's order are set aside and replaced with the following order: "The Commission's complaint against Cross Fire Management (Pty) Ltd is dismissed."
4. The respondent in the appeal must pay the appellant's costs in the appeal and in the condonation application, including the costs of two counsel.

JUDGMENT

ROGERS JA (Fisher and Unterhalter AJJA concurring):

Introduction

[1] The appellant, Cross Fire Management (Pty) Ltd (Cross Fire), was a respondent in complaint proceedings brought by the present respondent, the Competition Commission of South Africa (Commission), in the Competition Tribunal (Tribunal) against seven firms in the business of supplying and installing fire control and protection systems. The Commission alleged that five of them had engaged, with others, in prohibited conduct in the form of collusive tendering in violation of section 4(1)(b) of the Competition Act 89 of 1998 (Act). These five firms were Afrion Property Services CC (Afrion), Belfa Fire (Pty) Ltd (Belfa), Cross Fire, Fire Protection Systems (Pty) Ltd (FPS) and Tshwane Sprinklers CC (Tshwane Sprinklers). The Commission had a separate and discrete complaint of market division against the other two respondents, Fireco (Pty) Ltd (Fireco) and KRS Fire (Pty) Ltd (KRS, formerly Fireco Gauteng (Pty) Ltd).

[2] Before the Tribunal hearing began, settlements were reached between the Commission and Afrion, FPS and KRS. Shortly after the start of the Tribunal proceedings, Fireco reached a settlement with the Commission. The proceedings then continued against Belfa, Cross Fire and Tshwane Sprinklers. Belfa was only represented at the hearing on the first three days, apparently because it ran out of money.

[3] The Tribunal dismissed the complaint against Tshwane Sprinklers but found the case proved against Belfa and Cross Fire. Administrative penalties of R10,100,126 and

R12,894,000 were imposed on Belfa and Cross Fire respectively. Cross Fire appeals the Tribunal's finding that it contravened section 4(1)(b) and the penalty.

[4] It is not now in dispute that for some years Cross Fire was party to the prohibited conduct of which the Commission accused the respondent firms. On the merits, the important questions are whether Cross Fire's prohibited conduct ceased before the Commission initiated the complaint and, if so, when its conduct ceased. This is relevant because section 67(1) of the Act, as it read at all times material to this case, provided: "A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased." The complaint was initiated on 13 March 2015, so the question is whether Cross Fire's prohibited conduct ceased before 13 March 2012. The Tribunal held not.

[5] If this Court finds that Cross Fire's prohibited conduct ceased before 13 March 2012, the Commission asks us to condone its non-compliance with the time-limit imposed by section 67(1). That the Tribunal may in principle condone non-compliance with section 67(1) was settled by the Constitutional Court's judgment in *Pickfords*,[1] delivered on 24 June 2020. The Commission did not bring a condonation application in the Tribunal but has brought such an application in this Court. If we reach the issue of condonation, the questions which arise are whether this Court – as distinct from the Tribunal – has jurisdiction to grant condonation and, if so, whether it should do so; and, if we find that this Court lacks jurisdiction to grant condonation, whether we can and should remit the case to the Tribunal to deal with condonation.

[6] The Act came into force on 1 September 1999. The prohibited conduct started before that date and continued afterwards. Although Cross Fire pleaded that the incidents of collusive tendering occurred *ad hoc*, it does not now contest the Tribunal's finding that there was an overarching understanding in terms of which the collusive tendering took place, even though collusive tenders made up a relatively small part of

[1] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2021 (3) SA 1 (CC); 2020 (10) BCLR 1204 (CC) (*Pickfords*).

tenders in which Cross Fire participated (the collusive tenders specified by the Commission comprised on average fewer than 2% per annum of the tenders in which Cross Fire participated). The understanding was that from time to time the firms would favourably consider requests made by one of them to provide the requesting firm with cover bids, i.e. bids at higher prices than those which the requesting firm intended to submit.

The evidence

[7] In its complaint referral, the Commission attached a cumulative schedule setting out all the projects alleged to have been the subject of collusive tendering as well as individual schedules listing the projects in which each respondent firm was alleged to have engaged in prohibited conduct. Cross Fire was alleged to have participated in 33 collusive tenders over the period May 1996 to August 2015. Leaving aside the six instances predating the commencement of the Act, Cross Fire stood accused of prohibited conduct in 27 tenders. Cross Fire admitted collusion in 14 of these projects. The most recent of the admitted instances occurred in July 2009. In view of the finding of an overarching understanding, these 14 tenders were instances where Cross Fire gave effect to the understanding either by requesting or providing cover bids.

[8] The Commission adduced no direct evidence against Cross Fire. There were some incriminating documents. More importantly, in its answering affidavits and witness statements, Cross Fire admitted 14 instances of collusion. This position was maintained by its witnesses, Ms Catherine Stewart, Mr Anton Kriel and Mr Hermand Rampursat. With one possible exception, the Tribunal made no factual findings against Cross Fire in relation to projects where Cross Fire denied collusion. The important question, therefore, is whether Cross Fire's absence from collusive tendering after about mid-2009 until the Commission initiated the complaint in March 2015 was because – as Cross Fire says – it had withdrawn from the overarching understanding, or whether it just so happened that in this period of just under six years it neither requested nor gave cover bids to firms with whom it was still in a collusive relationship.

The early years

[9] The only direct evidence to explain Cross Fire's absence from collusive tendering after mid-2009 came from the Cross Fire witnesses. Ms Stewart started working in this industry at the age of 21, first for Belfa. In 1994 she moved to Fire Control Systems (Pty) Ltd (FCS), a firm which was involved in the collusion but which went into liquidation in early 2015 and was not cited as a respondent. She joined Cross Fire in 1997. In 2000 she moved from design to sales, and it was at this time that she was exposed to the long-standing practice of cover pricing. The company was headed by Messrs John Cross and David Dalgleish. The industry was dominated by men who had known each other for many years. According to Ms Stewart, she was frustrated by the collusion. Sometimes her hard work in preparing tenders came to nought when it emerged that Mr Cross had agreed the outcome with a competitor.

[10] Mr Dalglish sold out to Mr Cross in 2003. According to Ms Stewart, Mr Dalglish had been a leading protagonist of collusive conduct. Ms Stewart and Mr Kriel were promoted to more senior positions, allowing them to exert some, though still slight, influence. In December 2004 Ms Stewart acquired a modest shareholding in the company. In February/March 2007 Mr Kriel became the company's sales director, and Ms Stewart moved to the position of projects and operations director. Mr Cross was still the managing director. She and Mr Kriel had quite heated arguments with Mr Cross about cover pricing. Mr Cross did not share their confidence that the company could conduct itself legitimately and still succeed.

The One Monte project

[11] According to Ms Stewart and Mr Kriel, the first project where their resistance to collusive conduct came significantly to the fore was the One Monte Project in Johannesburg in late 2008/early 2009. One Monte was not one of the collusive projects listed in the Commission's complaint referral. The fire protection tender was managed for the client by Trevor Williams Consulting Engineers (TWCE). Only Cross Fire,

Belfa and FCS were invited to tender. A collusive arrangement was reached for Belfa to win the tender, Cross Fire being represented in this deal by Mr Cross. It turned out, however, that Mr Cross was out of the country when tenders were to be submitted. According to Ms Stewart and Mr Kriel, they took the opportunity to extricate Cross Fire from the collusion. This they did by not submitting a tender at all. Ms Stewart acknowledged that another reason for not participating in the tender was that the cover prices Belfa was asking Cross Fire to submit were "crazy".

[12] Ms Stewart testified that it was most unusual for an invited firm not to submit a tender. If the firm did not want the work (for example, because it was technically complicated or the firm was too busy or did not like the principal contractor), the firm would usually prefer still to submit a high (non-competitive) bid in order to stay on the consultant's invitation list. If a firm decided not to tender at all, it would give an explanation. According to Mr Kriel, he gave such explanation – he told Mr Williams Cross Fire was too busy.

[13] Nevertheless, the absence of a tender from Cross Fire elicited a call to Ms Stewart from Mr John Goring, manager of the industry association, Automatic Sprinkler Inspection Bureau (ASIB).[2] She told him that they did not want to be part of the industry collusion. She surmised that this would get back to TWCE and to the industry, and she later concluded that her surmise had been right. In its tender report dated 14 February 2009, TWCE noted that Cross Fire had not submitted a tender, citing a large workload as the "official reason". Subsequent discussions, according to TWCE, indicated "that the actual reason for declining to tender appears to be the fact that they were unwilling to participate in the collusion which took place between the other two parties." Ms Stewart believed that this information must have reached TWCE from

[2] Ms Stewart testified that ASIB (Automatic Sprinkler Installation Bureau) was a private company which carried out third-party inspections on fire sprinkler installations. Firms could list with ASIB on an annual basis, and ASIB would then inspect the firm's work to determine whether it complied with the ASIB Code. According to her, most of the firms in the industry belonged to ASIB. ASIB's website states that it was established in 1970 by the country's short-term insurers.

Mr Goring. TWCE recommended that the tender not be awarded and that serious consideration be given to taking action against Belfa and FCS for possible collusion.

Nampak Kliprivier project

[14] According to Ms Stewart and Mr Kriel, this decision destabilised the cartel and gave rise to a price war which lasted for some years. Ms Stewart testified that Cross Fire never again colluded with Belfa; Cross Fire consistently tried to reduce prices and outwit its opposition, she claimed. But she also faced Mr Cross' wrath for having reneged on the collusive deal he had struck. The strength of her resolve, in the immediate aftermath of the One Monte tender, was tested in relation to the Nampak Kliprivier project. Although in her answering affidavit Ms Stewart denied collusion in this project, supplementary discovery from the Commission led her to the conclusion, which she acknowledged in her witness statement, that she had collusively shared pricing information with Mr David Ford of Independent Fire (not one of the firms cited in the Tribunal proceedings).

