COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 018275, 081283,018267
(016584)

In the matter between:

EOH HOLDINGS LIMITED	**First Applicant**
EOH MTHOMBO (PTY) LTD	**Second Applicant**
INVENSYS PLC	**Third Applicant**
INVENSYS SYSTMES (UK) LIMITED	**Fourth Applicant**
EUROTHERM LIMITED	**Fifth Applicant**

And

PROTEA AUTOMATION SOLUTIONS (PTY) LTD	**Respondent**

Panel	:	Yasmin Carrim (Presiding Member) Andiswa Ndoni (Tribunal Member) Medi Mokuena (Tribunal Member)
Heard on	:	07 February 2014
Order issued on	:	28 February 2014
Reasons issued on	:	31 March 2014

Decision and order: Applicable to all Applications under case numbers: 018275, 018267, and 018283

Introduction

[1] On 07 February 2014 the Competition Tribunal ("Tribunal") heard three costs applications brought against the Respondent, namely a cost application and

security for costs application by the first and second Applicant, and a security for costs application brought by the third, fourth and fifth Applicants.

[2] The cost application, which was brought in terms of rule 50(3) of the Competition Act 89 of 1998 ("the Act") is in relation to an interim relief application and a direct complaint referral that was filed by the Respondent in 2011. Both these matters were subsequently withdrawn by the Respondent in 2011 ("the withdrawn applications"). The two applications for security for costs are in relation to an interim relief application that was filed in September 2012, and a direct complaint referral that was filed by the Respondent in April 2013.

[3] The first and second Applicants, namely EOH Holdings Limited and EOH Mthombo (Pty) Limited ("EOH Mthombo"), form part of the EOH group of companies. EOH Mthombo is the current sole and exclusive distributor of Foxboro and Eurotherm products and services in South Africa, and is also a competitor to Protea Automation Solutions (Pty) Ltd ("Protea") in the supply and distribution of Foxboro and Eurotherm products and services.

[4] The third and fourth Applicants, namely Invensys PLC and Invensys Systems (UK) Limited, (herein referred to as "Invensys") fall within the Invensys Group of companies. Invensys is responsible for the management of sales and distribution of components used in industrial automation and control systems worldwide which componentry is produced by entities within the Invensys Group.

[5] The fifth Applicant is Eurotherm Limited ("Eurotherm") which also falls within the Invensys Group of companies. Eurotherm manufactures control and automation componentry branded under the name Eurotherm, utilised in the provision of Industrial Solutions and distributed internationally.

[6] The Respondent, ("Protea") is a former distributor of Invensys' products in Southern Africa. Protea markets, installs and maintains certain equipment in the oil and gas, pharmaceutical, food, beverage and power utility sectors throughout Sub-Saharan Africa. The Protea group is also an electronic communications solutions provider, focusing on broadcast, multimedia,

communications and measurement solutions for the telecommunications, military and regulatory sectors.

Background

[7] To determine whether the Applicants are entitled to their cost applications, it is important to look at the history of events and litigation that has led to these applications being brought before this Tribunal.

[8] From as far back as 1947, Protea was the sole supplier of Foxboro products and related services in the whole of Southern Africa which are manufactured by Invensys. Protea was also the sole supplier of Eurotherm products and related services manufactured by Eurotherm. In a nutshell Protea's business comprised the purchase of Foxboro and Eurotherm products, providing the technical support services relating to these products, and the marketing, selling, distribution, installation, maintenance and upgrading of such products for end-users.[1]

[9] As such, Protea had installed Foxboro automation system for its customers, which systems have a life cycle of in excess of fifty years and which require maintenance support services as well as upgrades to be rendered thereto on a regular basis.[2] Invensys and Eurotherm gave Protea an undertaking that after its supply agreements were terminated, it would obtain products and services at the same rates as before until 29 February 2012, where after EOH Mthombo would supply products and services to Protea upon terms and conditions to be agreed between them. These negotiations commenced in January 2011.[3]

[10] Since EOH Mthombo's appointment in 2011, EOH Mthombo and Protea have been the only two competitors in the market for the provision of maintenance support services, replacement parts and upgrades to installed Foxboro systems.[4]

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[1] See page 11 of Protea's Answering Affidavit to EOH Mthombo's application for costs.
[2] See page 12 of Protea's Answering Affidavit to EOH Mthombo's application for costs.
[3] Ibid
[4] See page 15 Protea's Answering Affidavit to EOH Mthombo's application for costs.

