# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

**Reportable**

Case No: 20147/2014

In the matter between:

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| **PREMIER FOODS (PTY) LTD** | **APPELLANT** |
| **and** | |
| **NORMAN MANOIM NO** | **FIRST RESPONDENT** |
| **THE COMPETITION TRIBUNAL** | **SECOND RESPONDENT** |
| **THE COMPETITION COMMISSION** | **THIRD RESPONDENT** |
| **THE TRUSTEES FOR THE TIME BEING OF THE CHILDREN'S RESOURCE CENTRE TRUST** | **FOURTH RESPONDENT** |
| **THE TRUSTEES FOR THE TIME BEING OF THE BLACK SASH TRUST** | **FIFTH RESPONDENT** |
| **CONGRESS OF SOUTH AFRICAN TRADE UNIONS** | **SIXTH RESPONDENT** |
| **NATIONAL CONSUMER FORUM** | **SEVENTH RESPONDENT** |
| **TASNEEM BASSIER** | **EIGHTH RESPONDENT** |

**BRIAN MPAHLELE** **NINTH RESPONDENT**

**TREVOR RONALD GEORGE BENJAMIN** **TENTH RESPONDENT**

**NOMTHANDAZO MVANA** **ELEVENTH RESPONDENT**

**FARIED ALBERTU** **TWELFTH RESPONDENT**

**Neutral citation:** *Premier Foods v Manoim NO* (20147/2014) [2015] ZASCA 159 (4 November 2015)

**Coram:** Maya ADP, Shongwe and Petse JJA and Gorven and Baartman AJJA

**Heard**: **29 September 2015**
**Delivered:** **4 November 2015**

**Summary:** Competition Law – leniency under Corporate Leniency Policy – appellant participated as a self-confessed member of a cartel in complaint proceedings before the Competition Tribunal – order by the Tribunal finding that the appellant was involved in a prohibited practice – appellant excluded from the complaint referrals – whether such order competent – Tribunal having no power to make any order against appellant – order relating to appellant a nullity – no need to set aside order – the Tribunal or its Chairperson cannot issue a certificate under s 65(6)*(b)* of the Competition Act since order on which that certificate based a nullity.

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## ORDER

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**On appeal from** Gauteng Provincial Division of the High Court, Pretoria (Kollapen J sitting as court of first instance):

1 The appeal is upheld with costs, including those consequent on the employment of two counsel.

2 The order of the court *a quo* dismissing the application with costs is set aside and the following order substituted:

'1 Declaring that neither the first nor the second respondent can lawfully issue a notice in terms of section 65(6)*(b)* of the Competition Act 89 of 1998, certifying that the applicant's conduct has been found to be a prohibited practice under the Act in Competition Tribunal of South Africa case numbers 15/CR/Feb07 and 50/CR/May08.

2 The second and third respondents are directed to pay the costs of the Applicant.'

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**JUDGMENT**

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**Gorven AJA (Maya ADP, Shongwe and Petse JJA and Baartman AJA concurring):**

[1] Cartel activity is a form of practice prohibited by s 4(1)*(b)* of the Competition Act.[1] Self-interest dictates that the cartel members close ranks. For this reason, the third respondent, the Competition Commission (the Commission) has adopted a corporate leniency policy (CLP).[2] This offers a:

'. . . self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP.'[3]

It is hoped by this to encourage cartel members to disclose cartel activity and thus to contribute toward achieving the objects of the Act.[4]

[2] The appellant, Premier Foods (Pty) Ltd (Premier) had been granted conditional immunity under the CLP. It gave evidence of the cartel activity in complaints referred by the Commission to the second respondent, the Competition Tribunal (the Tribunal). This appeal concerns an order granted by

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[1]Competition Act 89 of 1998. The Act makes use of italics, which have been retained in quotes from the Act. Section 4(1)*(b)* reads as follows:
'(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 –
. . .
*(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.'

[2]Corporate Leniency Policy, GN 628, *GG* 31064, 23 May 2008, as amended by GN 212, *GG* 35139, 16 March 2012. The adoption by the commission of the CLP was upheld as valid and lawful in *Agri Wire (Pty) Ltd & another v Commissioner of the Competition Commission & others* [2012] ZASCA 134; 2013 (5) SA 484 (SCA) para 22.

[3]Paragraph 3.1 of the CLP, footnotes omitted.

[4]The relevant details of the CLP will be discussed more fully later in this judgment.

the Tribunal in those proceedings declaring the conduct of Premier to be a prohibited practice in respect of its involvement in cartel activity (the declaration).[5] Premier says that the Tribunal was not empowered to make the declaration because the conduct of Premier was not included in the complaints referred to the Tribunal. Premier submits that the declaration is therefore a nullity. As a result, the argument goes, neither the Tribunal nor the first respondent, the Chairperson of the Tribunal (the Chairperson), can lawfully certify the declaration in terms of s 65(6)*(b)*(i) of the Act.

[3] The declaration came to be granted as follows. In December 2006, the Commission received information of an alleged bread cartel operating in the Western Cape (the first complaint).[6] It initiated a complaint against Premier, Tiger Food Brands (Pty) Ltd (Tiger) and Pioneer Foods (Pty) Ltd (Pioneer). Premier applied for leniency under the CLP, disclosing that it and the other two parties had been operating a cartel in the Western Cape by fixing selling prices and other trading conditions.[7] Premier went further and disclosed that it, Pioneer and Foodcorp (Pty) Ltd (Foodcorp) had operated a bread cartel in other parts of the country. This involved agreements to allocate territories.[8] As a result of this information, the Commission initiated a second complaint (the second complaint).[9] The Commission referred the two complaints to the Tribunal. Only Tiger and Pioneer were cited as respondents in the first complaint and only Pioneer and Foodcorp were cited as respondents in the second complaint. Relief was sought only against the cited respondents.