[15] In her oral evidence she testified that she still had no independent recollection of the matter, but she inferred from an email she sent to Mr Ford on 1 July 2009 that she must have intended Independent Fire to provide a cover bid for Cross Fire at the prices she furnished to him. She was not the author of the document she emailed to Mr Ford. In her witness statement she said: "I deeply regret my conduct and I surmise that at the time I lacked sufficient authority to overrule the instruction to share Cross Fire's prices with Independent Fire." In the event, the project was not awarded to Cross Fire, and Ms Stewart thought that it never went ahead.

Ms Stewart becomes managing director

[16] In August 2009 Ms Stewart succeeded Mr Cross as the company's managing director, though the latter remained a director. This, she said, enabled her to bring an end to collusion, though she had been expressing her opposition to it for some years, and by 2009 she and Mr Kriel were taking a stand that they had "had enough". It was

also around this time that there was wide publicity about the Commission's uncovering of collusion in the construction industry. Fear of financial penalties and prejudicial effect on her shareholding were added incentives to withdraw from collusion.

The VW Centurion project

[17] After the Nampak Kliprivier project, the next case of collusion alleged against Cross Fire was said by the Commission to have taken place in August 2009, the month in which Miss Stewart became managing director. This was the VW Centurion Warehouse project. Mr Kriel was the person who had knowledge of the project. He testified that in 2008 or early 2009 he was approached by a Mr Esterhuizen of Volkswagen about the most cost-effective way of configuring Volkswagen's new warehouse in Centurion. At Mr Esterhuizen's request, Mr Kriel gave him "budget prices". He and Mr Esterhuizen worked through 15 iterations of the estimates as the plans underwent change. "Budget prices" in this context did not mean very low prices, but amounts which Volkswagen should include in its budget for the project, typically on a worst-case scenario.

[18] At some stage towards the end of this planning process, Mr Esterhuizen asked Mr Kriel to contact other fire protection firms to confirm that Cross Fire's budget prices were market-related. For this purpose, on 20 August 2009 Mr Kriel sent Mr Ford an email with these prices. This was still part of the "exploratory phase" of Volkswagen's Centurion project.

[19] About two months later, Volkswagen decided to issue a tender. According to Mr Kriel, Cross Fire prepared its tender independently, submitting aggressively low prices at a margin of less than 10%. Cross Fire won the tender. The record does not contain any documents about the tender. There is no evidence that Independent Fire submitted a tender or, if it did, that its prices justified an inference of cover bidding. Mr Ford, although he was a whistleblower in relation to collusion in the fire protection industry, does not seem to have supplied the Commission with any hard evidence on this project. The Commission did not file a witness statement from Mr Ford or from

his colleagues at Independent Fire, Messrs Prinsloo and Odd. The Commission's investigator, Mr Monareng, testified that Mr Ford was not a witness because he "fears the mob" and had stopped replying to the Commission's emails. Ms Stewart testified that she had heard a rumour that Mr Ford was deceased.

[20] The last payment Cross Fire received from the client in respect of the successful VW Centurion project was on 19 July 2011. The relevance of this is that if VW Centurion was a collusive tender forming part of the overarching understanding, the effects of this particular act of collusion arguably lasted until 19 July 2011. Although Cross Fire submits that this was not a collusive tender, its alternative argument is that this was the last collusive tender. The final payment on 19 July 2011 predated by eight months the three-year window period for complaint initiation in terms of section 67(1).

The last five alleged collusive tenders

[21] I shall return presently to the Tribunal's findings in relation to the VW Centurion project. What I note here is that the instances of collusion which the Commission alleged against Cross Fire subsequent to the VW Centurion project were the following five projects: Two River Platinum in April 2011 (Cross Fire and FCS); Makro Cape Gate in October 2011 (Cross Fire, Belfa and FCS); Makro Alberton in July 2012 (Cross Fire, Belfa and FCS); Makro Bloemfontein at an unspecified time in 2012 (Cross Fire and Belfa); and Makro Carnival (Cross Fire, Belfa and Tshwane Sprinklers).

[22] The Tribunal did not find any of these instances of collusion to be established against Cross Fire. There is nothing to gainsay Ms Stewart's evidence of an absence of any collusion with Belfa after the One Monte project. Tshwane Sprinklers, as we know, was acquitted, and the Commission did not adduce any evidence from persons associated with FCS. It is also noteworthy that even on the Commission's case there was, in relation to Cross Fire, an hiatus in collusive tenders from August 2009 to April 2011.

The anti-collusion presentations and related anecdotal evidence

[23] Ms Stewart testified that in June 2010 she made a presentation to Cross Fire's board on a five-year vision for the company. The other directors were Messrs Cross, Kriel and Netherlands. One of the points she wanted to address was collusion. She testified that in her view they had already made inroads in distancing the company from collusive behaviour "and I wanted once and for all a decision to be made that we weren't going to go that way going forward". In a slide dealing with "reasons we may fail (things to avoid)", she included in her list (emphasis in the original), "Getting busted for **COLLUSION**". Her next slide was headed "Collusion vs Squeaky Clean". I quote the text of the slide (emphasis in the original):

> "• Definition of Collusion: A secret agreement between two or more parties for a **fraudulent, illegal** or **deceitful** purpose.
> • Collusion is **criminal** – it rates up there with not paying tax.
> • Cross Fire's **longevity** and **reputation** is **at risk**.
> • Cross Fire is **Squeaky clean –** put the word out that we price things our way."

[24] Ms Stewart testified that at the board meeting this position on collusion was "adopted as an official policy" and was communicated to all relevant staff members. This was confirmed by Mr Kriel, who was present at the board meeting. Ms Stewart specifically recalled sharing the slide on collusion with staff at a meeting on 23 July 2010. She testified that Cross Fire did not formally notify competitors of its position. However, and although she could not recall specifics, she said that when competitors contacted them, they were told "we no longer collude, go away" . If clients or consultants wanted Cross Fire to arrange quotes from competitors, Cross Fire would refer them to the ASIB website which listed the competitor firms.

[25] Mr Kriel gave similar evidence. He said the fallout from the One Monte project was an enduring price war. Competitors had "really clearly got the message". He recalled one occasion where Mr Ford of Independent Fire phoned him and asked for a cover price. Mr Kriel told him, "look we don't do that". It is thus not without

significance that when Mr Ford in his blackmail correspondence (see below) listed the members of the "mob", he did not name Mr Kriel.

[26] Mr Kriel also testified that subsequently, when they went to tender openings at which competitors were present, "we made it quite clear that we'd sort of withdrawn from that sort of behaviour". He remembered one particular tender opening where, before the consultant arrived, he was giving his competitors "a bit of a rough time because their pricing was so ridiculously low". These competitors included Mr David Odd (at that time with Belfa), Mr Steven Ayerst (of FCS) and someone called Marco (from Accurate Fire). Mr Ayerst retorted that Cross Fire had chosen to cause the fight.

[27] On another occasion, Ms Stewart and he went to a restaurant for lunch with a client, and happened to encounter Mr Ayerst and FCS' managing director. Mr Kriel saw them ordering very expensive whiskey and commented that "we can't afford such expensive whiskey, we're just drinking beers", to which Mr Ayerst riposted, "Ja, well you guys chose that path, you know, you chose to extricate yourself from this collusion and that's why you can't afford the whiskey". Interactions of this kind convinced Mr Kriel that the opposition was well aware of Cross Fire's anti-collusion stance.

[28] Mr Rampursat, even though in 2010 he was still part of the design team, confirmed that he was present at a meeting when Ms Stewart made an anti-collusion presentation. He was again reminded of the policy when he became the sales manager in February 2012. Mr Rampursat, who became sales director in February 2014, testified that all bids submitted through his office were arrived at independently. He said, of the position since he joined the sales team in February 2012, "I can say with a degree of certainty that if Cross Fire was engaged in collusive practices at all, it would likely have come to my attention".

[29] In his sales director's report for September 2011, Mr Kriel discussed the competitive environment. He believed FCS was targeting Cross Fire in the belief that

Cross Fire was on the brink of financial failure. Belfa, in turn, was believed to be lowering standards in order to complete projects taken on at low margins. His conclusion on this aspect of his report is consistent with an anti-collusion stance:

> "• Considering the above I believe that the pursuit of an installers association by mostly FCS and Belfa is a thinly veiled attempt to firstly manipulate pricing in the market and to get some insights into where exactly [Cross Fire] is concerning work.
> • I would caution the pursuit of the installers association at a time when the competition commission is investigating the construction industry. We could ill afford to pay 10% of our annual turnover as a fine."

Evidence from competitors

[30] Mr Bruce Thomas was the only witness called by the Commission who had some personal knowledge of the collusive tendering. He joined FPS in 2008. Although he had been in the industry for many years, it was only in 2008 that he moved from design to tendering. He could not say when collusive tendering began. It was a *modus operandi* handed down to him by Mr Roy Kruger, who was FPS' sole director at the time. He confirmed that FPS had colluded with Belfa in four of the tenders alleged by the Commission over the period 2008-2013. He had not found documents implicating FPS in any of the other tenders alleged by the Commission.

[31] He was asked by the Commission's representative whether FPS had ever engaged in collusive tendering with Cross Fire. He replied, "No, not to my knowledge". When a member of the Tribunal probed whether collusion might have been arranged with Mr Kruger without his knowledge, Mr Thomas replied that he did all the tendering, so Mr Kruger could not have submitted a price without his knowledge.

[32] He was asked whether Mr Kruger ever told him about a communication from Cross Fire that they were now "squeaky clean" and that this should be "put out there". He replied that he had no knowledge of such a conversation, adding that he had never had any dealings with Cross Fire personally.

