



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 175/20

In the matter between:

COMPETITION COMMISSION

Applicant

and

BEEFCOR (PROPRIETARY) LIMITED

First Respondent

**CAPE FRUIT PROCESSORS (PROPRIETARY)
LIMITED**

Second Respondent

Neutral citation: *Competition Commission v Beefcor Proprietary Ltd and Another*
[2021] ZACC [9]

Coram: Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J,
Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J.

Judgments: Jafta J (unanimous)

Heard on: 23 February 2021

Decided on: 13 May 2021

Summary: Competition Act 89 of 1998 — interpretation of section 67(2) —
Competition Commission — withdrawn complaint —
completed proceedings

ORDER

On application for leave to appeal to the Constitutional Court, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order granted by the Competition Appeal Court is set aside.
4. There is no order as to costs.

JUDGMENT

JAFTA J (Mogoeng CJ, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaetsi AJ and Tshiqi J concurring):

Introduction

[1] This application for leave to appeal concerns the question whether the Competition Commission (Commission) can reinstate a complaint that was withdrawn before the Competition Tribunal (Tribunal). The determination of this issue turns on the proper meaning of section 67(2) of the Competition Act (Act).¹

[2] The Act establishes an independent Commission which is subject only to the Constitution and the law,² with jurisdiction that covers the entire territory of the

¹ 89 of 1998.

² Section 20(1) provides:

“(1) The Competition Commission—

- (a) is independent and subject only to the Constitution and the law; and
- (b) must be impartial and must perform its functions without fear, favour, or prejudice.”

Republic.³ Organs of state are obliged to assist the Commission to exercise its powers and carry out its functions effectively.⁴

[3] The powers and functions of the Commission are tabulated in section 21 of the Act.⁵ Among the powers vested in the Commission is the power to refer matters and

³ Section 19(1) provides:

- “(1) There is hereby established a body to be known as the Competition Commission, which—
- (a) has jurisdiction throughout the Republic;
 - (b) is a juristic person; and
 - (c) must exercise its functions in accordance with this Act.”

⁴ Section 20(3) provides:

- “(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties.”

⁵ Section 21 provides:

- “(1) The Competition Commission is responsible to—
- (a) implement measures to increase market transparency;
 - (b) implement measures to develop public awareness of the provisions of this Act;
 - (c) investigate and evaluate alleged contraventions of Chapter 2;
 - (d) grant or refuse applications for exemption in terms of Chapter 2;
 - (e) authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3;
 - (f) negotiate and conclude consent orders in terms of section 63;
 - (g) refer matters to the Competition Tribunal, and appear before the Tribunal, as required by this Act;
 - (gA) initiate and conduct market inquiries in terms of Chapter 4A;
 - (gB) conduct impact studies in terms of section 21A;
 - (gC) grant or refuse applications for leniency in terms of section 49E;
 - (gD) develop a policy regarding the granting of leniency to any firm contemplated in section 50;
 - (gE) issue guidelines in terms of section 79; and
 - (gF) issue advisory opinions in terms of section 79A;
 - (h) negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;
 - (i) participate in the proceedings of any regulatory authority;
 - (j) advise, and receive advice from, any regulatory authority;
 - (k) over time, review legislation and public regulations, and report to the Minister concerning any provision that permits uncompetitive behaviour; and

appear before the Tribunal to prosecute matters so referred. The Commission is also authorised to participate in the proceedings before the Tribunal and other fora.

Factual Background

[4] In September 2017, the Commission referred a complaint to the Tribunal against Beefcor (Pty) Limited (Beefcor) and Cape Fruit Processors (Pty) Limited (Cape Fruit) whom it accused of having been engaged in a prohibited practice under section 4(1)(b) of the Act.⁶ The Commission alleged that Beefcor and Cape Fruit had agreed not to compete in the market for processing wet peels and citrus peel pulp used in the production of livestock feed. The Commission asserted that this agreement constituted a breach of section 4(1)(b)(ii) of the Act.

[5] The Tribunal set the matter down for hearing from 2 to 4 July 2018. However less than a week before that hearing, the Commission approached Cape Fruit, seeking an agreement to postpone the hearing in order to explore settlement. Cape Fruit responded by stating that it would only agree to a settlement if the Commission

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- (1) deal with any other matter referred to it by the Tribunal.
 - (2) In addition to the functions listed in subsection (1), the Competition Commission may—
 - (a) report to the Minister on any matter relating to the application of this Act;
 - (b) enquire into and report to the Minister on any matter concerning the purposes of this Act; and
 - (c) perform any other function assigned to it in terms of this or any other Act.”