[11] Protea was aggrieved at the manner in which its former role in the distribution chain of Invensys products came to an end and thus alleged that the termination of that role and Invensys and EOH Mthombo's conduct represented an abuse of Invensys's dominance.[5] It is at this point in April 2011, that Protea lodged its first interim relief application to this Tribunal, against Invensys and Eurotherm, alleging that they were not prepared to meaningfully engage with Protea regarding the conclusion of a reseller agreement. Protea alleged in its application that Invensys and Eurotherm, refused to supply certain Foxboro and Eurotherm componentry products as well as essential facilities to it. It further alleged that Eurotherm engaged in an exclusionary act by allegedly refusing to supply Protea with such products.[6]

[12] Protea had at the same time also lodged a complaint to the Competition Commission ("Commission"). The Commission, after conducting an investigation, found no merit in Protea's complaint. Consequently the Commission did not refer the complaint to the Tribunal. Protea then referred the complaint directly to the Tribunal under section 51(1) of the Act.

[13] In addition to the referral of the complaint to the Tribunal, Protea also simultaneously filed an urgent application to the South Gauteng High Court in which it sought substantially similar relief to that sought in the interim relief application before the Tribunal. EOH Mthombo and Invensys raised the defence of *lis pendens*. Protea then withdrew its case in the High Court and its complaint referral to the Tribunal.

[14] It is worth noting that when Protea withdrew these applications, both Invensys and EOH Mthombo had already filed substantial answering papers to the applications, to which Protea never replied. Protea did not tender costs when it withdrew its interim application and the complaint referral.

[15] The withdrawal of these applications without tendering costs resulted in Invensys and Eurotherm bringing an application for wasted costs to the Tribunal in 2012, against Protea. The Tribunal granted the application and

[5] See page 6 of the Founding Affidavit of EOH Mthombo's application for costs.
[6] See page 11 of the Founding Affidavit of Invensys's application for security for costs.

held that the Applicants were entitled to their costs as they were put through the trouble of having to consider the merits of both the complaint referral and interim relief matters and file answering papers accordingly, which represented the time and attention of legal representatives.[7]

[16] In September 2012, Protea once again lodged a complaint to the Commission alleging that Eurotherm, Invensys and EOH Mthombo were in contravention of S4,S5(1), S 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), 8(d)(v) and S9(1) of the Competition Act[8]. Upon its investigation the Commission concluded that Protea's case had no merits and issued a notice of non-referral.

[17] After the non-referral by the Commission, Protea again lodged a direct complaint referral to the Tribunal in April 2013, which is the subject of the two applications for security for costs.

[18] Again in October 2012, Protea lodged another interim relief application to the Tribunal alleging that Eurotherm Invensys and EOH Mthombo have entered into an agreement which is in contravention of S4,S5(1), S 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), and S9(1) of the Act. The Respondents have filed their answering papers, to which replying papers were filed by Protea. However, EOH Mthombo has also filed an Application to strike out the entire Replying Affidavit of Protea, on the basis that it contains vexatious, irrelevant and argumentative matter as well as allegations that should have been contained in the founding affidavit.