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[5] The order was granted in terms of s 58(1)*(a)*(v) of the Act which provides for an order ‘declaring conduct of a *firm* to be a prohibited practice . . . for purposes of section 65’. Section 65(6)*(b)*(i) requires a notice certifying that the conduct in question ‘has been found to be a *prohibited practice*’. Section 65(9)*(a)* refers to the date of ‘a determination in respect of a matter that affects that person’. The underlined words are my emphases. These terms seem to me to be interchangeable. For the sake of consistency, I have used the word ‘declaration’ for all of these.
[6]This was allocated case number 15/CR/Feb07.
[7]In contravention of s 4(1)*(b)*(i) of the Act.
[8]In contravention of s 4(1)*(b)*(ii) of the Act.
[9]This was allocated case number 50/CR/May08.

[4] The two complaints were dealt with together by the Tribunal. The founding affidavit to the referral arising from the first complaint explains why Premier was not cited as a respondent or relief sought against it in the referrals:

‘Although [Premier] was also the subject of the [Commission’s] investigation, it has not been joined as a respondent in these proceedings because it has been granted conditional immunity from prosecution (in terms of the [Commission’s] corporate leniency policy) as a result of its co-operation with the [Commission] during its investigation and confession of its role in the bread cartel activity involving the first and second respondents and [Premier] itself in the Western Cape.’[10]

[5] After hearing the referred complaints, the Tribunal granted the declaration. This declares that Premier and the cited respondents had contravened s 4(1)*(b)*(i) and (ii) of the Act in respect of the complaints. At the time the declaration was made, both Tiger and Foodcorp had consented to orders under s 49D of the Act, which included administrative penalties. This left Pioneer as the remaining opposing respondent. A total administrative penalty of some R195 million was imposed on Pioneer. Premier, as mentioned, had been granted conditional immunity under the CLP. Premier was granted final immunity from prosecution as a result of the evidence it gave.

[6] This appeal has arisen because the 4th to 12th respondents (the claimants), who regard themselves as having been injured by the cartel activity, wish to sue the four entities for the damages they say they have sustained as a result. They may only institute action if they file with the Registrar or Clerk of the Court a notice in terms of s 65(6)*(b)* of the Act from the Chairperson of the Tribunal. Section 65(6) provides as follows:

‘A person who has suffered loss or damage as a result of a *prohibited practice* –

[10]There is a similar paragraph in the referral of the second complaint.

(a) may not commence an action in a *civil court* for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph *(a)*, when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the *prescribed* form –

(i) certifying that the conduct constituting the basis for the action has been found to be a *prohibited practice* in terms of *this Act*;

(ii) stating the date of the Tribunal or Competition Appeal Court finding; and

(iii) setting out the section of *this Act* in terms of which the Tribunal or the Competition Appeal Court made its finding.'

It is s 65(6)*(b)* which applies here. The crucial requirement is certification in terms of s 65(6)*(b)*(i) that the conduct on which the action is based has been found to be a prohibited practice in terms of the Act.

[7] The claimants obtained such notices in respect of Tiger and Pioneer. They thereupon launched proceedings in the Western Cape Division of the High Court[11] to institute a class action against Premier, Tiger and Pioneer.[12] This application was dismissed. One of the three bases for dismissing it was that no s 65(6)*(b)* notice had been filed in respect of Premier.[13]

[8] The claimants then applied to the Tribunal for a s 65(6)*(b)* notice in respect of Premier. This was opposed. The Chairperson convened a pre-hearing

[11]It was designated the Western Cape High Court, Cape Town at the time.

[12] See *The Trustees for the Time Being of the Children's Resource Centre Trust & others v Pioneer Foods (Pty) Ltd & others; Mukaddam & others v Pioneer Foods (Pty) Ltd & others* [2011] ZAWCHC 102.

[13] Two appeals from this judgment were heard by this court. The first resulted in the matter being referred back with leave given to supplement the papers to deal with the requirements for certification in class actions set out by this court in that judgment. It was held that prior certification by a court is necessary for the institution of a class action. See *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA). The second held that the applicants had not made out a case for an 'opt-in' class action. See *Mukaddam v Pioneer Foods (Pty) Ltd & others* [2012] ZASCA 183; 2013 (2) SA 254 (SCA). The Constitutional Court heard an appeal from the second of these. See *Mukaddam v Pioneer Foods (Pty) Ltd & others* [2013] ZACC 23; 2013 (5) SA 89 (CC).

conference. He there expressed the view that, in his capacity as Chairperson, it was he, rather than the Tribunal, who should issue the notice. He invited the parties to submit heads of argument on the issue. This application is still pending because Premier then approached the court below for the following relief:

‘Declaring that neither the First nor the Second respondent can lawfully issue a notice in terms of section 65(6)*(b)* of the Competition Act 89 of 1998, certifying that the Applicant’s conduct has been found to be a prohibited practice under the Act in Competition Tribunal of South Africa case numbers 15/CR/Feb07 and 50/CR/May08’.[14]

[9] The application was dismissed with costs by Kollapen J in the Gauteng Division of the High Court, Pretoria.[15] He held that the declaration was competent and, because an order in terms of s 58(1)*(a)*(v) had been granted, a notice in terms of s 65(6)*(b)* could be issued in respect of Premier. Leave to appeal was granted by this court after the court *a quo* refused an application for leave to appeal against that decision. This is the appeal which is before us. Only the Commission and the claimants oppose the appeal.