⁶ Section 4(1) provides:

- “(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if—
 - (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or
 - (b) it involves any of the following restrictive horizontal practices:
 - (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
 - (iii) collusive tendering.”

withdraws the matter before the Tribunal. For its part, Beefcor advised the Commission that its lawyer who was handling the matter was on leave and suggested that settlement discussions be scheduled for 2 July 2018. Beefcor pointed out that in its view, the referred complaint had no substance and that it should be withdrawn.

[6] The Commission responded by informing both respondents that it had decided to withdraw the matter to give settlement negotiations a fair chance. Indeed, a notice of withdrawal was filed at the Tribunal. While Beefcor accepted the withdrawal, it informed the Commission that it was not willing to negotiate any settlement other than in relation to costs. Cape Fruit's response was that the Commission took the wrong route. It should have asked for a postponement instead of a withdrawal.

[7] The Tribunal notified the parties on 29 June 2018 that the matter was removed from the roll, following the Commission's notice of withdrawal. The Tribunal further informed the Commission that should it wish to reinstate the matter, it would have to file a substantive application.

[8] Since the respondents were not willing to negotiate a settlement of the matter, negotiations did not occur. In October 2018, the Commission filed its application for reinstatement in the Tribunal. The respondents opposed it on the ground that section 67(2) of the Act precluded the Commission from referring that complaint to the Tribunal for the second time. In addition, the respondents argued that the relevant rules do not empower the Tribunal to reinstate a withdrawn matter.

[9] The Tribunal identified three issues as arising from the application. The first was whether the matter had been withdrawn or simply removed from the roll. The second was whether the withdrawal settled the dispute between the parties. And the third was whether the withdrawal constituted "completed proceedings" as envisaged in section 67(2) of the Act.

[10] With regard to the first issue, the Tribunal held that the matter had been withdrawn, before it was removed from the roll. As to the question whether the withdrawal settled the dispute, the Tribunal concluded that a withdrawal does not have the effect of a settlement in law. The Tribunal reasoned, rightly so, that a settlement involves some form of agreement by both sides to a dispute and that the withdrawal was a unilateral act which did not address any of the issues in the matter.

[11] Regarding the question whether the withdrawal amounted to “completed proceedings” under section 67(2), having referred to various decisions of the Competition Appeal Court, the Tribunal held that the withdrawal did not amount to completed proceedings. Departing from this premise, the Tribunal concluded that the Commission was not forbidden from seeking reinstatement. However, the Tribunal was not persuaded that a proper case for reinstatement was made out by the Commission. Consequently, reinstatement was refused.

In the Competition Appeal Court

[12] Unhappy with the refusal to reinstate the referral, the Commission appealed to the Competition Appeal Court. That Court determined that the meaning of the word “completed” as used in section 67(2) was central to the appeal and that its correct meaning would dispose of the appeal.⁷

[13] With reference to its decision in *Sappi*,⁸ the Competition Appeal Court held that the purpose of section 67(2) is to protect firms against double jeopardy.⁹ The Court proceeded to trace the prevention of double jeopardy in criminal trials from the period of the Roman Dutch law to the present Criminal Procedure Act.¹⁰ Relying on the prohibition entrenched in section 35(3)(m) of the Constitution, the Competition Appeal Court held that the inquiry was whether the protection afforded by that provision should

⁷ *Competition Commission of South Africa v Beefcor (Pty) Ltd* [2020] ZACAC 5 (CAC judgment) at paras 14-6.

⁸ *SAPPI Fine Paper (Pty) Ltd v Competition Commission* [2003] ZACAC 5; [2003] 2 CPLR 272 (CAC).

⁹ CAC judgment at para 17.