[19] As already submitted in para 17 above, following the Commission's non-referral, Protea lodged a direct complaint referral to the Tribunal, alleging that Eurotherm Invensys and EOH Mthombo have entered into an agreement which is in contravention of S4,S5(1), S 8(a), 8(c), 8(d)(i), 8(d)(ii), 8(d)(iii), and S9(1) of the Act respectively. EOH Mthombo filed answering papers, to which Protea filed an exception application requesting further particulars from

[7] See Tribunal judgement in Invensys PLC & Others vs. Protea Technology (Pty) Ltd & Others: case no: 015297.
[8] The Competition Act No 89 of 1998

EOH Mthombo in relation to products, customers, manufacturers of Foxboro and Eurotherm products and services *inter alia*. It must be noted that this was a rather peculiar application by Protea as such documents could have been obtained by simply furnishing a replying affidavit. Nevertheless the matter was heard on 27 November 2013 by the Tribunal and dismissed with costs against Protea.[9]

Relief Sought

[20] First and second Applicants are requesting the Tribunal to order Protea to pay their wasted costs in respect of Protea's interim relief application under Section 49C and in respect of the direct complaint referred in terms of section 51(1), both of which were withdrawn without the tender of costs.[10]

[21] All Applicants in this application, applied to the Tribunal to order Protea to provide security for costs that they will incur in the current complaint referral and interim relief lodged by Protea on the basis that both these matters are vexatious, have been brought for an ulterior motive and amount to abuse of process of the Tribunal.[11]

[22] In this judgment we will first deal with the wasted costs followed by security for costs applications.

Wasted Costs

[23] The Applicants submitted that they are entitled to wasted costs for the interim application brought by Protea in terms of Section 49C and subsequently the withdrawn direct complaint referred by it against EOH and Invensys & Others in terms of Section 51(1) of the Act. Their co-Respondents, Invensys PLC, Invensys Systems (UK) Limited and Eurotherm Limited were awarded wasted

[9] See Tribunal order in Invensys PLC & Others vs. Protea Technology (Pty) Ltd & Others: case no: 017905. No judgment has been issued for the exception application.
[10] See page 4 of the Founding Affidavit of the cost application by EOH Mthombo.
[11] See page 5 of the Founding Affidavit of the Security for costs application by Invensys, as well as pages 3-4 of the Founding Affidavit of the security for cost application by EOH Mthombo.

costs by the Tribunal in November 2012, in a similar application. EOH Mthombo has now brought its wasted costs application. .

[24] Applicants' submission is simple: Protea withdrew the complaint referral as well as interim relief application that was filed to the Tribunal, the Applicants incurred costs and they are entitled to recover them from Protea as the said costs were wasted.

[25] The Applicants further submitted that the Tribunal has jurisdiction to award costs.

[26] Protea opposed the application for wasted costs on the following grounds:

[26.1] Under section 57(1) of the Competition Act, the general rule is that each party bears its own costs;

[26.2] The Tribunal is authorised to award costs in very limited circumstances as contemplated in section 57(2);

[26.3] Under section 57(2) those circumstances are limited only to a complaint referral made under s51(1) in which the parties are a complainant and Respondent and then further limited to only in the *hearing of the main matter*. Hence the Tribunal does not have the jurisdiction to award costs in a matter that is not a complaint referral made under s51(1). Furthermore, even where the matter is a referral made under s51(1), the Tribunal's powers to award costs are limited only to the hearing of the main matter and cannot be extended to include any interlocutory matters pertaining to that main matter. In other words, Protea argues, we are not entitled to award costs in circumstances where a complainant, such as Protea, brings an interim application *prior* to the Commission finalising its investigation in the complaint.

[27] It is common cause that the Tribunal is not authorised to award costs in matters that involve the Commission, whether as Applicant or Respondent. It is also common cause that the Tribunal does enjoy the power to award costs against private parties. The point of departure between the parties in this

matter is the ambit of the latter power. Protea argues that that power is limited only to a hearing of the merits of a matter directly referred to us under section 51(1). The Applicants argue that the Tribunal is entitled to award costs against private parties in any interlocutory matter that flows from the dispute between those parties.

[28] Protea's counsel relied to a large extent on the recent decision of the Constitutional Court in Competition Commission v Pioneer [12] *("Pioneer case")* as support for its interpretation of section 57(2).

[29] In the alternative it submitted that even if the Tribunal found that it had such powers the circumstances of the case before it do not justify the granting of a costs order and we ought not to exercise our discretion in favour of the Applicants.