[10] It is as well to sketch the basic contours of the Act at this point. A prohibited practice is defined to mean one prohibited in terms of Chapter 2.[16] Cartel activity is dealt with in this chapter in s 4(1)*(b)*. A ‘complainant’ is defined as ‘a person who has submitted a complaint in terms of section 49B(2)*(b)*’.[17] A ‘respondent’ is defined as ‘a *firm* against whom a complaint of a *prohibited practice* has been initiated in terms of *this Act*’.[18] The Act establishes

[14]Premier also sought costs.
[15]It was known as the North Gauteng High Court, Pretoria, at the time.
[16]Section 1 of the Act.
[17]Ibid.
[18]Ibid.

three specialist bodies: the Commission,[19] the Tribunal[20] and the Competition Appeal Court (the CAC).[21]

[11] The Commission *inter alia* investigates complaints of alleged prohibited practices which have been initiated.[22] Once the complaint has been investigated, the Commission is limited to three courses of action. If it is of the view that no prohibited practice has been established, it must issue a certificate of non-referral.[23] Where it is of the view that a prohibited practice has been established, it has two options. First, it can 'agree on the terms of an appropriate order' with the respondent to the complaint.[24] Secondly, if it does not do so, it must refer the complaint to the Tribunal.[25] If the terms of an order are agreed, the Tribunal may confirm the agreement as a consent order without hearing evidence.[26] If that order includes an award of damages to the complainant, the complainant must consent to the damages.[27] The consent order does not preclude a complainant from applying for a declaration in terms of, inter alia, s 58(1)*(a)*(v).[28] If no damages were awarded in the consent order, a complainant is not precluded from claiming damages.[29]

[12] Where a referral takes place, the Commission may refer all or only some of the particulars of the complaint in terms of s 50(3).[30] If it refers only some

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[19] In terms of section 19.
[20] In terms of section 26.
[21] In terms of section 36.
[22]Section 49B.
[23]If this is done, the complainant is entitled in terms of s 51(1) to refer the complaint to the Tribunal, subject to its procedural rules.
[24]Section 49D(1).
[25]Section 50(1) read with s 50(2)*(a)* and s 50(5).
[26]Section 49D(1).
[27]Section 49D(3).
[28]Section 49D(4)*(a)*.
[29]Section 49D(4)*(b)*.
[30]Section 50(3) reads:
'(3) When the Competition Commission refers a complaint to the Competition Tribunal in terms of subsection (2)*(a)*, it –
*(a)* may-
(i) refer all the particulars of the complaint as submitted by the *complainant*;
(ii) refer only some of the particulars of the complaint as submitted by the *complainant*; or
(iii) add particulars to the complaint as submitted by the *complainant*; and

particulars, it must then issue a certificate of non-referral in respect of those which it does not refer.[31] If it does not refer a complaint or issue such a certificate within a year after the complaint was submitted, the Commission must be regarded as having issued a notice of non-referral.[32] The complainant may thereupon refer the complaint, or that part of it which was not referred, to the Tribunal.[33]

[13] On referral of the complaint, the Tribunal must conduct a hearing.[34] This encompasses 'every matter referred to it in terms of *this Act*.' At the conclusion of the hearing, the Tribunal must make an order and give written reasons.[35] One order it can make is set out in s 58(1)*(a)*(v) which reads:

'(1) In addition to its other powers in terms of *this Act*, the Competition Tribunal may –

(a) make an appropriate order in relation to a *prohibited practice*, including –

. . .

(v) declaring conduct of a *firm* to be a *prohibited practice* in terms of *this Act*, for purposes of section 65;

. . . .'

This is the order whose declaration to that effect must be certified in the notice in terms of s 65(6)*(b)*. Another order the Tribunal can grant is to impose an administrative penalty in the circumstances set out in s 59.[36]

[14] The Tribunal and the CAC are the only bodies that can make an order declaring that a firm has engaged in a prohibited practice. Unless they do so, no such declaration can be made. This is clear from s 62(1)*(a)*, which provides that the Tribunal and CAC have exclusive jurisdiction in respect of the interpretation

*(b)* must issue a notice of non-referral as contemplated in subsection (2)*(b)* in respect of any particulars of the complaint not referred to the Competition Tribunal.'

[31] As can be seen, s 50(3)*(a)*(iii) also allows the Tribunal to add particulars to a complaint.

[32] Section 50(5). This time period can be extended by agreement with the complainant or by application to the Tribunal in terms of s 50(4).

[33] In terms of s 51(1).

[34] Section 52(1).

[35] Section 52(4).

[36] For the sake of completeness, it is noted that it can also make other orders in terms of s 60 relating to mergers which will not be dealt with here.

and application of Chapter 2 of the Act. An order made by the Tribunal may be served, executed and enforced as if it were an order of the High Court.[37] Section 65(2) ousts the jurisdiction of a civil court to consider whether conduct prohibited by the Act has taken place and, if so, to make a declaration.[38] A civil court is obliged to apply the determination of these specialist bodies.[39] Once a declaration has been made by the Tribunal or CAC, it therefore renders *res judicata* the issue of the wrongful conduct of the firm in question. Section 65(9)*(a)* provides that a 'person's right to bring a claim for damages arising out of a *prohibited practice* comes into existence' on the date that the Tribunal or CAC makes a declaration. Without a declaration, no right to claim damages comes into existence. Once a declaration has been made, a s 65(6)*(b)* notice can be obtained by a person wishing to claim damages. Such a notice 'is conclusive proof of its contents, and is binding on a *civil court*.'[40] Without that notice, therefore, a claim for damages cannot be prosecuted.