[33] The Commission did not call witnesses from any of the other firms with whom settlement agreements were reached or from firms, such as FCS and Independent Fire, which had not been charged. In his opening address in the Tribunal, the Commission's representative said that the Commission intended calling Mr Charles van Deventer, a Belfa employee, to establish collusion between Cross Fire and Tshwane Sprinklers and, by so doing, to demonstrate that the prohibited conduct had not ceased more than three years before the date of the complaint initiation. The Commission did not, in the event, call Mr van Deventer. It appears that the Commission reached a provisional settlement with Belfa in October 2018, which was retracted after it emerged that Belfa was unable to offer the Commission additional evidence to establish its case against the other respondents. By that time, the only other respondents with whom the Commission had not settled were Cross Fire and Tshwane Sprinklers.

[34] Before the case was adjourned for argument, counsel for Cross Fire said that if the Tribunal wanted to hear from Mr Cross, Cross Fire's legal representatives were willing to call him; and that if the Tribunal wanted to subpoena Mr van Deventer, Cross Fire was quite happy for that to happen: "We are utterly confident in the case we have brought, and if the Tribunal wishes to hear from any party, they are welcome to exercise their inquisitorial powers and hear from them." The chairperson said that the Tribunal would discuss the matter. The Tribunal evidently decided not to exercise its inquisitorial powers.

Mr Ford's threats

[35] On 4 March 2014 Mr Ford sent the first in a series of emails evidently designed to induce the buying of his silence. He claimed to have compiled a list of collusive projects and all supporting documentation regarding the cartel. He claimed that this had been on his conscience for many years and he felt it only right to report this to the Commission and become a "state witness". His conscience was evidently somewhat contingent, because he said that "if" he went down, he intended taking everybody down with him. Ms Stewart replied by email, asking Mr Ford to call her or let her have his number so that they could chat.

[36] Another email from Mr Ford followed on 14 March 2014. He said he did not know whether Mr Cross had spoken to the "main players of the mob" to discuss Mr Ford's intentions and possible solutions. All he could give Ms Stewart was two weeks to try and resolve the issue. He listed the members of the "mob". There were no names from Cross Fire on the list, though Mr Cross was mentioned in the body of the email. Ms Stewart again replied by email, asking what kind of solution Mr Ford was looking for.

[37] On 21 March 2014 Mr Ford sent Ms Stewart a third email. He said he had the impression that the "gangsters" thought he was bluffing. He attached random scans for her to look at. He said he had kept all the deals made with Independent Fire over the last 11 years. He would be implicating all and sundry. He anticipated fines in the millions, loss of future revenue, possible closure of some companies, and civil cases. He concluded: "Come up with a decent proposal and I'm out of your face." On 26 March he sent her another email simply attaching something called "trade.pdf".

[38] Ms Stewart testified that there were several telephone conversations between Mr Ford and her in March 2014. Mr Ford evidently wanted something, but never defined exactly what it was, though she inferred it was money. She felt harassed, because Mr Ford evidently saw her as an intermediary between himself and the industry's old guard, and it was not a position she wanted to occupy. She did not contact any of the role players in response to Mr Ford's approaches. She did, however, consult Ms Lesley Morphet, a competition lawyer at Webber Wentzel. In a letter dated 27 March 2014, Ms Morphet told Mr Ford that she was instructed that his threats were without foundation insofar as Cross Fire was concerned and that Cross Fire was satisfied it had nothing to fear from the competition authorities. She pointed out that a complaint could only be initiated in respect of conduct taking place within the last three years, over which period Cross Fire's conduct had been "exemplary". She warned Mr Ford that his letters amounted to attempted extortion.

[39] Mr Ford did not make contact with Cross Fire again. Whether he made approaches to others is unknown. Eventually, on 25 February 2015 he supplied information to the Commission, which led to the complaint initiation on 13 March 2015.

[40] On 6 June 2014 Ms Veronica Cadman, a competition attorney, conducted a comprehensive competition law compliance training programme at Cross Fire. Ms Stewart testified that Mr Ford's threatening emails had given her a "wake-up call", which is why she organised this event. Ms Cadman's presentation was meant to be a reaffirmation and to make sure that everybody, including new employees, knew about the company's position. In the board minutes of 22 July 2014 this was described as an "anti-collusion workshop", and it was noted that "all were made aware that collusion would not be tolerated in the organisation".

Fireco's approach to Mr Cousins

[41] In early 2015 Mr Zane Cousins, who worked at Cross Fire's Cape Town branch, was contacted by someone from Fireco wanting to discuss price increases. Cousins reported this to Ms Stewart who expressed her anger and unequivocally told him that no such conduct would be tolerated. In his February 2015 branch report, Cousins noted this approach and stated that he had not responded to Fireco.

Cessation of prohibited conduct – legal principles

Incidence of onus

[42] In *Pickfords*, the Constitutional Court held that section 67(1) was a time-bar provision and that in terms of section 58(1)(c) the Tribunal could condone non-compliance with the time limit. Before *Pickfords*, section 67(1) was viewed as a non-condonable prescription provision. According to the Tribunal's pre-*Pickfords* jurisprudence, the burden of proving that a complaint initiation was out of time (i.e. that the prohibited conduct had ceased more than three years before the initiation date) was

held generally to rest on the party invoking "prescription".[3] This Court approved that approach.[4] According to the Tribunal, this is not a rigid rule – considerations of fairness might dictate that in a particular case the Commission should bear the burden of proving when prohibited conduct ceased.[5]

[43] Counsel for Cross Fire submitted that all of this had changed because of the Constitutional Court's judgment in *Pickfords* .Since section 67(1) was a pure time-bar provision, not a prescription provision, the pre-*Pickfords* case law on the burden of proof no longer applied. Instead, so it was argued, the Commission must always prove that it complied with the three-year limit.

[44] In my view, this submission is unsound. Although the Constitutional Court in *Pickfords* framed the issue as being whether section 67(1) was a time-bar provision or a prescription provision, this appears simply to have been a different way of posing the question whether section 67(1) imposed a "time limit" as contemplated in section 58(1)(c), in which case the Tribunal has the power to condone non-compliance, or whether it was an absolute bar to complaint initiation. On no view of the matter could section 67(1) be accurately described as a prescription provision. A "complaint" is not a "debt", and cannot be extinguished with the passing of time. In the case of prescription, a debt which was previously in existence is extinguished. A "complaint", by contrast, has no existence until it is initiated. Section 67(1) simply subjects to a time limit the Commission's entitlement to exercise the administrative power of initiating a complaint in terms of section 49B.

[45] The fact that section 67(1) has now been held to be a condonable, rather than a non-condonable, time limit does not in my view justify a reversal of the jurisprudence

[3] *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] ZACT 9; [2010] 2 CPLR 195 (CAC) at para 86.

[4] *Paramount Mills (Pty) Ltd v Competition Commission* [2012] ZACAC 4; 2012 JDR 1329 (CAC) (*Paramount Mills*) at paras 36-45; *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* [2014] ZACAC 1; 2014 JDR 0479 (CAC) (*Videx*) at para 78.

[5] *Pickfords Removals SA (Pty) Ltd v Competition Commission* (CR129Sep15/PIL162Sep17) [2018] ZACT 109 at paras 71-78.

of the Tribunal and this Court regarding the burden of proof. There is no general principle in our law that the burden of proof in respect of a time-bar provision, as distinct from a prescription provision, rests on the claimant. Time limits on the institution of legal proceedings (i.e. an expiry period, or "*vervaltermyn*" in Afrikaans) have in other settings been held to impose a burden of proof on the party alleging that the claim is time-barred.[6]

[46] A public body which is the repository of a statutory power must satisfy itself, before exercising the power, that the jurisdictional prerequisites for its exercise are present. It does not follow that if the presence of those jurisdictional prerequisites is placed in issue, the burden of proof rests on the public body to show that the jurisdictional prerequisites were satisfied. If the purported exercise of the power is challenged by way of review proceedings, it would be for the challenger to make out its grounds of review. There is no reason in principle for the position to be different where, in the case of the initiation of a complaint by the Commission, the challenge is raised in response to a complaint referral.

[47] I mentioned earlier that the Tribunal has held there to be an element of flexibility on the question of onus, since considerations of fairness may dictate that in certain circumstances the Commission should bear the burden of proving when prohibited conduct ceased. Ordinarily, the incidence of the burden of proof is a matter of substantive law and does not alter according to the ease or difficulty of discharging the burden in a particular case. It is unnecessary in this case to decide whether considerations of fairness alter the incidence of onus or merely place an evidentiary burden on the Commission.

[48] The above discussion relates to the incidence of onus on cessation where a firm is relying on the time-bar in section 67(1). It is conceivable that for other purposes the

[6] *Thorne v Union Government* 1929 TPD 156 at 159; *Mgobozi v Administrator Transvaal* 1963 (3) SA 757 (D) at 758D- 759F; *Groenewald v Minister van Justisie* 1972 (3) SA 596 (O) at 600A-D; *Administrateur van die Provinsie, Kaap die Goeie Hoop v Burger* 1993 (3) SA 414 (A) at 422D-E; *De Klerk v Die Groter Kroonstad Plaaslike Oorgangsraad* [2000] 4 All SA 357 (SCA) at para 12.

onus might rest on the Commission. The egregiousness of prohibited conduct is affected by its duration, and this is reflected in the guidance which the Tribunal follows in the imposition of penalties. For this reason, the Commission typically alleges the period over which the prohibited conduct was committed. The Commission did so in this case, alleging that the respondents engaged in the prohibited conduct from at least 1996 until 2015. It may be that the Commission still bears the onus of proving the duration of prohibited conduct for purposes of establishing its egregiousness and the appropriate penalty, but it is unnecessary in this case to pursue the question.