[30] The power of the Tribunal to award costs is found in Section 57 of the Act. The general rule is that each party pays its costs in the proceedings before a Tribunal. However, in justifiable circumstances, the Tribunal can award costs. Section 57(2) provides for circumstances which justify the costs award and reads as follows:

> *(2) If the Competition Tribunal –*
>
> *(a) has not made a finding against a Respondent, the Tribunal member presiding at a hearing may award costs to the Respondent, and against a complainant who referred the complaint in terms of section 51(1); or*
>
> *(b) has made a finding against the Respondent, the Tribunal member presiding at the hearing may award costs against the Respondent, and to a complainant who referred the complaint in terms of section 51(1).*

[31] In Omnia Fertilizers Ltd v The Competition Commission[13] we set out our understanding of the costs framework in the Act and section 57. In that case

[12] Competition Commission and Pioneer Hi-Bred International Inc & Others, Case no: CCT 58/13 [2013] ZACC 50.

we came to a conclusion that section 57(1) precludes us from making an order of costs in a matter where the Commission is a party but that we are empowered, in terms of section 57(2) to make an award of costs where the matter involves private parties such as Complainants and Respondents and in appropriate circumstances.

[32] The Competition Appeal Court ("CAC") confirmed our approach on appeal in Omnia Fertilizer Ltd v The Competition Commission .[14] The Constitutional Court in the Pioneer case also confirmed the Tribunal's interpretation of section 57.

[33] However, the Pioneer case can be distinguished from this case. The enquiry in that case was whether the CAC could grant costs against the Commission which costs had been incurred by the merging parties in merger reconsideration proceedings at the Tribunal. The Court confirmed that the CAC could not make such an award simply because the Tribunal did not enjoy the power to award costs in matters where the Commission was a party. While the Constitutional Court confirmed, albeit obiter, that we could only award costs against private parties as contemplated in section 57(2) it did not expand on the ambit of those powers. Hence Protea cannot rely on the Pioneer case for support of its own interpretation of section 57(2).

Power to award costs in a referral under S51(1)

[34] As we have previously stated, section 57(2) of the Act permits us to award costs against private parties in circumstances where a complaint has been referred to us under section 51(1). If we are empowered to award costs in the main dispute between two private parties, it follows – as a matter of law and logic - that we are empowered equally to award costs in disputes that may arise between the same parties following a referral to us, simply because the interlocutory costs are nothing more than the costs of disputes that arise in the course of the referral or the main dispute between the same parties.

[13] See Tribunal judgement in Omnia Fertiliser Ltd vs. Competition Commission Case no: 45/CR/May06.
[14] CAC case No. 77/CAC/Jul/08

Moreover when one has regard to the wording of section 57(2), the words "at a hearing" clearly refer to the Tribunal member who is presiding and cannot be interpreted to mean, as Protea would have it, "at the hearing of the main matter of a referral under section 51(1)".

[35] Furthermore our powers to award costs under section 57(2) do not stand on their own but must always be understood in the context of the other powers of the Tribunal to fulfil its functions. To this extent it must be read in conjunction with both section 27(1)(d) and section 55. Section 27(1)(d) provides that the Tribunal may make any ruling or order necessary or incidental to the performance of its functions. Section 55 confers upon us a wide discretion to determine our proceedings. Once we are empowered to award costs in a referral under section 51(1) then we are entitled to exercise that discretion piecemeal (as and when costs are incurred during the conduct of litigation) or at the end in their totality as we deem appropriate.

[36] Hence section 57(2) cannot be interpreted to preclude us from awarding costs in any interlocutory matter (between the same parties) such as discovery, interim relief, exception or postponement applications, which are simply costs incurred by parties in the course of the resolution of the main dispute between them. There is no provision in the Act, principle of law or underlying policy that requires us to exercise our discretion to award such costs only at the end of the matter or *in the hearing* of the main matter.