[15] Having sketched an outline of the relevant aspects of the Act, it will be helpful to briefly consider the provisions of the CLP. An applicant for immunity such as Premier (a leniency applicant) must acknowledge culpability and fully disclose all relevant facts. Immunity is conditional until the Tribunal has made a final determination in relation to the reported cartel activity.[41] Immunity means:

'. . . that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed to that successful applicant.'[42]

Footnote 4 to this clause explains that:

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[37]Section 64(1).

[38]Defined as a High Court or Magistrates Court in s 1.

[39]Section 65(2)*(a)*. If no such order has been made at the time the court is approached, the court is obliged to refer the issue of prohibited conduct to the Tribunal except in circumstances which do not apply here. See s 65(2)*(b)*.

[40]Section 65(7).

[41] Clause 3.1 read with clause 9.1.1.2 of the CLP.

[42]Clause 3.3 of the CLP. Footnotes omitted.

‘Adjudication means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view of getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.’

[16] In the context of this matter, accordingly, all that is offered to a leniency applicant is immunity from the application of the provisions of s 59. The CLP expressly provides that leniency applicants do not enjoy immunity in civil actions.[43] No immunity is therefore offered from a declaration because this is what gives rise to the right to claim damages. It is clear that, unless a declaration can be made concerning a leniency applicant, the provisions of clauses 5.9 and 6.4 are rendered nugatory.

[17] Premier submits that the crisp issue for decision is whether the Tribunal had the power to grant an order under s 58(1)*(a)*(v) declaring Premier’s conduct to be a prohibited practice. In the first place, it submits that the Tribunal had no such power. Secondly, it says that the effect of this is that the declaration is a nullity and does not need to be set aside. There is therefore, the argument goes, no order containing a determination capable of certification. I shall deal with these submissions in turn.

[18] Did the Tribunal have the power to grant the order? The Tribunal is a creature of statute. It has only those powers given to it by the Act and must exercise its functions in accordance with the Act.[44] The Commission investigates, refers and prosecutes complaints. The Tribunal determines those complaints which have been referred to it. Its power to determine a complaint only arises on referral in terms of the Act, generally by the Commission.[45] Put

[43] Clause 5.9 of the CLP, as underscored by clause 6.4 of the CLP, which provides that ‘[n]othing in the CLP shall limit the rights of any person who has been injured by cartel activity in respect of which the Commission has granted immunity under the CLP to seek civil or criminal remedies’. (footnotes omitted)
[44] Section 26(1)*(d)*.
[45] As indicated, complainants may also refer complaints in certain circumstances under s 51(1) but this does not apply to the present matter.

another way, the referral by the Commission is 'a jurisdictional fact for the exercise of the Tribunal's powers in respect of prohibited practices.'[46] In *Competition Commission of South Africa v Senwes Ltd*,[47] the Constitutional Court held:

'The question whether the complaint that was found to have been established by the Tribunal adequately canvassed that which was referred to it must be determined with reference to the terms of the referral.'[48]

The Tribunal is only empowered to make a declaration on matters falling within terms of a referral. The Commission submits that the question 'is whether a complaint against a particular party is properly referred to and before the Tribunal when that party is not formally cited as a respondent.' For reasons which will become apparent, my view is that the question goes beyond the issue of citation.

[19] When the Commission refers a complaint to the Tribunal in terms of s 50(2)*(a)*, it is entitled to refer only some of the particulars of a complaint. This is clear from s 50(3). If this is done, the Tribunal's power is limited to those particulars referred to it by the Commission. In *Agri Wire (Pty) Ltd & another v Commissioner of the Competition Commission & others*,[49] this court upheld the right of the Commission to exclude one or more cartel members from a referral to the Tribunal. That decision is not challenged by the Commission or the claimants. In that matter, the following was said:

'If, at the conclusion of the investigation, the Commissioner decides to refer the complaint to the Tribunal, the Act specifically provides that the Commissioner may refer all or some of the particulars of the complaint and may add particulars to the complaint submitted by the complainant. One of the central particulars in respect of cartel conduct is the

[46] Per Harms DP in *Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA) para 12.
[47] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) para 36.
[48] In the majority judgment by Jafta J. The minority judgment did not comment on this approach, but applied it when it held that the matter should be referred back to the Tribunal for it to rule on the ambit of the referral.
[49] *Agri Wire (Pty) Ltd & another v Commissioner of the Competition Commission & others* [2012] ZASCA 134; 2013 (5) SA 484 (SCA).

identity of the members of the cartel. If the complaint is that A and B and C have engaged in cartel behaviour the Commissioner may decide to refer only A and B. In that way, the Commissioner exercises the express statutory power to exclude certain particulars, namely C, from the referral.'[50]

[20] In *Agri Wire*, the party referred to as CWI had been given conditional immunity under the CLP. It was cited as a respondent in the complaint referral but no relief was sought against it. Agri Wire and nine others were cited as respondents against whom relief was sought. As is clear, this court arrived at the conclusion that CWI could properly be excluded from the referral by interpreting 'particulars of the complaint' in s 50(3) to include the parties alleged to be involved in the cartel activity.

