IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 252/CAC/Aug24

In the matter between:

TAKATA SOUTH AFRICA (PTY) LIMITED	**Appellant**
and	
THE COMPETITION COMMISSION OF SOUTH AFRICA	**First Respondent**
TAKATA CORPORATION	**Second Respondent**
TRW AUTOMATIVE INC.	**Third Respondent**
TRW OCCUPANT RESTRAINTS SOUTH AFRICA INC.	**Fourth Respondent**
AUTOLIV INC.	**Fifth Respondent**
AUTOLIV SOUTHERN AFRICA (PTY) LIMITED	**Sixth Respondent**

Coram: VALLY AJA, NKOSI AJA, and MURPHY AJA

Heard: 22 August 2024

Delivered: 16 January 2025

Summary: Competition law – approach to a simultaneous appeal and review of the same case – appeal and review of the decision of the Competition Tribunal - whether the Tribunal's decision dismissing Takata SA's exceptions is (a) appealable and, if so, whether Takata SA has made out a case for the relief it seeks in its appeal, and; (b)

reviewable and, if so, whether Takata SA has made out a case for the relief sought – court held where an appeal and a review are simultaneously brought the complaint in each case must be different, failing which the party should be allowed to institute only the appeal or the review proceeding – appeal dismissed – review dismissed.

ORDER

On appeal from: The Competition Tribunal

1. The appeal is dismissed.
2. The review is dismissed.
3. The appellant is directed to pay the costs of the appeal as well as the costs of the review, including the costs of two counsel, where employed.

JUDGMENT

Vally and Nkosi AJA (Murphy AJA concurring)

Introduction

[1] This matter comes before us as an appeal and/or review application. It is brought by Takata South Africa (Pty) Limited (Takata SA), an erstwhile subsidiary of Takata Corporation (Takata Corp) based in Japan, against the decision of the Competition Tribunal (the Tribunal) to dismiss the exceptions raised by Takata SA to 21 complaint referrals (referrals) brought by the Competition Commission (the Commission) against Takata SA, Takata Corp and four other manufacturers and suppliers of the Occupant Safety Systems (OSS) components, comprising the automotive passenger airbags, the steering wheel airbags and the seatbelts that are fitted in motor vehicles.

[2] Takata SA and the other parties were supplying the OSS components concerned to the Original Equipment Manufacturers (OEMs) of motor vehicles. In each referral the Commission sought an order declaring that Takata SA and the other parties contravened section 4(1)(b) of the Competition Act 89 of 1998 (the Act).

Factual background

[3] On 3 August 2012, the Commission initiated a complaint against various parties operating in the market for the manufacture and supply of the OSS components. Between March and June 2018, the Commission filed a total of 21 complaint referrals against, *inter alia*, Takata SA and Takata Corp. Takata Corp excepted to each of those referrals on the ground that the Tribunal had no jurisdiction over it as a *peregrinus*, while Takata SA excepted thereto on the grounds that each referral failed to disclose a cause of action ‘and/or’ was vague and embarrassing.

[4] In respect of Takata Corp's exceptions, the Tribunal, at the instance of the parties, stayed the exception proceedings pending the outcome of the Competition Appeal Court's judgment in *Bank of America Merrill Lynch and Others*[1] (*Forex*) because similar questions of jurisdiction had been raised in that matter. Following the decision of this Court in *Forex*, the Commission delivered a combined supplementary affidavit with a view to addressing the concerns raised by Takata Corp and Takata SA in their respective exceptions. Thereafter, Takata Corp elected not to pursue its exceptions, while Takata SA persisted with its exceptions on the basis that the Commission's supplementary affidavit had failed to cure any of the defects raised in the exceptions.

[5] On 10 May 2021, the Tribunal issued directions, *inter alia*: that Takata SA must file its answering affidavits in relation to the 21 complaint referrals brought against it by the Commission, despite the fact that Takata SA had taken an exception to the referrals. In other words, it directed that Takata SA plead over and; that the Commission must thereafter file its replying affidavits. Both parties duly complied with the directions issued by the Tribunal. However, Takata SA contends that it filed its answering affidavit under protest.

[6] The 21 exceptions were argued jointly before the Tribunal on 2 June 2022, and were all dismissed by the Tribunal on 8 December 2023, some 18 months after the hearing. At this stage, we pause to mention that the 18 months' delay in issuing the Tribunal's decision is, in itself, a cause for concern, particularly as it adds to the already lengthy delay in the resolution of this matter. This is not the first case where the Tribunal has taken so long to issue its decision. While we are not provided with the reasons for this, we do, nevertheless, voice a concern about such a lengthy delay.