Ongoing effects

[49] Decisions of this Court establish that a prohibited practice in the form of collusion does not cease when the last collusive deal is struck, but continues for as long as the adverse effects of the practice are, within appropriate bounds, still being felt in the market.[7] Typically that will be when the last payment is received in respect of a contract concluded with an unsuspecting customer as a result of the collusion[8] or for as long as the cartel members continue to apply prices fixed by them.[9]

[50] This approach is applicable to a collusive tendering cartel. If the overarching understanding comes to an end, the prohibited practice will, generally, cease when the customer makes the final payment in respect of the last collusive tender. It is here, however, that the flexibility which the Tribunal recognised in *Pickfords*[10] may require consideration. If a firm wins the last collusive tender in which it participated, that firm will need to establish when it reaped the last fruits of the tender. But if another member of the cartel won the tender, fairness may dictate that the Commission should at least bear an evidentiary burden of showing when the last fruits were reaped by that other

[7] *Videx* (note 4 above) at para 80.

[8] *Power Construction (West Cape) (Pty) Ltd v Competition Commission of South Africa* (145/CAC/Sep16) [2017] ZACAC 6 at para 45.

[9] *Paramount Mills* (note 4 above) at para 44.

[10] Note 5 above.

member. The information would not be readily available to the firm which provided a cover bid, whereas the Commission has the investigative powers to get the evidence.

Withdrawing from a cartel

[51] The Tribunal held that in law Cross Fire had to distance itself from the cartel by way of a clear and unambiguous communication to its competitors. Without such an act of distancing, other cartel members might continue to conduct themselves on the basis of coordination and not competition. The Tribunal referred to the decisions of this Court in *MacNeil*[11] and *Omnico*[12] and to several decisions of the Court of Justice of the European Communities (CJEC), later renamed the Court of Justice of the European Union (CJEU). In my view, the Tribunal materially misdirected itself on the law.

[52] *MacNeil* and *Omnico* were price-fixing cases. The passages to which the Tribunal referred dealt with the position of a firm which attended but was passive at collusive meetings and which later claimed not to have been part of the prohibited conduct. This Court's judgments did not use the expression "clear and unambiguous distancing". More importantly, though, the cases were concerned with the impression which passive presence could create in the minds of other participants. If discussions at a meeting of competitors are plainly collusive, a firm which sits by passively instead of declaring that it is opposed to the collusion may be understood to be acquiescing. As explained in *MacNeil*, the circumstances give rise to a duty to speak. Silence may otherwise result in the other participants implementing the collusive arrangement on the understanding that everyone at the meeting agrees.

[53] The European judgments dealt with similar situations. They were concerned with the circumstances in which a firm which attended collusive price-fixing meetings could claim not to have become part of the cartel. The cases cited by the Tribunal, and

[11] *MacNeil Agencies (Pty) Ltd v Competition Commission* (121/CACJul12) [2013] ZACAC 3.

[12] *Omnico (Pty) Limited v The Competition Commission* 142/CAC/JUNE16.

in argument before us,[13] were decided in the period 2003-2009. The effect of these and other cases was summarised more recently by the CJEU (Second Chamber) in *Toshiba Corporation*,[14] hearing an appeal from the General Court (citation of authority omitted):

> "61. In that regard *[public distancing]*, it should be borne in mind that it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anticompetitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anticompetitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs …
>
> 62. In order to assess whether an undertaking has actually distanced itself, it is indeed the understanding which the other participants in a cartel have of that undertaking's intention which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement …
>
> 63. In that context, it should be noted that the concept of 'public distancing' reflects a factual situation, the existence of which is found by the General Court, on a case-by-case basis, taking account of a number of coincidences and indicia submitted to it and accordingly an overall assessment of all the relevant evidence and indicia …"[15]

[54] As is apparent from the above cases, distancing is not an independent legal requirement that exists for its own sake. It is a duty imposed on a firm where its passivity or silence might cause other cartel members to implement or continue with their collusive deal on the assumption that the passive or silent firm has acquiesced in or is continuing to abide by the arrangement. To take a simple price-fixing arrangement, firms may agree at a meeting that they will increase their prices for the next year by 10%. This collusive agreement might be intended to last until the firms again agree a

[13] *Adriatica di Navigazione SpA v Commission of the European Communities. (Competition)* [2003] EUECJ T-61/99 at paras 135-40; *Westfalen Gassen Nederland v Commission* [2006] EUECJ T-303/02 at paras 86-7, 95-6, 101-3 and 122-130; *Archer Daniels Midland v Commission* [2009] 4 CMLR 20, [2009] EUECJ C-510/06 at paras 119-20.

[14] *Toshiba Corporation v Commission* [2016] EUECJ C-373/14, ECLI:EU:C:2016:26, EU:C:2016:26.

[15] The expression "public distancing" in this context does not mean that the distancing must be made publicly to the world at large or to the authorities. The requirement is one of external manifestation to the other cartel members.

new increase. A firm which passively attends a meeting where this deal is struck may be understood by the others to have agreed to the arrangement, and they may proceed to implement and maintain it on that assumption. Similarly, a firm which positively agrees to such an arrangement and then wishes to terminate its collusion would need to communicate this to the others, since otherwise they might continue to abide by the arrangement on the assumption that the firm is still on board. Of course, other members of the cartel might decide to continue with the price-fixing even though one firm has told them of its withdrawal, but that would then not be attributable to the conduct of the firm which has withdrawn.

[55] Not all price-fixing cartels are as straightforward as the above example. The plausibility of passivity or silence by one firm having the effect of perpetuating anti-competitive behaviour by the other cartel members may be affected by the particular nature and dynamics of the cartel, but it is unnecessary to explore this question here.

[56] What is clear is that the requirement of "clear and unambiguous distancing", to the extent that its is applicable in our law, cannot be divorced from the purpose that distancing – when applicable – is intended to serve, nor can it simply be transposed to a bid-rigging cartel without regard to the differences between a bid-rigging cartel and a straightforward price-fixing cartel. I shall discuss some of these differences in the following paragraphs, but before doing so I emphasise that there is no evidence that after mid-2009 Cross Fire was present, passive or otherwise, at any collusive meetings.

[57] In the case of a straightforward price-fixing cartel, the colluding firms agree that they will, going forward, charge a particular price. In a collusive tendering cartel, by contrast, the harmful understanding is not an understanding that the firms will henceforth charge a particular price. It is an understanding that they will rig future tenders. That understanding does not itself cause harm; rather, it creates an enabling environment within which actual harm can be brought about by the rigging of particular tenders. Generally, the bringing about of actual harm would require communication between the cartel members in respect of each tender, since the character of such a cartel

is to identify one of their number as the intended winner of the tender in question and to agree the price above which the other members must bid to ensure that the intended winner has the lowest bid.

[58] Collusive tendering cartels, like price-fixing cartels, may come in various forms. It is notionally possible that the cartel members could agree to rig all tenders in which they are involved or all tenders of a particular type. Even in such a case, one would generally expect communication among all the cartel members on the occasion of each tender. However, it is arguable that if a particular member of the cartel were not approached by the others, and was silent, the others would take it for granted that the member in question would either not participate in the tender or would set its price unattractively high. This might result in the others colluding on the assumption that the firm in question will not try to be the winner.

[59] The bid-rigging cartel in the present case did not partake of the character discussed in the preceding paragraph. It involved, instead, sporadic approaches by firms to each other in terms of a broad understanding that made such approaches acceptable. The evidence did not remotely show that all, most or even a significant proportion of tenders in the industry were the subject of collusion. If, in the case of such a cartel, a firm (X) ceases, from a particular time, to participate in collusive tendering, its contribution to competitive harm has come to an end, save for any past collusive contracts which still have to run their course.

[60] If the other members of the cartel approach X in relation to a tender and are rebuffed, any harm arising in relation to that tender from collusion between the others cannot be said to have been brought about by a mistaken assumption about X's stance. If the other members choose not to approach X, the same is true. This is because, in such a cartel, a particular tender is only brought within the scope of the collusive understanding by communication between the cartel members. If the other members choose not to tell X that they intend to rig this particular bid, non-communication from X could not plausibly cause the other members to make any assumptions about X's

approach to the tender. To the contrary, if they do not draw X into the arrangement, they have no reason to believe that X will not treat the tender as a fully competitive one falling outside the scope of the collusive understanding.

[61] To this may be added that collusion on a tender is unlikely to be effective unless every tenderer who could realistically win is part of the collusion. The point of such collusion is for a prearranged firm to win the tender as a result of the other tenderers providing cover bids at higher prices. If one of the tenderers (X in my example) is acting independently and genuinely trying to win the tender, the others cannot, through their conduct alone, ensure that one of them will win the tender, and their incentives to try to do so are minimal.

[62] To conclude on this aspect. A firm's silence or inactivity is only relevant to the enduring nature of prohibited conduct where the silence or inactivity has the potential to perpetuate actual competitive harm through wrong assumptions about the firm's stance on an illicit understanding to which it was previously party. Where the firm's stance about the illicit understanding is not relevant to any ongoing harm that occurs, silence or inactivity should not in itself preclude the firm from raising the defence that its prohibited conduct ceased when it stopped actually performing collusive acts. There was no evidence in this case, and the Tribunal in its reasoning did not find, that Cross Fire's supposed failure to communicate its internal decision to the other cartel members was responsible for the perpetuation of any competitive harm.

[63] In any event, and as I shall explain, I consider that the other firms in this case must have understood, well before March 2012, that Cross Fire was no longer willing to participate in collusive tendering. The fact that Cross Fire did not formally give them notice to this effect does not bar Cross Fire from contending that its participation in prohibited conduct had terminated. And in this regard section 68 of the Act should be borne in mind: save for exceptions not here relevant, the standard of proof in any proceedings in terms of the Act is no higher than on a balance of probabilities.

When did Cross Fire's prohibited conduct ceased?