[21] In support of its contention that the Tribunal was empowered to make the declaration, the Commission relies on *Senwes*. It makes the following submissions:

'The Court found that, as a question of fact, the Commission had indeed failed to specify the particular complaint against the parties in the referral.'

and

'But, the Court held that the Tribunal nevertheless had jurisdiction to determine the matter. The Tribunal determined a complaint not originally referred but which was brought to its attention during the course of deciding a referral.'

These submissions do not reflect the finding in *Senwes*. The issue in *Senwes* was whether the complaint on which the Tribunal ruled was covered by the referral. This court held that the conduct fell outside of the ambit of the referral[51] but the majority in the Constitutional Court held that it was included. In this regard, Jafta J said:[52]

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[50]Paragraph 24.

[51]*Senwes Ltd v Competition Commission of South Africa* [2011] ZASCA 99 para 46.

[52] Paragraph 39. Mogoeng CJ, Moseneke DCJ, Nkabinde, Skweyiya, Van der Westhuizen, Yacoob JJ and Zondo AJ concurred in the judgment of Jafta J.

‘It was this same complaint which the Tribunal found to have been established in evidence. As it appears below, the error made by the Tribunal was to call it a margin squeeze. In my respectful view, the Supreme Court of Appeal erred when it held that the Tribunal considered a complaint which was not covered by the referral.’[53]

The enquiry, therefore, is whether the complaint ruled upon in any one matter fell within the ambit of the referral.[54] This is a fact based enquiry.

[22] In the present matter, in the light of *Agri Wire*, the issue is whether the particulars of the complaint relating to Premier’s conduct fell within the ambit of the referrals. The Commission and the claimants accept that Premier was not cited as a respondent in the complaint referrals. They further accept that no relief was sought against Premier in the referrals. They say, however, that the particulars of the complaint relating to Premier nevertheless fell within the ambit of the referrals.

[23] In support of this contention, the claimants submit that Premier was a respondent as defined in the Act because it formed part of the complaint initiation. They, and the Commission, submit that Premier’s conduct formed part of the referral because Premier participated as a party to whom conditional immunity had been granted on the basis of its admitted involvement in the cartel activity. Of the seven witnesses called, five were employees of Premier. All gave evidence of the cartel activity which included Premier. The only reason the commission sought no relief against Premier in the referrals was because conditional immunity had been extended to Premier. The Commission summed up by saying:

‘The boundaries of the Tribunal’s powers are therefore not determined by whether or not the leniency applicant was formally cited in the referral. They are determined by the fact of the

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[53]Froneman J, in whose judgment Cameron J concurred, held that the referral was open to more than one reasonable interpretation and should be referred back to the Tribunal for a ruling on its ambit.

[54]This remains the case when the Commission acts in terms of s 50(3)*(a)*(iii) and adds particulars to a complaint as submitted by the complainant.

leniency applicant's participation in the hearing, the material facts set out in the referral affidavit and the evidence adduced by and about it.'

[24] None of this means that Premier's conduct fell within the ambit of the referrals. Although it was a respondent as defined in the Act, this also does not mean that it was included in the referrals. That must be determined by construing the ambit of the referrals themselves. In *Agri Wire*, CWI participated on the same basis as did Premier in the present one except that it was also cited as a respondent in the referral. It was a party to whom conditional immunity had been extended on the basis of its admitted involvement in cartel activities. It gave evidence of its involvement in the cartel activities and that of the other respondents at the enquiry. But, because no relief was sought against it, this court held that its particulars had not been included in the referral for the following reasons:

'Clause 9.1.1.3 [of the CLP] warns that, at any stage until total immunity is granted, the Commission reserves the right to revoke the grant of conditional immunity for lack of co-operation and pursue a prosecution before the Tribunal. That signals quite clearly that a party that has been afforded conditional immunity, is not before the Tribunal for the purposes of the latter making a determination against it, including the imposition of an administrative penalty. It will only be referred to the Tribunal for the purpose of an adverse determination and the imposition of an administrative penalty if the Commission revokes its conditional immunity.'

[25] The judgment in *Agri Wire* thus distinguishes between a determination and the imposition of an administrative penalty. When it refers to a determination, it does not refer to one for the purpose of imposing an administrative penalty alone. It includes such a determination but makes it clear that this is not the only determination from which the referral excluded CWI. What is then meant by other types of determination? The only places where the Act refers to a determination in this context is in s 65(2)*(a)* and s 65(9). The former relates to a determination concerning conduct that is prohibited in the

Act. The latter relates to a determination for the purposes of a claim for damages arising from a prohibited practice. Both of these therefore relate to what I have referred to as a declaration, which is an order in terms of s 58(1)*(a)*(v) of the Act. This means, accordingly, that CWI was before the Tribunal as a cited respondent, but had been excluded from the referral 'for the purposes of' seeking any relief at all against it, whether by way of an order in terms of s 58(1)*(a)*(v) or the imposition of an administrative penalty under s 59.