Power to award costs against private parties prior to a referral under S51(1)

[37] The Tribunal's substantive power to award costs is granted to it in section 57. However the section suggests that there are myriad circumstances in which the Tribunal could grant costs. The first is the general rule that each party bears its own costs. Then there are the curious words "Subject to subsection 2 and *the Competition Tribunal's rules of procedure"* (our emphasis) which

suggest that there may be other circumstances in which we could award costs but the ambit of these is not clear.

[38] Ms Engelbrecht puts forward the argument that this Tribunal is precluded from awarding costs in interim relief applications brought by a complainant during the course of the Commission's investigation and prior to a referral under s51(1) simply on an ordinary reading of section 57(2).

[39] If the sub-section meant to say what Ms Engelbrecht intends, all that the legislature needed to state was a simple sentence along the lines "The Tribunal may only award costs against or in favour of private parties in a referral under section 51(1)."

[40] Instead we see that the section is divided in two sub-sections namely (a) and (b). Within each sub-section we find possible redundancy and tautology. Consider sub-section 2(a) which reads as follows

> *"If the Competition Tribunal –*
> *(a) has not made a finding against a Respondent, the Tribunal member presiding at a hearing may award costs to the Respondent, and against a complainant who referred the complaint in terms of section 51(1)"*

[41] If the Tribunal member presiding at a hearing awards costs to the Respondent, is this not by implication a cost award against a complainant? Or are we to interpret the latter part of the sentence as a different species of costs that is expressly awarded against a complainant? If, as Ms Engelbrecht suggests the power under section 57(2) ought to be limited only to a hearing for a referral under section 51(1) we would expect the word "hearing" rather than "complainant" to be qualified by the reference to section 51(1). Instead we find that the words "section 51(1)" clearly do not refer to the "hearing" but refer to the identity of the complainant.

[42] Furthermore, as observed by the CAC in Omnia Fertilizers, the words of section 57(1) "*Subject to subsection (2) and the Competition Tribunal's rules of procedure*," suggest that the Tribunal's authority to award costs between private parties referred to in section 57(2) must be interpreted in the context of the rules of procedure of the Tribunal.[15] We see from the above discussion that an ordinary reading of the section does not provide us with an unambiguous answer.

[43] This is why it behoves us to interpret section 57 (2) (in which we are granted the power to award costs against private parties) in the context of the Competition Act itself and its objectives. This is the approach we have taken in Omnia which approach was met with approval from the CAC and the Constitutional Court.

[44] Chapter 5 of the Competition Act deals with Investigation and Adjudication Procedures. This chapter provides the operational flesh and bones of the agencies established in Chapter 4. Parts A and B set out the powers and duties of the Commission. Part C deals with complaint procedures. It is in this latter Part that we observe the basic framework of the Act in relation to prohibited practices alleged by private complainants (i.e. not initiated by the Commission itself). The Commission is the primary point of entry into the enforcement framework for an aggrieved party.[16] Such a party cannot approach the Tribunal directly. It must lodge its complaint with the Commission[17] and allow the Commission to investigate it and determine whether the matter should be referred to the Tribunal. Thus it is the Commission that is the principal investigator, and if the matter were to be referred to the Tribunal, would be the primary Applicant or 'prosecutor of first instance'. The reason for such a procedure is obvious. The objectives of the

[15] See para 20 of CAC's decision in Omnia Fertilizer Limited & Competition Commission case no: 77/CAC/July08.
[16] Section 49B
[17] Once it has done so in the prescribed manner it falls within the definition of "complainant" in s1(1)(iv).

Act are to achieve public outcomes. Our function is to enforce the provisions of the Competition Act and not to resolve disputes between private parties. This is not to say that complainants do not have an interest in the outcome of the complaint but their role at this stage is to assist the agencies in the fulfilment of their public function.

[45] The Commission has the obligation to investigate complaints and to arrive at a determination within one year, or such extended period as may be agreed by the complainant. [18] Unlike in the ordinary courts, private complainants enjoy different rights of participation at the Tribunal. As complainants, they can become parties to Tribunal proceedings if they refer the matter directly *after* the Commission has issued a notice of non-referral, (a direct referral is only available to a complainant once the Commission has non-referred) or if they are admitted by the Tribunal as interveners in a Commission referral.