[64] In assessing the factual findings made by the Tribunal on the question of the cessation of prohibited conduct, I bear in mind the rule that the Tribunal, which heard and saw the witnesses, had advantages which this Court lacks, and that the Tribunal's findings are thus entitled to a measure of deference. As has been said, however, this rule of practice must be used to assist, and not hamper, an appellate court to do justice in the case: an appellate court may interfere with factual findings if the trial court has misdirected itself on the facts or made findings which are clearly wrong.[16]

[65] An appellate court has greater liberty to interfere where the factual finding does not "essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities", for in such a case "a court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts".[17] The Tribunal did not mention demeanour or the impression made on it by the witnesses. In the main, its findings were based on its view of the inherent probabilities, on inferences it drew regarding secondary facts and on supposed internal contradictions.

[66] In addition to the well-known restrictions on appellate interference in factual findings, this Court has held that it should, in merger appeals, show a "measure of deference" to the Tribunal's assessment of the matters set out in section 12A(1) of the Act. This is because the Tribunal is a specialist body consisting not only of lawyers but economists with specialised financial and economic expertise. This Court will be cautious before imposing its own conception of the policy considerations adopted by the Tribunal. This Court's function is to examine and rigorously test the justifications

[16] *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106; *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) at para 40; *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* [2021] ZACC 35 (*Mediclinic*) at paras 45-7.

[17] *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) at para 24; *Minister of Safety and Security v Craig* [2009] ZASCA 97; 2011 (1) SACR 469 (SCA); [2010] 1 All SA 126 (SCA) at para 58.

offered by the Tribunal.[18] This approach in merger proceedings was endorsed by the Constitutional Court in *Mediclinic.*[19] These cases were concerned with policy matters and policy-oriented predictive decisions[20] which typically arise in merger proceedings. While policy-oriented predictive decisions could perhaps also arise in other types of proceedings, the present matter is not such a case. We are concerned with the legal test for cessation of prohibited conduct and with the sustainability of the Tribunal's factual findings. On legal matters arising under the Act, this Court is a specialist forum. On factual findings, we are subject to the usual appellate constraints. This is not a case in which specialist economic expertise or predictive policy-laden decisions require a measure of deference from this Court.

The last ad hoc collusion by Cross Fire

[67] Cross Fire's last admitted collusive conduct was in relation to the Nampak Kliprivier project, the relevant date being 1 July 2009. There is no evidence, nor any finding by the Tribunal, that the project went ahead, so the prohibited conduct had no enduring effects.

[68] The VW Centurion contract had ongoing effects until 12 July 2011, but was this a collusive tender? The Tribunal said that Mr Kriel's explanation for sending prices to Mr Ford was implausible. If he and Ms Stewart had refused to participate in the One Monte Project because collusion was wrong, how could Mr Kriel see nothing wrong in sending Cross Fire's confidential pricing information to Independent Fire? The Tribunal said that Mr Kriel must have had sight of Independent Fire's pricing. In any event, Mr Kriel's version that Volkswagen asked him to check his prices with competitors was not a defence to illegal conduct.

[18] *Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1; 2017 JDR 0531 (CAC) at para 43, quoting with approval a passage from *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* [2002] ZACAC 2; [2001-2002] CPLR 84 (CAC).

[19] *Mediclinic* (note 16 above) at para 44.

[20] *Mediclinic* (note 16 above) at paras 37, 48-52, 59 and 70.

[69] The finding of implausibility was not justified and was clearly wrong. Mr Kriel named the person at Volkswagen with whom he was dealing. It was open to the Commission to interview Mr Esterhuizen. Ms Stewart testified that it was not unusual for customers or their consultants to ask a chosen firm to get other firms to provide quotes. She stated that after turning over a new leaf, Cross Fire would tell customers and consultants to consult the ASIB website.

[70] The Tribunal's statement that Mr Kriel must have had sight of Independent Fire's pricing is a material factual misdirection. There was no oral or documentary evidence that Independent Fire ever provided pricing for the VW Centurion project, either to Cross Fire or to Volkswagen. Mr Kriel's evidence is that Volkswagen wanted him to check that Cross Fire's prices were market-related. Mr Kriel's email of 20 August 2009 is consistent with his having given Cross Fire's proposed prices to Mr Ford. There is no evidence that a tender invitation existed at that time, so Cross Fire was not in competition with Independent Fire for Volkswagen's business.

[71] In ascribing motives to Mr Kriel, the Tribunal failed to heed the totality of the evidence about Cross Fire's changing stance on collusion, a topic I address later. However, even if one accepts that Mr Kriel acted wrongly (he certainly acted unwisely) in sending Cross Fire's pricing to Mr Ford, the Tribunal made no factual findings as to what came of this. The prohibited conduct which the Commission alleged was not inappropriate sharing of pricing information but collusive tendering. According to Mr Kriel, there was no tender under way as at 20 August 2020. According to him, Volkswagen only decided to go out to tender about two months later. The Tribunal did not find that the tender itself was infected by collusion. The Tribunal did not reject Mr Kriel's evidence that Cross Fire prepared its bid independently and went in at aggressively low prices. The Tribunal did not find that Independent Fire provided a cover bid or that it participated in the tender at all. Information about the tender must have been available to the Commission. Since Mr Ford was the whistleblower, he would presumably have supplied the Commission with more incriminating documents if they existed. Furthermore, the Commission could have analysed the tenders and

asked the Tribunal to make inferences about cover bidding, assuming such inferences were justified.

[72] It thus cannot be found that the tender itself was collusive. At worst for Cross Fire, there was prohibited conduct in relation to this project in August 2009 but the prohibited conduct did not have enduring effects. Mr Thomas, who joined FPS in 2008 and was responsible for FPS' tendering from that time, was called by the Commission as a witness. He testified that while he was with FPS, the company had never been involved with Cross Fire in collusive tendering.

Cross Fire's stance on collusion

[73] The Tribunal assessment of Cross Fire's evidence about its withdrawal from collusion was inappropriately sceptical. The Tribunal was not obliged to accept Cross Fire's evidence just because it was uncontested. Nevertheless, the Tribunal did not pay proper regard to the fact that there was no countervailing evidence in circumstances where one might have expected the Commission to be able to adduce countervailing evidence if Cross Fire's testimony were untrue. Furthermore, the Tribunal did not view the evidence holistically or have regard to the inherent probabilities. This amounts to a material misdirection in its assessment of the facts. I deal with this in the paragraphs which follow.

One Monte project

[74] The background to what unfolded as from early 2009 was Ms Stewart's gradual progression in an industry hitherto characterised by a male-dominated "old guard". There was no basis for the Tribunal to call into question the genuineness of Ms Stewart's desire to extricate Cross Fire from collusive tendering. It would be unrealistic to expect her to be able to achieve this in one fell swoop, nor did she make that claim. In early 2009 Mr Cross, a member of the old guard, was still the managing director. And yet it cannot be disputed that in early 2009 Ms Stewart and Mr Kriel caused Cross Fire not to

give effect to a collusive deal Mr Cross had struck with Belfa and FCS in relation to the One Monte Project.

[75] The Tribunal found Cross Fire's evidence on the One Monte incident to suffer from "a few inherent contradictions", branding it "unpersuasive in the main". The Tribunal supported its view with reference to five points:

(a) The first was that authority at the time lay with Mr Cross, not Ms Stewart. That is true, but misses the point. We are ultimately concerned with whether Ms Stewart caused Cross Fire to withdraw from collusion. She did not have authority in February 2009, but became the managing director in August 2009. Despite the fact that Mr Cross was still the managing director, her strength of feeling is shown by the fact that she countermanded the collusive deal, taking advantage of his absence.

(b) The Tribunal's second point was that Ms Stewart was not motivated only by a desire to refrain from collusion. She also thought the cover bid Cross Fire was being asked to submit was so excessive that it would arouse suspicion. Again that is true, but the fact that two factors were operative did not entitle the Tribunal to reject the legitimacy of one of them.

(c) The Tribunal's third point was that the decision of Ms Stewart and Mr Kriel not to submit a bid did not suggest a withdrawal from the cartel. It might simply have suggested a decision not to compete in that particular tender, something which would have the effect of abiding by the agreement Mr Cross had reached. This reasoning is materially flawed. The point of cover bids is to lend legitimacy to the preferred bidder. Only three firms were invited to bid, so the absence of one of them materially affected the collusive arrangement, as subsequent events showed. Belfa and FCS could not have thought that Cross Fire, by not submitting a bid at all, was abiding by the deal.

(d) Fourth, the Tribunal discounted Ms Stewart's evidence that communication to Mr Goring of ASIB would get back to competitors.

The Tribunal did so because no evidence had been led on the role or status of ASIB and because Mr Goring was not called as a witness. For present purposes, I am focusing on the genuineness of Cross Fire's endeavour to withdraw from collusion, not a communicated distancing (assuming this to have been required). What remains uncontested is that Ms Stewart did tell Mr Goring that Cross Fire did not want to be part of the collusion. Since she testified that she did not make the same disclosure directly to TWCE, the most probable inference is that TWCE's information in that regard came from Mr Goring. At any rate, Cross Fire's position did not remain internal.

(e) In the fifth place, the Tribunal said that Mr Williams of TWCE had not been called as a witness. His report was confined only to the One Monte project, and did not provide evidence of Cross Fire's withdrawal from the overall collusive understanding. Again this is true, but it reflects a piecemeal approach to the mosaic of evidence of withdrawal. Ms Stewart did not testify that she told Mr Goring that Cross Fire was withdrawing from an overall collusive understanding. She was explaining to him why Cross Fire had not submitted a bid in the One Monte project. The importance is that this was a manifestation of the desire to avoid collusion.

[76] In this context, the Tribunal also referred to Mr Kriel's anecdotal evidence about the restaurant incident. Mr Kriel did not mention this anecdote specifically with reference to the One Monte project, nor was it his only anecdotal evidence. It was one of his recollections about competitor comments indicating that they knew where Cross Fire stood. Be that as it may, the Tribunal said that Mr Kriel's evidence did not explain why this incident should be treated as evidence of exit from the cartel. This is again a piecemeal approach to evidence. It is the whole picture which required examination. Clearly on its own this incident would not take Cross Fire very far, but this does not make it irrelevant.