[26] In the present matter, as is accepted by the Commission and the claimants, the Commission neither cited Premier as a respondent nor did it seek any relief, including a declaration, against it. The referrals were covered by Form CT1(1) as was required by the rules.[55] The forms were headed 'The Competition Commission seeks an order granting the following relief' with the explanation below '(Concise statement of the order or relief sought:)'. In the second referral, the Commission wrote in that space: 'SEE THE ATTACHED AFFIDAVIT OF AVISHKAR KALICHARAN'. The affidavit in question concluded with a prayer for the relief sought by the Commission. This comprised orders against only the cited respondents, Pioneer and Foodcorp, in terms of s 58(1)*(a)*(v), that they desist from such conduct and that an administrative penalty be imposed on them. In the first referral, the relief was set out in the covering form as well as in the prayer to the affidavit. It sought identical relief to that in the second referral, but also only against the cited respondents, Pioneer and Tiger. As I have already noted, the Commission itself said that it had deliberately not cited Premier as a respondent. Premier's position in the present matter thus corresponds to that of C in the example given in *Agri Wire*.[56] Unlike in *Senwes*, the Commission consciously exercised its right to exclude certain particulars, namely the involvement of Premier in the cartel

[55]Competition Tribunal Rules, *GG* 22025, 1 February 2001 (Note: the Notice Number was omitted in the publication of these Rules.)
[56]See paragraph 19 above.

activity, from the referrals. There was thus only a partial referral of the complaints to the Tribunal as is allowed by s 50(3)*(a)*(ii).

[27] The Commission says that s 58(1)*(a)*(v) distinguishes between a 'firm' and a 'party'. Accordingly, it submits that the firm against whom such an order is made need not be a party. Because Premier participated in the proceedings on the basis of its admitted involvement in the cartel activity, an order could be made against it. It says that no prejudice to Premier ensued. But this ignores the approach in *Agri Wire* and *Senwes*, both of which require the subject matter of the order to fall within the ambit of the complaint referral, failing which the Tribunal has no power to make a declaration. As I have indicated, my view is that Premier's conduct is not covered by the referrals. The Tribunal thus had no power to make the declaration. The issue of prejudice does not arise since the Tribunal was not empowered.

[28] The decision not to cite Premier as a respondent in the referrals provides an additional basis why the Tribunal was not empowered to make the declaration. In this regard, Premier differs from the position of CWI, which was cited as a respondent in *Agri Wire*. This point is illustrated in a different context by *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others*.[57] In that matter, a single party was referred to a Bargaining Council in a dispute over unfair dismissals. When conciliation did not result from the referral, the dispute was referred to the Labour Court, also with only one party being cited. However, the Union then sought to join two other parties in the Labour Court. The difficulty was that, in terms of the Labour Relations Act 66 of 1995, if there has been no referral to conciliation, the Labour Court has no jurisdiction over such a dispute. The Labour Court nevertheless allowed the joinder.

[57] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC).

[29] An appeal to the Labour Appeal Court to set aside the joinder succeeded. The Constitutional Court agreed with the Labour Appeal Court. It held that joinder was not permissible because those two parties had not been referred to the Bargaining Council. This meant that the Labour Court had no jurisdiction in relation to them. This was so even though all three parties had notice of the conciliation proceedings. In so finding, the majority judgment of Cameron J said:

> ‘Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it.’[58]

He concluded:

> ‘So the purpose of the statutory provision – to tell those on the line that the impending legal process might make them liable to adverse consequences – was not fulfilled. That the three companies’ shared HR services, and the companies’ attorney, knew about the referral against Steinmüller did not mean that they knew, or should have concluded, that the dispute against Intervalve and BHR had also been referred for conciliation. On the contrary, the referral against Steinmüller alone told them the opposite. Intervalve and BHR were left out. The ensuing legal process did not encompass them.’[59]

[30] Premier knew that the other members of the cartel had been cited as respondents and that relief was sought against them. This does not mean that it should have anticipated that relief would be sought against it since the referral told it the opposite. In the words of Cameron J, it was not notified that it was ‘liable to the consequences of enmeshment in the ensuing legal process.’ The submission that, because Premier was involved as a leniency applicant in which it clearly admitted its culpability, a finding could be made against it, attempts to invoke precisely that ‘liability to legal process through oblique or informal

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[58]Paragraph 53.
[59]Paragraph 58.

acquaintance' which was rejected by the Constitutional Court. Citation as a party is necessary so that that person can invoke all the rights of a party against whom relief is sought.

[31] The position of Premier is not dissimilar to that of a witness under s 204 of the Criminal Procedure Act 51 of 1977 where immunity from prosecution can be granted if the witness fulfils certain criteria. If the witness does not do so, the court has no jurisdiction to convict the witness because the witness was not an accused before the court. A court would have jurisdiction to do so only if the witness was subsequently charged before it and was thus accorded all of the rights of an accused person.[60]

[32] In all the circumstances, therefore, I hold the view that the Tribunal lacked the power to make the declaration. This brings into focus the second issue as to the consequence of that lack of power.

[33] What, then, is the effect of the lack of power of the Tribunal to make the declaration? In this regard, Kollapen J in the court a quo held that 'for as long as the finding of the Tribunal remains unchallenged, then the issue of the certificate as proof of such finding is not only permissible but also in my view peremptory.'[61] The Commission and the claimants support this approach. Premier submits, however, that, because the Tribunal did not have the power to make the declaration, it is a nullity. It is therefore not necessary to set it aside. The notice in terms of s 65(6)*(b)* accordingly cannot be issued because it would amount to certifying a nullity.

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[60]By this rough analogy, I do not seek to suggest that the power of the Tribunal to determine the terms of the referral should be narrowly or restrictively construed. See note 6 of the minority judgment in *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC), where it was said that such an approach would be more appropriate to the investigative powers of the Commission than to those of the Tribunal. See also *Woodlands Dairy (Pty) Ltd & another v Competition Commission* [2010] ZASCA 104; 2010 (6) SA 108 (SCA) para 10.