¹⁰ 51 of 1977.

be extended to firms under section 67(2) of the Act.¹¹ The Court stated that under section 67(2), firms were entitled to the right to fair administrative process and observed:

“The word ‘completed’ in s 67(2) is open to two possible interpretations: either the withdrawal of a complaint completes the case and thus a new complaint on the same cause is precluded; or the withdrawal alone is not enough and the case can only be rendered complete on the Tribunal making a determination of the complaint. On the latter interpretation, the Commission is allowed to re-refer or reinstate a fresh complaint on the same cause to the Tribunal.”¹²

[14] In determining which meaning of “completed” between those two is to be preferred, the Competition Appeal Court took account of a number of considerations. Eventually that Court rejected the meaning that says for proceedings to be completed, there must be a decision taken by the Tribunal on whether the firm is guilty of the misconduct charged or not. The Court stated:

“To my mind, s 67(2) must be interpreted broadly and as a constitutional protection which is analogous to that created under s 106(4) of the [Criminal Procedure Act]. The word ‘completed’ in its ordinary and natural meaning can be applied to proceedings which have come to an end in one way or another - whether following a trial on the merits, a consent order or an abandonment of the proceedings by way of withdrawal.”¹³

[15] Thus the Competition Appeal Court held that the withdrawal of the complaint here by the Commission, amounted to completed proceedings under section 67(2). Consequently, the Commission was precluded from reinstating or referring the same complaint to the Tribunal.¹⁴ The appeal was dismissed and the Commission was ordered to pay costs.

¹¹ *CAC judgment* at paras 24-7.

¹² *Id* at para 15.

¹³ *Id* at para 53.

¹⁴ *Id* at para 57.

[16] What is unusual with this order is that the Commission did not appeal against the interpretation of section 67(2) by the Tribunal. In fact, the Tribunal approved the Commission's interpretation of the section. But in the exercise of a discretion, the Tribunal refused to grant reinstatement on the ground that such order would be unfair and prejudicial to the respondents. Before the Competition Appeal Court, the Commission had contended that the Tribunal had not exercised its discretion judicially and requested that Court to intervene.

[17] By holding that the meaning of section 67(2) was dispositive of the appeal before it, the Competition Appeal Court overlooked the fact that it was also required to express views on the exercise of discretion. This was particularly necessary in the event of a further appeal, especially if the appeal court disagreed with the Competition Appeal Court on the question of interpretation.

Leave to appeal

[18] There can be no doubt that this matter raises constitutional issues. In its judgment the Competition Appeal Court, whose decision is the subject of the appeal, invokes the Constitution in the process of deciding the matter.¹⁵ Moreover, in *Pickfords*,¹⁶ this Court has held that the duty imposed by section 39(2) of the Constitution when a court interprets legislation, is triggered when section 67 is construed. Section 67(2) with which we are concerned here implicates the right of access to the Tribunal which is entrenched in section 34 of the Constitution.¹⁷

[19] The fact that in this matter it is the Commission and not a private party that seeks leave makes no difference. The section prohibits both the Commission and private

¹⁵ Id at paras 24-5, 27, 31, 40-1, 44-5, 47 and 53.

¹⁶ *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2020] ZACC 14; 2020 JDR 1227 (CC); 2020 (10) BCLR 1204 (CC).

¹⁷ Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

complainants who are bearers of the section 34 rights, from having access to the Tribunal under certain circumstances. One meaning is to be assigned to section 67(2), regardless of whether the complainant is the Commission or a private party. Consequently, the importance of the matter transcends the interests of the Commission alone.

[20] What remains for consideration on this aspect of the matter is whether the interests of justice favour the granting of leave. The decision of the Competition Appeal Court has a precedential effect over the Tribunal and if left intact, it will be binding on the Tribunal and the parties involved in similar cases.

[21] With regard to the interpretation of section 67(2), there are reasonable prospects of success. While the Competition Appeal Court accepted that the provision is capable of two possible meanings, it appears that the interpretation favoured by that Court undermines the right of access to the Tribunal instead of promoting it. In fact, while the Competition Appeal Court invoked section 39(2) of the Constitution, it is not clear from its judgment that its preferred interpretation advances the objects of the Bill of Rights. Reference was made to administrative law fairness without explaining how that was promoted by the chosen interpretation. Nor was it shown how the other interpretation would undermine administrative justice rights. The result was an improper application of section 39(2) of the Constitution.

[22] In these circumstances, it will be in the interests of justice to grant leave.

Issues

[23] Two main issues arise. The first is the proper meaning of section 67(2) of the Act. The second is whether the Tribunal exercised its discretion improperly when it declined to reinstate the present complaint. But it will be necessary in the process of determining those issues, to have consideration of other ancillary issues.