Nampak Kliprivier and VW Centurion

[77] The Tribunal called Ms Stewart's *bona fides* into question in view of her providing prices to Mr Ford in the Nampak Kliprivier project for cover bidding purposes. This was in July 2009, before she became managing director. Her evidence was that she was acting under instruction, and that she regretted her actions. The question is not whether the One Monte incident marked the end of all collusion from Cross Fire's perspective. The Tribunal was required to assess Ms Stewart's lapse in relation to Nampak Kliprivier in the context of what went before and came afterwards. It is not surprising that a company which had been part of a collusive industry for some years, and which still had a member of the old guard as its managing director, did not have a neat and decisive transformation. The Tribunal criticised Ms Stewart for putting up the excuse that she was not the author of the document sent to Mr Ford and that she was acting under instruction, contrasting this with her version in relation to the One Monte incident. However, Ms Stewart did not claim to have had corporate authority to override Mr Cross' collusive One Monte deal. She faced his wrath for having reneged on the deal. The difference between One Monte and Nampak Kliprivier is that Mr Cross was not, in the former case, in South Africa at the crucial time.

[78] I have already dealt at some length with the VW Centurion project. There was no evidence of a collusive tender. There is no evidence to warrant a conclusion that Mr Kriel's sending of prices to Mr Ford related to collusive tendering. And whatever criticisms there may be of Mr Kriel in this regard, they do not extend to Ms Stewart who became the company's managing director at around the same time.

Presentations of mid-2010

[79] The Tribunal's treatment of Ms Stewart's presentation to the board in June 2010 is highly unsatisfactory. After recounting the content of the presentation and some of Ms Stewart's oral testimony, the Tribunal noted that on her version the board only adopted the policy of non-collusion in mid-2010. The Tribunal went on to say that

"even if [we] were to accept" that Cross Fire adopted the anti-collusion policy internally, this did not mean that the withdrawal was communicated to competitors. If this had been known, so the Tribunal reasoned, there would not have been to more recent incidents suggesting that competitors were unaware of the withdrawal, namely Mr Ford's communications of March 2014 and Fireco's approach to Mr Cousins in early 2015.

[80] Despite its "even if we were to accept" formulation, the Tribunal did not make a finding that the board presentation, and subsequent presentation to the staff, did not take place, nor could such a finding properly have been made. Both Ms Stewart and Mr Kriel gave direct evidence about the board meeting. The board presentation was adduced as a documentary exhibit. Mr Rampursat testified that he was at the 2010 staff meeting when a similar presentation was later made.

[81] The Tribunal was thus required to approach the matter on the basis that Ms Stewart and Mr Kriel were opposed to collusion; that they had taken some steps in that direction in relation to the One Monte project in early 2009; that there were no collusive tenders thereafter, even if there was an attempt in July 2009 (Nampak Kliprivier) and a possible inappropriate sharing of pricing information in August 2009 (VW Centurion); and that by June/July 2010 their opposition to collusion had crystallised in the form of an official board decision subsequently communicated to staff.

[82] Before I address what the Tribunal said about Mr Ford's emails and Fireco's approach to Mr Cousins, it is necessary to make a point which might seem obvious but which the Tribunal disregarded. The overarching collusive understanding in the present case entailed that from time to time cartel members would approach each other for cover bids. But there was no evidence that after July 2009 there was any collusive communication between Cross Fire and any other member of the cartel or that Cross Fire participated in any collusive tenders. The period of nearly six years until the Commission initiated the complaint is too long a period for Cross Fire to have been a

slumbering member of the cartel, given that Cross Fire was a major player in the industry and a frequent participant in tenders. There are only two plausible possibilities: either the other firms did not approach Cross Fire because they already knew where Cross Fire stood by virtue of the One Monte incident, or they did initially approach Cross Fire but were rebuffed, as they surely would have been, at least after mid-2010. It is just not plausible, if a cartel to which Cross Fire belonged still existed, for Cross Fire fortuitously not to have been asked to participate in any collusive tenders.

The Ford correspondence

[83] As I have said, the Tribunal discerned, in Mr Ford's correspondence and in the approach to Mr Cousins, evidence that other firms were unaware of Cross Fire's exit from the cartel. But Mr Ford's emails to Ms Stewart contained nothing to suggest that Cross Fire was still engaging in collusion. Ms Stewart had been the managing director of Cross Fire since August 2009, and Mr Ford may well have chosen her as an intermediary because she was not one of the "mob".

[84] The Tribunal thought that Ms Stewart's responses to Mr Ford's first and second emails were not what one would have expected from a firm that had withdrawn from a cartel in 2009. She should, the Tribunal thought, have told Mr Ford that Cross Fire had withdrawn from the cartel in early 2009 and that her communication to Mr Goring had been a message to competitors. However, it is quite wrong to read so much into Ms Stewart's initial guarded responses to what was evidently an attempt at extortion. She had not yet taken legal advice. She would not have known what Cross Fire's exposure was in relation to its historical participation in the cartel. She was not only the company's managing director but had a shareholding in the company. It is not apparent why she was required to grace a blackmailer with any information. An attempt to get Mr Ford to speak more plainly would have strengthened her hand in dealing with his veiled extortion threats. What the Tribunal failed to note, in relation to Mr Ford's first two emails and his list of mob members, was that he had no stage suggested that Ms Stewart was compromised.

[85] Far more important is the response which Mr Ford received after Ms Stewart had sought legal advice from Webber Wentzel. Ms Stewart was evidently told about the three-year limit in section 67(1). She in turn must have told Ms Morphet that Cross Fire had terminated its involvement in collusive tendering more than three years previously. Ms Morphet wrote her letter in March 2014. This is consistent with Ms Stewart's evidence to the Tribunal, including the evidence about the presentations in mid-2010.

[86] The Tribunal said that Ms Stewart must, by the time of Mr Ford's emails, have become aware of the Commission's corporate leniency policy, yet she had not explained her failure to approach the Commission with information about the cartel. I accept that Ms Stewart must have learnt about corporate leniency after consulting Ms Morphet. But she was evidently advised that Cross Fire was in the clear because of section 67(1). However commendable it might have been for Ms Stewart to provide information to the Commission, she was not obliged to do so. The fact that Cross Fire did not seek corporate leniency in response to Mr Ford's threats shows that Ms Stewart genuinely believed that Cross Fire had divorced itself from collusion for more than three years. If those were not the factual instructions she gave Ms Morphet, the latter would certainly have advised Cross Fire to seek corporate leniency, and Cross Fire would almost certainly have followed the advice. This is the point the Tribunal should have made.

Fireco's approach to Cousins

[87] The Tribunal deduced from Fireco's approach to Mr Cousins that as late as February 2015 competitors were still under the impression that Cross Fire was open for collusive business. This incident, which was brought to the fore by Cross Fire, not the Commission, simply cannot bear the weight placed on it by the Tribunal. First, Fireco was not alleged by the Commission to be part of the collusive tendering cartel. The Commission had a discrete case against Fireco and KRS, one of market division. So even if Cross Fire had to communicate its withdrawal to the other cartel members, Fireco was not such a member.

[88] Second, Fireco was not in existence in 2009/2010, when Cross Fire says it ceased being part of the cartel. Third, the fact that a firm's withdrawal from a cartel has become known to other cartel members is not a guarantee against a rogue approach six years later from an unspecified employee of a competitor. The employee might have been a relatively newcomer to the industry, unaware of Cross Fire's position, or he might just have been taking a chance. Far more important is that Mr Cousins did not respond to the approach and instead reported it to Ms Stewart. And fourth, it is apparent from the context in which Ms Stewart dealt with this incident in her statement that she was putting it up as her reaction to an unusual and isolated event.

Conclusion on cessation

[89] In my view, the Tribunal materially misdirected itself on the law and on the facts, and in any event reached findings that were clearly wrong and not reasonably open to it on the evidence. These findings are largely matters of inference or assessment of the inherent probabilities. The Tribunal did not make credibility findings based on demeanour.

[90] My conclusion is that Cross Fire's last participation in collusive conduct was in the Nampak Kliprivier project in July 2009, though it would make no practical difference if one instead extended this to the VW Centurion project in August 2009 (bearing in mind that the subsequent tender in the VW Centurion project was not shown to have been collusive).

[91] Based on the correct legal test for cessation in relation to a collusive tendering cartel of the kind in which Cross Fire was alleged to have participated (i.e. that the firm's withdrawal from collusion need not necessarily have been communicated to the other members), Cross Fire's prohibited conduct came to an end, on a balance of probabilities, in July/August 2009. This means that a complaint as against Cross Fire became time-barred, subject to condonation, in July/August 2012. If contrary to this view of the legal position, one is looking for the date by which the other members of the cartel knew of Cross Fire's anti-collusion position, the probabilities are that the other

members must have known of this by June/July 2010, since the absence of collusive approaches to Cross Fire thereafter is not explicable on any other basis. On this alternative, a complaint as against Cross Fire became time-barred, subject to condonation, in June/July 2013.

[92] It follows that the Commission initiated the complaint against Cross Fire 30 months (two years and six months), alternatively 19 months (one year and seven months) after the three-year period expired. Unless this non-compliance with section 67(1) is condoned, the complaint initiation was barred.

The condonation application

The Pickfords decision

[93] In *Pickfords* the Constitutional Court held that section 67(1) was not an absolute "prescription" provision but a time-bar provision condonable by the Tribunal in terms of section 58(1)(c). In reaching this conclusion, the Constitutional Court said that the purpose of the Act would be undermined if the section 67(1) time limit were not ameliorated either by a knowledge requirement or by the possibility of condonation.[21] The Commission abandoned its argument that a knowledge requirement should be imported into section 67(1).[22] The Constitutional Court also had regard to the fact that a finding of prohibited conduct was the gateway for civil claims in terms of section 65.[23]

[94] Prescription, the Court said, was aimed at penalising negligent inaction, not the inability to act. Cartels are by their nature secretive, and it would be inequitable to penalise the Commission, which would invariably lack knowledge of the cartel's surreptitious behaviour, for its failure to act within the three-year period. This would reward cartels for their covert activities and not be in the interests of justice.[24] Recognition that the time limit was subject to condonation struck the proper balance

[21] *Pickfords* (note 1 above) at para 39.