[61]*Premier Foods (Pty) Ltd v Manoim NO & others* [2013] ZAGPPHC 236 para 45.

[34] In support of this submission, Premier relies on a line of authorities stretching back over one hundred years. These were reaffirmed by this court in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others*,[62] which said:

‘As long ago as 1883 Connor CJ stated in *Willis v Cauvin* 4 NLR 97 at 98 – 99:

“The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. . .”

*Willis v Cauvin* was cited with approval in *Lewis & Marks v Middel* 1904 TS 291; and *Sliom v Wallach's Printing & Publishing Co, Ltd* 1925 TPD 650. In the former, Mason J (with whom Innes CJ and Bristowe J concurred) held at 303:

“It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, *ad Cod*. 2; 41; 7, 54; *Willis v Cauvin*, 4 N.L.R. 98; *Rex v Stockwell*, [1903] T.S. 177*; Barnett & Co. v Burmester & Co.*, [1903] T.H. 30).”’

These authorities confirm two bases for nullity: lack of jurisdiction to make an order and non-citation of a person against whom an order is granted. This further underscores the approach mentioned above in *NUMSA v Intervalve* that citation is a necessary prelude to an order granted against an entity.

[35] In *Lewis & Marks v Middel*,[63] the plaintiffs sued for cancellation of a diagram of the defendant’s farm insofar as it encroached on that of the plaintiffs’ farm. The diagram of the plaintiffs’ farm had been confirmed in 1870 and, in 1882, the defendant lodged a protest against that diagram which came before the Land Commission. The Land Commission awarded the disputed ground to the defendant who had his farm surveyed in accordance with the award. This

[62] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) para 12.
[63] *Lewis & Marks v Middel* 1904 TS 291.

diagram was confirmed and, although the report of the Land Commission was published, no appeal was noted against it. The court upheld the plaintiffs' challenge to the defendant's diagram on the basis that, because the plaintiffs had not been given notice of the sitting of the Land Commission, the proceedings before it were null and void.

[36] In a footnote to *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*,[64] the Constitutional Court approved this approach:

'In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) the Supreme Court of Appeal, reaffirming a line of cases more than a century old, held that judicial decisions issued without jurisdiction or without the citation of a necessary party are nullities that a later court may refuse to enforce (without the need for a formal setting-aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.'[65]

[37] In attempting to address this, the Commission relies on the following passage in *Kirland*:

'[98] The outcome does not change if we consider the approval from the perspective of whether the decision-maker acted within her jurisdiction in granting approval. Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist before the exercise of power, and the procedures to be followed when exercising that power. It is true that we sometimes refer to lawfulness requirements as "jurisdictional facts". But that derives from terminology used in a very different, and now defunct, context (namely where all errors, if they were to be capable of being reviewed at all, had to be construed as affecting the functionary's "jurisdiction"). In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with

[64]*MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC) at 512, note 78.
[65]Per the majority judgment of Cameron JA.

the preconditions for lawfully exercising her powers. She acts, but she acts wrongly, and her decision is capable of being set aside by proper process of law.

[99] So the absence of a jurisdictional fact does not make the action a nullity. It means only that the action is reviewable, usually on the grounds of lawfulness (but sometimes also on the grounds of reasonableness). Our courts have consistently treated the absence of a jurisdictional fact as a reason to set the action aside, rather than as rendering the action non-existent from the outset. The absence of jurisdictional facts did not entitle Mr Boya to withdraw the approval, but only to approach a court to set it aside.'[66]

On the strength of this, the Commission says that, even if it is found that the Tribunal lacked power, the declaration must be set aside before Premier can succeed. This also accords with a long line of authority concerning the effect of invalid administrative action. In such a case, the administrative decision cannot be ignored because it exists in fact and has legal consequences until set aside.[67]

[38] As I see it, the *dictum* relied upon by the Commission in no way detracts from the approach in *Motala* and the line of authorities there referred to. Premier has not simply ignored the declaration. Nor is it contending that the Chairperson or Tribunal should do so. It may convincingly be argued that the declaration could not be ignored by the Chairperson or the Tribunal because neither of these is a court of law and this would amount to self-help. This may well be correct but it is not necessary to deal with that issue.

[39] The reason for this is that the footnote in *Kirland* says that the right of a court to ignore as a nullity other court orders does not amount to self-help. The court *a quo* was thus in a different position to the Chairperson and the Tribunal. It was requested to declare that the order against Premier could not lawfully be certified. It must be borne in mind that, in the present matter, the declaration had the force and effect of a High Court order.[68] If the court *a quo* disclaimed the

[66]Paragraphs 98 and 99, references omitted.
[67]*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26.
[68]Section 64(1) of the Act.

declaration, which is a nullity, it 'therefore does not risk disorder or self-help'.[69] This is because, 'as the fount of legality, [the court *a quo* had] the means itself to assert the dividing line between what is lawful and not lawful.'[70] On this basis, the court *a quo* was surely entitled to regard the declaration as a nullity and grant the relief sought by Premier. In my view, it was not necessary to first set the declaration aside.