[46] The one exceptional remedy granted to complainants is that of interim relief applications under section 49C, which allows complainants to seek some kind of interim remedy while the Commission is conducting its investigations which in complex markets could span a number of years. [19] The parties in interim relief applications are the complainant and the Respondent, private parties. Interim relief applications are similar to that of interim interdict applications in the High Court.

[47] Section 49C does not make a distinction between complainants who have submitted a complaint in terms of s49B(2)(b) (the defined term) and complainants who may have directly referred the matter under s51(1). All that is required is that the Applicant must be a *complainant* as defined which means a person who has lodged a complaint in the prescribed manner in terms of s49B and the application must be brought prior to a hearing in an alleged *prohibited practice* having commenced. This is the same *complainant* who is referred to in s51(1) and in s57(2). Conceivably a *complainant* can also approach the Tribunal

[18] See provisions of section 49B and the powers of the Commission under Part B. Section 50
[19] The complainant also enjoys the right to be consulted in consent order proceedings where a settlement agreement provides for damages.

for interim relief either before the Commission has completed its investigation and non-referred the matter, or after the Commission has referred under s50 or a complainant has directly referred under s51(1). One can think of a number of circumstances such as a multitude of complainants or prolonged pre-trial processes that could give rise to post-referral interim relief applications. What is however important is that it is the *same complainant* – namely the one who first submitted a complaint to the Commission under section 49B(2)(b) – who enjoys both the right to bring an interim relief application (whether or not this is understood as being available before or after a referral) and to a direct referral under s51(1). If that Applicant has not lodged a complaint with the Commission at inception, it cannot seek relief under any section of the Act.

[48] When one has overall regard to these provisions, it is clear that the Act discourages complainants from seeking to enforce provisions of the Act before approaching the Commission *first* and permits such a complainant direct access to the Tribunal only in very limited circumstances.

[49] This is the context in which we are enjoined to understand our powers to award costs in section 57(2).

[50] If at the level of principle we are authorised to award costs in a matter between complainants and respondents (private parties) and in interlocutory disputes that may flow therefrom *after* a direct referral under s51(1), on what basis can we distinguish interim relief applications or any other type of interlocutory application between *the same two parties* prior to a referral for the purposes of granting *costs* (as opposed to substantive relief)?

[51] At the level of substance no meaningful distinction can be drawn between the parties *prior to and after* a referral – they are the same parties.

[52] A contextual approach suggests that the purpose of section 57(2) is to distinguish between the public enforcement of cases in which the Commission

is a party (and where each party bears its own costs) from private disputes in which the Commission is not a party (in which case costs can be awarded).

[53] The Tribunal's power to award costs against private parties under section 57(2) must also be read in the context of its wide discretion to conduct its proceedings (s55 and rule 55) and its incidental powers under section 27(1)(d). Both these sections confer on us the ability to exercise functions that have been granted to us by the Act, one of which is to consider whether to exercise our power to award costs between private litigants in appropriate cases. [20]

[54] We conclude that the Tribunal is authorised by a contextual interpretation of s57(2) read with s55 and s27(1)(d), together with rules 55 and 58, to award costs in interlocutory matters and interim relief applications between private parties irrespective of whether the application is filed prior to or after a s51(1) direct referral. The award of costs in such circumstances would be a matter of discretion, not a matter of *vires*.

[55] Accordingly we find no merit in Protea's argument that section 57(2) limits our powers to award costs only to a referral under section 51(1).