Section 39(2) injunction

[24] In mandatory terms, section 39(2) of the Constitution obliges every court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation.¹⁸ But this obligation is not triggered if the legislation under interpretation does not implicate any of the rights entrenched in the Bill of Rights.¹⁹

[25] Here the section 39(2) duty is activated because section 67(2) affects the right of access to the Tribunal which is guaranteed by section 34 of the Bill of Rights. Since section 67(2) is reasonably capable of two interpretations, the duty obliges us to discard a meaning that impacts negatively on the right of access. The obligation does not end there. If the other meaning also promotes that right, we are obliged to choose it. In *Makate* this Court declared that:

“The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning.”²⁰

Meaning of section 67(2)

[26] Section 67(2) of the Act provides:

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

[27] Textually the provision prohibits a second referral to the Tribunal if that referral is based on conduct that is substantially similar to the one that was involved in the first

¹⁸ *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

¹⁹ *Makate v Vodacom (Pty) Limited* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88.

²⁰ *Id* at para 89.

referral. But this prohibition is subject to the sole condition that the proceedings were completed in respect of the first referral.

[28] It is the meaning of words describing that condition which is at the heart of this matter. It is that meaning which will reveal whether the prohibition in the provision was triggered. In other words, whether the withdrawn complaint could be reinstated. Crucial to this interpretative exercise are the words “completed proceedings”.

[29] The purpose of section 67(2) to a large degree illuminates the sense in which those words were employed. That purpose is to protect firms from harassment in the form of repeat referrals arising out of one and the same conduct. The provision seeks to immunise firms from vexatious complaints. But even so, the provision does not insulate firms against all repeat referrals. The scope of the protective shield is restricted to completed proceedings only.

[30] For proceedings to be completed, they must have some element of finality. There must be a decision on some of the issues raised. For example, there must be a decision of the Tribunal on whether the firm against which the complaint was referred, was responsible for the illegal conduct or that the conduct it was accused of does not violate the Competition Act. Proceedings cannot be complete if no decision was rendered on any of the issues arising from the complaint. This much is also clear from the text of section 106(4) of the Criminal Procedure Act²¹ which was invoked by the Competition Appeal Court, as being analogous to section 67(2) of the Act.

[31] Even where section 106(4) has been applied and a verdict of an acquittal has been returned, it does not follow as a matter of course that the constitutional protection against double jeopardy would be triggered. For double jeopardy to be sustained, the

²¹ Section 106(4) of the Criminal Procedure Act provides:

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

accused is required to prove that he or she was in jeopardy of conviction in the first proceedings. For example, if the court that acquitted him lacked jurisdiction over the charge or the charge itself was invalid, the plea of double jeopardy cannot succeed.²² This plainly signifies the need of some form of finality in the first proceedings, for double jeopardy to arise.²³

[32] Therefore, the words “completed proceedings” are employed in section 67(2) in the sense of finalised proceedings in respect of which the Tribunal has disposed of issues relating to the merits of the complaint.

[33] This interpretation promotes access to the Tribunal by restricting the prohibition to finalised cases. It strikes the right balance between the rights of access to have genuine complaints resolved by the Tribunal on the one hand, and the abuse of making referrals of matters that have already been resolved, on the other. It follows that the Competition Appeal Court erred in concluding that the withdrawn complaint constituted completed proceedings.

Tribunal’s competence to reinstate

[34] In defending the interpretation assigned to section 67(2) by the Competition Appeal Court, the respondents argued that the other interpretation leads to uncertainty because the withdrawn complaint cannot be reinstated. They submitted that the Tribunal has no power to reinstate withdrawn complaints, as both the Act and the Tribunal rules do not confer such power on the Tribunal.

[35] The question whether the Tribunal has the power to reinstate has little bearing on the correct meaning of section 67(2). While it is true that the rules of the Tribunal

²² *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at paras 62-5.

²³ *S v Delport alias Boucher* 1984 (1) SA 511 (O) and *S v Vermeulen* 1976 (1) SA 623 (C).

do not grant it the power to reinstate withdrawn complaints,²⁴ the Act does albeit impliedly.