[40] The Commission further submits that a notice under s 65(6)*(b)* has only three requirements. These are a finding as to conduct, a date of the finding, and a section of the Act which was transgressed. It submits that Premier seeks, in its approach, to read in a fourth requirement - that of the need to be cited as a respondent in a referral to the Tribunal. The argument goes that this is not permissible because the meaning of the section does not lead 'to some absurdity, inconsistency, hardship or anomaly which . . . the Legislature could not have intended'.[71]

[41] In the first place, it seems to me that there is, in effect, only one requirement for the issue of a notice, but three aspects which must be dealt with in it. The single requirement is an order in terms of s 58(1)*(a)*(v) which declares conduct of the party concerned to be a prohibited practice in terms of the Act. The other two matters give details of when such order was granted and the section of the chapter which was found to have been contravened. Be that as it may, the submission misconceives the approach of Premier. It is not that it seeks to read in a fourth requirement. Its argument is that the declaration is a nullity. There is therefore nothing capable of certification.

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[69] *Kirland* above at 512, note 78.
[70] Ibid.
[71] *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129, cited with approval in *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* [2001] ZASCA 31; 2001 (3) SA 582 (SCA) para 10.

[42] The Commission and the claimants submit that the approach of Premier to the interpretation of s 58(1)*(a)*(v) and s 65(6)*(b)* results in the claimants being non-suited because they are unable to procure a certificate concerning Premier's self-confessed conduct. They submit that, in line with s 39(2) of the Constitution, an interpretation of these sections which least limits the right of access of the claimants to court should be favoured. The approach set out in *Cool Ideas 1186 CC v Hubbard & another,*[72] should be followed:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[73]

[43] This approach to interpretation cannot be faulted. But the enquiry in the present matter does not have to do with the interpretation of s 58(1)*(a)*(v) or s 65(6)*(b)* or, ultimately, with the question of access to the courts. It has to do with whether the declaration was a nullity and, accordingly, whether there was anything which could be certified in terms of s 65(6)*(b)*.

[44] It is not clear that the claimants are non-suited as is their contention. This aspect was not canvassed in the papers and cannot be decided here. If, however, the claimants are non-suited, it is not the interpretation of the sections of the Act and CLP in this matter or the conduct of Premier which leads to this situation. It

[72] *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28. The judgment quoted from is that of Majiedt AJ, in whose judgment four other justices concurred. The other two judgments did not question the approach to interpretation enunciated in this dictum but differed on other matters.

[73] References omitted.

is the decision of the Commission not to include Premier in the referrals, or any referral, for the purposes of seeking an order in terms of s 58(1)*(a)*(v) of the Act.

[45] *Agri Wire* says that 'a party that has been afforded conditional immunity, is not before the Tribunal for the purposes of the latter making a determination against it, including the imposition of an administrative penalty.'[74] As I have said earlier, the reference to a 'determination' must needs cover an order in terms of s 58(1)*(a)*(v) of the Act. I see no reason in principle why a leniency applicant cannot be referred for this purpose. Such an order is, after all, necessary for the prosecution of a damages claim and the CLP expressly states that immunity will not affect the right of persons to bring such a claim. It may be, therefore, that the above *dictum* goes too far but that need not be decided here.

[46] Having said this, that issue did not arise in *Agri Wire* since the referral there was construed as excluding the grant of any relief against CWI. The issue of a limited referral was clearly not fully canvassed or dealt with in that matter. Nor, for the same reason, does the issue arise here. I raise it only as an indication that *Agri Wire* does not necessarily offend against the right of persons such as the claimants to pursue a civil claim. The issue whether a firm which has been granted conditional immunity may be referred to the Tribunal for the purpose of a finding and can, thus, be subject to an order under s 58(1)*(a)*(v), must therefore stand over until it arises squarely.

[47] To sum up, the following is the position. Based on the fact that the conduct of Premier was not part of the referral to the Tribunal, the Tribunal had no power to grant any order against it. In addition, Premier was not cited as a respondent. The declaration is accordingly a nullity. Premier was not obliged to

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[74] Paragraph 7.

have the order containing the declaration set aside. Being a nullity, it is competent for a court to find that there is simply no declaration to certify. This in turn means that, in this matter, no notice in terms of s 65(6)*(b)* should be issued. As is clear from what I have said above, however, it was necessary for Premier to approach a court. Premier, the Commission, the Tribunal and the Chairperson were not entitled to simply ignore the declaration.

[48] I therefore respectfully differ from the court *a quo* that the finding made against Premier in the declaration was capable of certification. It should have granted, the order sought by Premier. The appeal must accordingly succeed.

[49] The following order is made:

1 The appeal is upheld with costs, including those consequent on the employment of two counsel.

2 The order of the court *a quo* dismissing the application with costs is set aside and the following order substituted:

'1 Declaring that neither the first nor the second respondent can lawfully issue a notice in terms of section 65(6)*(b)* of the Competition Act 89 of 1998, certifying that the applicant's conduct has been found to be a prohibited practice under the Act in Competition Tribunal of South Africa case numbers 15/CR/Feb07 and 50/CR/May08.

2 The second and third respondents are directed to pay the costs of the Applicant.'

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**T R Gorven**

**Acting Judge of Appeal**

Appearances

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| For the Appellant: | D Unterhalter SC (with him M Du Plessis and L Kelly) |
| | Instructed by: |
| | Nortons Inc., Sandton |
| | McIntyre & Van der Post, Bloemfontein |

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|---|---|
| For the 3rd Respondent: | G J Marcus SC (with him C Steinberg)<br>Instructed by:<br>Cheadle Tomson & Haysom Inc., Johannesburg<br>Webbers Attorneys, Bloemfontein |
| For the 4th to 12th Respondents: | M M Le Roux<br>Instructed by:<br>Abrahams Kiewitz Attorneys, Cape Town<br>Honey Attorneys, Bloemfontein |