[56] In Invensys & Others vs. Protea, a costs order was awarded by the Tribunal, which rejected the submission of Protea that special circumstances militated against a cost order. And that the reason for withdrawing the two cases, was consequent to the misrepresentation by the Applicants. Lawrence Reyburn said[21] *"What the costs order is directed at is the costs incurred by the Applicants in dealing with a complaint which required their attention and justified their engagement of legal representation. They were put to the trouble of considering the merits of the complaint referral and responding to it, in the instance of preparing and filing a notice of exception. In the case of interim relief they had to peruse the paper filed by the Respondents, and file a*

[20] See Tribunal judgment in The Competition Commission of Southern Africa vs. Federal Mogul Aftermarket Southern Africa (Pty) Ltd & Others case number: 08/CR/B/May01 at para 28.
[21] Par 23 of Invensys PLC & 2 others v Protea Technology (Pty) Ltd Case No. 31/IR/A/Apr11

considered answer. This again represented the time and attention of legal representatives. The associated expenditure was incurred and in the light of the Respondent's withdrawal of their application, was justifiably incurred, regardless of the eventual outcome of any litigation which may take place."

[57] This application before us is on all fours with the earlier one referred to in the preceding paragraph heard on 7 November 2012. The Applicants were able to show that they incurred unnecessary costs. Consequently the Applicants are entitled to their wasted costs and their application succeeds.

Security for Costs

[58] The second question that must be addressed is the application for security for costs.

[59] The Applicants seek an order compelling Protea to furnish security for costs on the basis that its application and complaint were vexatious, it had brought the proceedings for an ulterior motive and its actions were equivalent to an abuse of the Tribunal proceedings.

[60] The Applicants argued that the Commission had refused to refer the complaint to the Tribunal because it did not see merit in Protea's case. The Applicants conceded that the Tribunal is a creature of the Act, but argued that section 27(1)(d) sets out its functions which include *"... make any ruling or order necessary or incidental to the performance of its functions in terms of this Act."* To buttress their submission on the competency to grant security for costs the Applicants referred to section 55(1) of the Act. Section 55(1) provides that: *"Subject to the Competition Tribunal's rules of procedure, the Tribunal member presiding at a hearing may determine any matter of procedure for that hearing, with due regard to the circumstances of the case, and the requirements of section 52(2)."*

[61] In addition to this, the recent North Gauteng High Court judgement of Siemens Telecommunications v Datagencies[22] which stipulated that an *incola* company cannot be compelled to give security for costs, even if such company embarked upon vexatious and/or speculative action, it could not be ordered to provide security for costs. This is the same judgment that Protea relied on during the hearing and submitted that courts do not have the powers to grant security for costs orders, no matter how vexatious the litigation may be.[23] We agree with the submission made by Protea, and since we are bound by the judgment of the High Courts, we accordingly dismiss the applications for security for costs.

Conclusion

[62] Based on the analysis above, we therefore deem it appropriate to award the wasted costs application by the First and Second Applicants, and to dismiss the security for costs applications filed by First to Fifth Applicants.

ORDER

Wasted Costs

1.1 The wasted costs application filed by the First and Second Applicants in the withdrawn complaint referral under Section 51(1) and in the withdrawn interim relief application under Section 49C, is hereby granted.

1.2 The costs of this application are to be borne by the Respondent, such costs to include the cost of one counsel.

Security for Costs

1.3 The application for security of costs filed by the First and Second Applicants is hereby dismissed.

[22] Siemens Telecommunications (Pty) Ltd v Datagencies (Pty) Ltd 2013 (1) SA 65 (GNP)
[23] See Transcript of hearing at page 68.

1.4 First and Second Applicants must pay the costs of the Respondent, jointly and severally, such costs to include the cost of one counsel.

1.5 The application for security of costs filed by the Third, Fourth and Fifth Applicants is hereby dismissed.

1.6 Third, Fourth and Fifth Applicants must pay the costs of the Respondent, jointly and severally, such costs to include the cost of one counsel.

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Ms. MEDI MOKUENA and Ms. YASMIN CARRIM

31 March 2014

Date

Ms. Andiswa Ndoni concurring.

Tribunal Researcher:	Caroline Sserufusa
For the 1st and 2nd Applicants:	Adv. P. Pauw instructed by Botoulas Krause & Da Silva Inc
For the 3rd, 4th and 5th Applicants:	Craig Assheton-Smith of Craig Assheton-Smith Inc instructed by Glyn Marais Inc
For the Respondent:	Adv. Greta Engelbrecht instructed by Duncan Oakes Attorneys