[36] A power is taken to have been impliedly conferred in our law if it is a logical or necessary consequence of the expressly conferred power.²⁵ A power is implied if it is necessary for the proper exercise of the expressly conferred power. This principle was affirmed by this Court in a number of decisions. In *Matatiele Municipality*, this Court stated:

“It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given.”²⁶

[37] The same principle was later applied in *Masetlha*²⁷ in relation to a power expressly granted by section 209(2) of the Constitution and in respect of a power conferred by statute in *Amabhungane*.²⁸ In *Masetlha* the issue that arose was whether the power conferred on the President to appoint a head of the intelligence agency

²⁴ Rule 50 of the Tribunal rules provides:

“Withdrawal and postponements

- (1) At any time before the Tribunal has determined a matter, the initiating party may withdraw all or part of the matter by—
 - (a) serving a Notice of Withdrawal in Form CT 8 on each party; and
 - (b) filing the Notice of Withdrawal with proof of service.
- ...
- (3) Subject to section 57—
 - (a) a Notice of Withdrawal may include a consent to pay costs; and
 - (b) if no consent to pay costs is contained in a Notice of Withdrawal the other party may apply to the Tribunal by Notice of Motion in Form CT 6 for an appropriate order for costs.”

²⁵ *GNH Office Automation CC and Another v Provincial Tender Board Eastern Cape and Another* [1998] ZASCA 25; 1998 (3) SA 45 (SCA) at 51G–H.

²⁶ *Matatiele Municipality v President of the RSA* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) at para 50.

²⁷ *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

²⁸ *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services (Media Monitoring Africa Trust, Right2know Campaign and Privacy International Amicus Curiae)* [2021] ZACC 3; 2021 JDR 0145 (CC); 2021 (4) BCLR 349 (CC).

includes the power to dismiss such head. Mr Masetlha had disputed his dismissal by the President on the ground that the President had no power to dismiss him.

[38] In rejecting the argument that the President did not have the power to dismiss a head of the intelligence agency, this Court held:

“The power to dismiss is necessary in order to exercise the power to appoint. The High Court is right that the power to dismiss a head of the Agency is a necessary power without which the pursuit of national security through intelligence services would fail. Without the competence to dismiss, the President would not be able to remove the head of the Agency without his or her consent before the end of the term of office, whatever the circumstances might be. That would indeed lead to an absurdity and severely undermine the constitutional pursuit of the security of this country and its people. That is why the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into s 209(2) of the Constitution. There is no doubt that the power to appoint under s 209(2) of the Constitution and the power under ISA implies a power to dismiss.”²⁹

[39] This Court was of the view that once the head of the relevant agency had been appointed, it was necessary for the President to have the power to dismiss him or her, if circumstances warranted his or her removal from office. The Court reasoned that whilst he or she was still in office, the President could not exercise the expressly granted power to appoint his or her successor, hence the necessity of the power to dismiss. The exercise of the implied power to dismiss would enable the President to exercise the expressly granted power to appoint.

[40] Here, like in *Masetlha*, the power to reinstate withdrawn complaints is implied in two provisions. The first is section 27(1) of the Act which authorises the Tribunal to adjudicate complaints on conduct prohibited by chapter 2 of the Act.³⁰ It will be recalled

²⁹ *Masetlha* above n 27 at para 68.

³⁰ Section 27(1) of the Act provides:

“(1) The Competition Tribunal may—
 (a) adjudicate on any conduct prohibited in terms of Chapter 2, to determine whether prohibited conduct has occurred, and, if so, to impose any remedy provided for in this Act.”

that the complaint against the respondents was based on section 4(1)(b) of the Act which is located in chapter 2.

[41] The second provision is section 52(1) of the Act which obliges the Tribunal to conduct hearings into every matter referred to it in terms of the Act.³¹ Once a complaint is referred, the Tribunal is afforded no choice but to conduct a hearing into the matter. Both these provisions do not expressly confer power on the Tribunal to reinstate withdrawn complaints. It cannot be gainsaid that the power to reinstate is necessary in cases where complaints have been withdrawn, so as to enable the Tribunal to adjudicate or conduct hearings into those complaints.

[42] The scheme of the Act indicates that the Tribunal is in charge of proceedings placed before it. It may decide that the hearing shall be informal or even be held in an inquisitorial manner or in chambers if no oral evidence is lead or by telephone or video conference, if it is in the interests of justice. In view of these powers, it would be absurd to hold that once a complaint is withdrawn, the Tribunal has no power to reinstate and deal with it in terms of the Act.