[22] Id at para 32.

[23] Id at para 40.

[24] Id at para 46.

between, on the one hand, the need for general certainty in commercial affairs and the public interest in having the Commission's vast investigatory resources spent only on combating recent prohibited practices and, on the other hand, the objective of the Act to deter prohibited practices, including older practices in appropriate circumstances. If section 67(1) were construed as an absolute time limit, it would encourage cartel members to remain silent in exchange for immunity after three years, which would completely defeat the aims of the Act.[25]

[95] Section 58(1)(c) gives the Tribunal the power to condone non-compliance with time limits in the Act "on good cause shown". The Constitutional Court in *Pickfords* said that condonation was not a mere formality. There was a large body of jurisprudence on the concept of "good cause". A power of condonation on this basis afforded courts a wide discretion. The overriding consideration is the interests of justice, considered on the facts of each case. Factors germane to the inquiry might include the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issues raised by the matter; and prospects of success.[26]

Procedural history

[96] The Commission initiated the complaint in March 2015. In March 2017 the Commission referred the complaint to the Tribunal. Cross Fire's answering papers were delivered in October 2017. In those papers Cross Fire raised the section 67(1) defence. Witness statements were served in September 2018, and the hearing began in the Tribunal on 8 October 2018. The Tribunal heard argument in January 2019. The Tribunal required the parties to file further submissions on penalties. Because Belfa by this time had gone into liquidation, a collateral issue arose as to whether a new entity, Belfa Solutions (Pty) Ltd, could be held liable for any penalty imposed on Belfa. The Tribunal heard argument on that issue in May 2019.

[25] Id at para 47.

[26] Id at para 54.

[97] The Tribunal only delivered its order and reasons on 15 January 2021. This delay is not explained in the Tribunal's reasons. Cross Fire served a notice of appeal on 5 February 2021 from which it was apparent that Cross Fire persisted with its section 67(1) defence. The appeal was set down for hearing on 1 July 2021. Cross Fire delivered its heads of argument on 9 June 2021. A substantial part of its heads was devoted to the section 67(1) defence.

[98] The Commission delivered its heads on 17 June 2021. It simultaneously delivered its section 67(1) condonation application. No condonation application had been brought in the Tribunal or foreshadowed before 17 June 2021. This late development resulted in the appeal being postponed to 22 October 2021 with a timetable for the filing of further papers in the condonation application. The appeal could not proceed on 22 October 2021 due to the unavailability of a member of the Court, and it was eventually heard on 10 December 2021.

Does this Court have jurisdiction in the condonation application?

[99] Section 58(1)(c) grants a general power of condonation to the Tribunal. As interpreted in *Pickfords*, this power of condonation is not limited to time limits imposed in relation to the Tribunal's own proceedings. Complaint initiation, which is the process which section 67(1) subjects to a time limit, is not a process of the Tribunal but of the Commission. The complaint initiation may or may not result in a referral to the Tribunal.

[100] This Court is a court as contemplated in section 166(e) of the Constitution with a status similar to that of a High Court.[27] Like a High Court, this Court thus has the inherent power to regulate its own processes.[28] This Court can, therefore, condone non-compliance with time limits such as the period for noting a merger appeal to the Court

[27] See section 36(1) of the Act.

[28] *Competition Commission of South Africa v Standard Bank of South Africa Limited* [2020] ZACC 2; 2020 (4) BCLR 429 (CC) at para 117.

in terms of section 17(1) of the Act.[29] However, this Court's inherent jurisdiction does not extend to condoning non-compliance with section 67(1), because the time limit in question does not relate to a process of this Court or even to a process of the Tribunal. A superior court's "'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' … does not extend to the assumption of jurisdiction not conferred upon it by statute".[30]

[101] In terms of section 37(1) read with section 61(1) of the Act, the function of this Court is to review decisions of the Tribunal and to consider appeals arising from the Tribunal. In such proceedings, this Court may, in terms of section 37(2), "give any judgment or make any order", including an order to confirm, amend or set aside a decision or order of the Tribunal or remit a matter to the Tribunal for further hearing on any appropriate terms; and in terms of section 61(2) the Court may make costs orders according to the requirements of the law and fairness.

[102] If the Commission had brought a condonation application in the Tribunal, and if the Tribunal had either dismissed or granted the application or found it unnecessary to decide it, this Court could on appeal have dealt with the condonation application or remitted it to the Tribunal. However, there was no such application in the Tribunal. Section 37(2) cannot be interpreted to confer on this Court a power to make orders in respect of matters which were never before the Tribunal. Appellate jurisdiction is a jurisdiction to correct, not an original jurisdiction.[31] On appeal, this Court can make

[29] *Astral Foods Limited v Competition Commission* [2004] ZACAC 3; [2004] 1 CPLR 1 (CAC) at para 29.

[30] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E-F.

[31] Cf *S v Cassidy* 1978 (1) SA 687 (A) which might be regarded as an analogous case. The appellant had applied to the trial court for leave to appeal against sentence, which the trial court refused. On petition, the Appellate Division, having doubts about the correctness of the conviction, granted the appellant leave to appeal against both sentence and conviction. However, in its subsequent judgment in the appeal, the Appellate Division held that it did not have jurisdiction to entertain the appeal against conviction in the absence of the appellant having made an application to the trial court for leave to appeal against conviction: 690F-691B. To similar effect, see *National Union of Metalworkers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 740B-D and *S v Fourie* [2001] 4 All SA 365 (A) at para 13. The analogy is not, however, complete, because in matters of the foregoing kind the trial court is not, in relation to leave to appeal, *functus officio*: it is entitled, if condonation is sought and granted, to consider a late application for leave to appeal. This means that the appellate court could in principle postpone the appeal in order to allow the appellant to seek condonation and leave from the trial court. In the

any order which the Tribunal could and should have made. The Tribunal could not have made an order on the condonation application, because there was no such application before it.

[103] In my view, therefore, this Court cannot decide the condonation application. And the power of remittal in section 37(2)(b) cannot be exercised in relation to a matter which is not properly before this Court and was never before the Tribunal.

[104] Could this Court postpone its judgment in order to allow the Commission to bring the condonation application in the Tribunal? No. The Tribunal is *functus officio*.[32] Its jurisdiction in the matter could revive through a remittal in terms of section 37(2)(b), but absent a proper remittal under that section the Tribunal cannot entertain a condonation application. A power to do so could not be sourced in the variation power contained in section 66 of the Act.

[105] This conclusion is not repugnant to the purposes of the Act. The Constitutional Court in *Pickfords* declared the true meaning which the Act has always had. The lawmaker ameliorated the rigidity of the time limit in section 67(1) by making provision for condonation in terms of section 58(1)(c). The lawmaker gave a specific body, the Tribunal, the power to condone the time limit, despite the fact that the time limit did not relate to the Tribunal's own processes. If the Commission foresees a risk of time-barring, it has, and has always had, the right, in terms of the Act properly interpreted, to approach the Tribunal for condonation. The interpretation of the statutory provisions governing the jurisdiction of this Court should not be distorted to accommodate what is likely to be a temporary phenomenon brought about by a misapprehension on the part of the Commission and others as to the proper interpretation of section 67(1). There is no need, in order to avoid the undesirable results identified in *Pickfords*, to recognise

present matter, by contrast, and as shall presently appear, the Tribunal is *functus officio* and could thus not belatedly hear a section 67(1) condonation application.

[32] *Competition Commission v Pioneer Foods (Pty) Ltd* (91/CAC/Feb10) [2010] ZACAC 2 at para 9.

this Court as having an original power of condonation. A timeous application to the Tribunal is all that is needed.

The merits of the condonation application

[106] In case my view of this Court's jurisdiction is wrong, I shall explain why in any event I would not have come to the Commission's aid. If this Court has jurisdiction to decide the condonation application, I would dismiss it. If this Court does not have jurisdiction to decide the condonation application but does have the power to remit it to the Tribunal, I would not exercise my discretion in favour of remittal.

[107] In addition to showing good cause for failing to comply with a time limit, a party seeking condonation must bring the application promptly after learning of the need for it. I deal first with good cause.

[108] Section 67(1) does not state that the three years starts to run when the Commission learns of the prohibited conduct. It would be a rare case indeed for the Commission to learn of prohibited conduct but only to initiate the complaint more than three years later. Complaint initiation marks the beginning, not the end, of an investigative process. The Commission does not require very much information in order rationally to initiate a complaint. Accordingly, and while the date when the Commission learnt of the prohibited conduct is a relevant consideration, it cannot be decisive, since otherwise section 67(1) would in practice become a dead letter. At least one of the objects of the section is for the Commission's investigative powers not to be expended on stale matters.

[109] I accept that in this case the Commission did not have knowledge of the prohibited conduct until shortly before it initiated the complaint in March 2015. According to the Commission, it was alerted to the prohibited conduct by way of disclosures made by Mr Ford in February 2015. There is thus a reasonable explanation for the Commission not having initiated the complaint within the three-year window.

[110] As to the prospects of success, this is easily judged with the benefit of hindsight. At the end of the case, after everyone had conducted the hearing on the basis that section 67(1) was an absolute time-bar, one can say, based on Cross Fire's own admissions, that the Commission had good prospects of showing prohibited conduct by Cross Fire up to mid-2009. If the Commission had brought a prospective condonation application, before Cross Fire had put all its cards on the table, things might have looked rather different. Nevertheless, I shall assume in the Commission's favour that it had good prospects of success against Cross Fire. I also accept that if a condonation application had been timeously brought, there would probably have been no litigation prejudice to Cross Fire, i.e. the lapse of time would not have materially hampered Cross Fire's ability to ascertain the facts and call witnesses.