Whether the Tribunal had exercised its discretion judicially

[43] The Commission urged us to remit the matter to the Tribunal because, in the Commission's view, the Tribunal had improperly exercised its discretion. Attention

³¹ Section 52 provides:

- “(1) The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act.
- (2) Subject to subsections (3) and (4), the Competition Tribunal—
 - (a) must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice; and
 - (b) may conduct its hearings informally or in an inquisitorial manner.
- (2A) Despite subsection (2)(a), the Chairperson of the Tribunal may order that a matter be heard—
 - (a) in chambers, if no oral evidence will be heard, or that oral submissions be made at the hearing; or
 - (b) by telephone or video conference, if it is in the interests of justice and expediency to do so.”

was drawn to paragraph 57 of the Tribunal's ruling as proof of the application of the wrong test to the application for reinstatement. In that paragraph, the Tribunal stated:

“In other words, as a matter of law, while the complaint referral has been withdrawn by the Commission, this does not mean that the Commission cannot bring another complaint referral against the respondents, which would be equivalent to the reinstatement of charges of criminal proceedings. However, it will have to explain why this ‘new’ complaint was different from the withdrawn complaint. For example, it will have to explain that new facts have come to light or the same evidence has been reviewed by the Commission's investigators in a different light.”

[44] A perusal of the ruling reveals that this statement was made in a context that is different to reinstatement. The test mentioned in that paragraph was not applied to determine whether reinstatement should be granted. In the statement, the Tribunal expressly mentions the bringing of “another complaint referral against the respondents, which would be equivalent to the reinstatement of charges in criminal proceedings”. This was said in answer to the question whether the withdrawal amounted to a settlement of the *lis* (disputes) between the parties.

[45] The Tribunal held that the withdrawal did not as a matter of law amount to a settlement of the dispute. It concluded that, since the matter was not settled, the Commission was entitled to bring another complaint, on condition that there was an explanation for why the new complaint differs from the withdrawn one. Therefore, the test mentioned in paragraph 57 relates to a new complaint which differs from the one that was withdrawn.

[46] It must be emphasised that the test in question was not directed at reinstatement. This is put beyond doubt by what the Tribunal stated in paragraph 59. It said:

“This then brings us to the question of whether the Commission is precluded from reinstating the withdrawn complaint and whether the withdrawal constituted ‘completed proceedings’ before the Tribunal under section 67(2).”

[47] This paragraph plainly tells us that the Tribunal was turning to consider two questions. First, whether the Commission was precluded from reinstating the withdrawn complaint. Second, whether the withdrawal constituted completed proceedings under section 67(2). The Tribunal proceeded to address the second question first and concluded that the withdrawal did not amount to completed proceedings, as contemplated in section 67(2) of the Act.

[48] The first question was dealt with from paragraph 68. Having found that the withdrawal was not a removal of the matter from the roll, the Tribunal held that the Commission was not precluded from reinstating the complaint. But in the next paragraph, the Tribunal held that an inadequate explanation was furnished for seeking reinstatement and that the Commission's application had to be dismissed.

[49] In paragraph 70, the Tribunal amplified its reasons for declining to reinstate. It pointed out that "the Commission might have played fast and loose with the rules of the Tribunal". It reasoned that fairness lies at the heart of an application for reinstatement and concluded that fairness and the interests of justice did not support reinstatement. It is quite plain from paragraph 70 that the Tribunal applied the right test and exercised its discretion against granting reinstatement.

[50] The question that arises is not whether this Court could have granted reinstatement but whether the Tribunal had improperly exercised its discretion. Interference with that discretion on appeal is permissible only if the Tribunal had applied wrong legal principles or misdirected itself on material facts.³²

[51] I have already accepted that the correct test of the interests of justice was applied, together with the other relevant principles. And no misdirection relating to the facts has been established. Consequently, there is no basis for interfering with the exercise of the discretion by the Tribunal. The request for the remittal of the matter must fail. In the

³² *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 41.

circumstances the effect of overturning the order granted by the Competition Appeal Court is that the order that was issued by the Tribunal is revived.

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order granted by the Competition Appeal Court is set aside.
4. There is no order as to costs.

For the Applicant:

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