[111] As against these considerations, there is the fact that the extent of the non-compliance is very significant, 30 months on my primary approach, 19 months on the alternative approach. Furthermore, the conduct which took place in mid-2009 did not result in actual competitive harm, since in the one case (Nampak Kliprivier) no tender ensued while in the other case (VW Centurion) the tender was not tainted. One would have to go back to 2008 to find the last collusive tender in which Cross Fire participated.

[112] The Commission contends that the granting of condonation would better serve the object of deterring collusion, as it will signal to cartelists that mere "winding down the clock" will not guarantee exoneration. On the facts, however, this is not a case where it can be said that Cross Fire "kept mum" for three years in order to secure immunity from prosecution. There is nothing to suggest that in the period mid-2009 to March 2014 Ms Stewart was aware of section 67(1). Her decision to chart a non-collusive course for Cross Fire was based on a genuine aversion to collusion. Also unjustified is the Commission's insinuation that in the period March-June 2014 Cross Fire must have received legal advice to apply for corporate leniency and declined to do so. The overwhelming probabilities are that in March 2014 Cross Fire received the advice implicit in Ms Morphet's letter to Mr Ford, namely that Cross Fire was by that time "in the clear".

[113] Refusing condonation in this case would not mean that the cartel could not be exposed for purposes of deterrence. There is no indication that any of the other firms in the cartel raised or were able to raise the section 67(1) defence. In pursuing the complaint against these other firms, the Commission was entitled to rely on evidence of Cross Fire's collusion with other firms until mid-2009. The interests of justice, in my view, do not dictate that Cross Fire should be penalised despite its *mero motu* withdrawal from collusive conduct nearly six years before the complaint was initiated.

[114] What I have said thus far does not stand alone. An applicant for condonation must bring the application as soon as the need for it is realised.[33] The Commission knew from Cross Fire's answering papers in the Tribunal that the company was raising a section 67(1) defence. In fact, having regard to Cross Fire's admissions in its answering papers and witness statements, section 67(1) was what the whole case was about from Cross Fire's perspective. The Commission was, of course, entitled to stake everything on a finding from the Tribunal that Cross Fire's prohibited conduct had not ceased by March 2012, but it then lacked a fallback position in the event of a contrary finding, whether by the Tribunal or by this Court. If the Commission wanted to cover the contingency of such a finding, it should have delivered a condonation application in November 2017, when replying to the answering papers, and at any rate before the Tribunal hearing began in October 2018.

[115] The Commission contends that it ran the case in the Tribunal on the basis that the prohibited conduct had not ceased more than three years before the complaint initiation, and that because the Tribunal agreed, "there was no need for the Tribunal to offer the Commission the opportunity to apply for condonation". The position was said to be different in this Court, because we might reverse the Tribunal's decision on cessation. This argument lacks merit. Although the Commission ran the case in the

[33] *National Police Services Union v Minister of Safety and Security* [2000] ZACC 15; 2000 (4) SA 1110 ; 2001 (8) BCLR 775 (CC) at para 4; *Rennie v Kamby Farms (Pty Ltd* 1989 (2) SA 124 (A) at 129G-H; *Beira v Raphaely Weiner*1997 (4) SA 332 (SCA) at 337D;

Tribunal on the basis that the prohibited conduct had not ceased more than three years before the complaint initiation, it knew that Cross Fire's only defence on the merits was that the conduct had ceased more than three years before the complaint initiation. The Commission could not assume that the Tribunal would reject Cross Fire's defence. The position is no different in this Court: the Commission has continued to contend that the conduct did not cease more than three years before the complaint initiation, and the Commission has rightly, albeit belatedly, appreciated that a rejection by this Court of Cross Fire's defence could not be taken for granted. If a contingent condonation application was apposite in this Court, the same was true in the Tribunal. Furthermore, it was not for the Tribunal to "offer" the Commission the opportunity of seeking condonation, any more than it would be the function of this Court to "offer" such an opportunity. It was for the Commission to take the initiative.

[116] It is not an excuse that the Commission mistakenly believed that section 67(1) was a non-condonable time limit. Litigants must generally live with the consequences of such misapprehensions. If the Commission failed to follow a certain procedure because it misapprehended the law, the same is likely to be true also for Cross Fire. Competition lawyers were probably under the same misapprehension as the Commission. If it had been known in 2014 that non-compliance with section 67(1) could be condoned, Ms Morphet would probably have advised Cross Fire in March 2014 to apply for corporate leniency. Ms Stewart has stated in opposition to the condonation application that Cross Fire would in all likelihood have sought corporate leniency; and that, if for any reason it had not been granted leniency, Cross Fire would have tried to settle with the Commission. Instead, it operated under the misapprehension that section 67(1) was an absolute time-bar. If Cross Fire must live with the consequences of its misapprehension, it does not seem unfair that the Commission should have to do likewise.

[117] In any event, in April 2018 the Commission, represented by counsel, argued before the Tribunal in *Pickfords* that section 58(1)(c) conferred a power of condonation. It is true that the Tribunal rejected that argument in its decision of June 2018, but the

Commission did not give up; it pursued its case in this Court and in the Constitutional Court. If the Commission wanted, in the present case, to keep open the possibility of condonation, it should have followed the same course. Because the final outcome of such a condonation application could have affected Cross Fire's trial strategy, it might have asked to have the application, and any appeals arising therefrom, determined before the Tribunal hearing on the merits began. It is idle to speculate how things would have unfolded procedurally.

[118] The Commission not only did not bring a condonation application in the Tribunal. It did not indicate to the Tribunal and Cross Fire that it was pursuing that issue in *Pickfords* and that it wished to reserve the right to bring such an application in the present case if it was ultimately successful in *Pickfords*. Had the Commission done so, it may again have affected procedural developments in the Tribunal's hearing, and it may have led to the Tribunal being asked to defer its decision until *Pickfords* was resolved.

[119] This did not happen. Instead, the Commission and Cross Fire conducted the litigation on the basis that section 67(1) was an absolute time-bar and that everything turned on when Cross Fire's prohibited conduct ceased. Cross Fire prepared its witness statements and made decisions on the calling of witnesses on the basis that it had no cause to be reticent about its historic involvement in collusive conduct. The lateness in bringing the condonation application was calculated to cause litigation prejudice. Furthermore, in motivating condonation, the Commission has relied *inter alia* on inferences it asks us to draw from the evidence of Ms Stewart as to whether and if so when Cross Fire was advised by lawyers to seek corporate leniency. Although in the event the inferences are not justified, it strikes me as unfair to a respondent for the Commission first to run a trial to completion and then to use material derived from the trial to bolster a case for condonation.

[120] But it does not end there. For whatever reason, the Tribunal took more than 18 months to hand down its decision. The Constitutional Court delivered judgment in

Pickfords about seven months before the Tribunal's decision in the present case was delivered. The Commission thus had ample time to notify the Tribunal and Cross Fire that it wanted to bring a condonation application to cover the possibility that Cross Fire's time-bar defence (its only defence on the merits) succeeded. But the Commission did not do so. Nor did it react in February 2021 when Cross Fire served its notice of appeal. It was only in June 2021, apparently on counsel's advice, that the Commission decided to bring a condonation application. This was three and half years after the application should have been delivered. And this last-minute development delayed the hearing of the appeal.

[121] The Commission is not a hapless litigant. In its sphere of operation, it is a well-resourced and skilled regulator. Its excuse for only delivering a condonation application on 17 June 2021 is, in the circumstances, unacceptable. It would not be in the interests of justice for this Court at first instance to have to consider such a late application, particularly when the trial was run on a common understanding at odds with the condonation application.

[122] In all the circumstances, if this Court has jurisdiction to decide the application, I would dismiss it. If this Court does not have jurisdiction to decide the application, but does have jurisdiction to remit it to the Tribunal for decision, I would not exercise my discretion in favour of such a course. Finality is an important consideration when condonation is sought so late in the day. A remittal would significantly delay finalisation of the matter. The Tribunal would need to hear argument and make a decision on condonation. The losing party might then again appeal to this Court. If the Tribunal granted condonation, there would have to be a further hearing in the Tribunal on penalties. This is so for the reason that this Court's finding as to when the prohibited conduct ceased would affect two important components of the penalty assessment, namely (a) the duration of the prohibited conduct and (b) the affected turnover in the last financial year in which the prohibited conduct occurred.

[123] A further consideration is that a remittal to the Tribunal on the issue of condonation would substantially reduce the significance of the proceedings in this Court in which both parties have invested significant resources. Hitherto (i.e. until the condonation application reared its head), our decision on when the prohibited conduct ceased was critical to the outcome of the case. If the Tribunal were belatedly to grant condonation, however, the only remaining significance of a finding on the date of cessation would be in relation to penalty. Cross Fire might not have thought it worth the candle to appeal on a question of that kind.

Conclusion and order

[124] It follows that the condonation application must be dismissed because we lack jurisdiction to entertain it. The appeal succeeds on the merits. It is unnecessary in the circumstances to consider Cross Fire's appeal against the penalty. There is no reason for costs not to follow the result.

[126] The following order is made:

1. The application for condonation is dismissed.
2. The appeal succeeds.
3. Paragraphs 2 and 3 of the Tribunal's order are set aside and replaced with the following order: "The Commission's complaint against Cross Fire Management (Pty) Ltd is dismissed."
4. The respondent in the appeal must pay the appellant's costs in the appeal and in the condonation application, including the costs of two counsel.

ROGERS JA

For the Appellant:	A Gotz SC and S Quinn instructed by Cliffe Dekker Hofmeyr Inc.
For the Respondent:	N Maenetje SC and K Monareng instructed by the Competition Commission of South Africa.