[7] The Tribunal essentially found that the Commission's complaint referrals complied with the requirements of rule 15(2) of the Tribunal Rules (the Rules) and dismissed the exceptions. It found that the referral does disclose a cause of action

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[1] *Competition Commission v Bank of America Merrill Lynch and Others* 2020 (4) SA 105 (CAC).

and that it contained sufficient particularity to enable Takata SA to discern what case it is required to meet. Aggrieved by the decision of the Tribunal, Takata SA proceeded to lodge its appeal and/or review applications to have the Tribunal decisions set aside by this Court.

[8] Takata SA adopted a catch-all approach to the matter. It appeals the decision of the Tribunal, yet at the same time applies for the decision to be reviewed. It characterises its case as one of an 'appeal and/or a review'. The characterisation is clumsy, to say the least. It is not clear whether both processes are to be treated as complementary to each other or whether they are to be treated as disparate and separate. This caused unnecessary confusion, which was exacerbated by the fact that the grounds of review are, in the main, the same as the grounds of appeal. We deal with this in greater detail below.

The Act

[9] The Act allows for this Court to entertain an appeal of a decision of the Tribunal which is an administrative body. It also allows this Court to review any decision of the Tribunal. Section 37(1) of the Act provides:

> '(1) The Competition Appeal Court may –
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> (a) review any decision of the Competition Tribunal; or
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> (b) consider an appeal arising from the Competition Tribunal in respect of –
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> (i) any of its final decisions other than a consent order made in terms of section 63; or
>
> (ii) any of its interim or interlocutory decisions that may, in terms of this Act, be taken on appeal.'

Grounds of Appeal

[10] Takata SA contends that the Tribunal made a number of material errors in its decision dismissing the exceptions. These, according to it, are as follows. Firstly, the Tribunal found that the Commission had pleaded that Takata SA acted in the fulfilment of

the design and overall strategy of its parent company, Takata Corp. This was never the Commission's pleaded case, and, in any event, even if this were proven, it is insufficient to warrant a finding that Takata SA contravened s 4(1)(b) of the Act. Secondly, the Commission argued that following upon the conclusion of the collusive agreements between Takata Corp and others, an inference could be drawn that Takata SA was itself a party to the said agreements. This, once again, was not the Commission's pleaded case. Thirdly, the Tribunal improperly relied upon its answering affidavit, which was filed under protest, to find that Takata SA understood clearly the case of the Commission.

[11] Takata SA asks this Court to uphold its appeal and find that the referral fails to disclose a cause of action. It asks further that this Court dismiss the case against it altogether, rather than allow the Commission to remedy the defective referral as it is incurable.

Grounds of Review

[12] The review is brought in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the principle of legality.

[13] The grounds raised by Takata SA are: the Tribunal took account of irrelevant considerations; the Tribunal's decision was materially influenced by an error of law in that it concluded that Takata SA was itself a party to the agreement by virtue of its conduct after the agreement was concluded by Takata Corp and the other colluding parties; and, the Tribunal's decision was irrational having regard to the information before it.

[14] The contention that the Tribunal committed an error of law is its main ground and, in fact, the only ground of review that was pursued. But all three grounds are really a repetition of what it raises in its appeal. And, it seeks the same relief as it does in the appeal, which is to set the referral aside and not allow the Commission to remedy it as it is incurably defective.

The Issues

[15] The issues for determination are whether the Tribunal's decision dismissing Takata SA's exceptions is (a) appealable and, if so, whether Takata SA has made out a case for the relief it seeks in its appeal, and; (b) reviewable and, if so, whether Takata SA has made out a case for the relief sought.

Appeals and Reviews

[16] An appeal and a review are distinct legal processes aimed at attending to different sets of grievances raised by parties aggrieved by an order, judgment or decision. An appeal in the normal sense is a formal request made to a higher court to reconsider a decision made either by a lower court, or in certain circumstances, such as the present case, by an administrative tribunal. The two processes and the outcomes that follow in each case are different. An appeal against a decision of an administrative body is only available to a party if allowed by statute,[2] as in this case.

[17] One of the first cases dealing with the differences between an appeal and a review was *Tickly.*[3] *Tickly* was decided long before the enactment of the *Constitution of the Republic of South Africa Act 108 of 1996* (Constitution). The court there pointed out that in general there are two types of appeals: an appeal in the wide sense and one in the narrow sense. Both forms of appeal involve a re-hearing of the matter. However, in the former case, the re-hearing takes place, 'with or without additional evidence or information',[4] whereas in the latter, which is also referred to as an 'ordinary appeal', the re-hearing is 'limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether that decision was right or wrong'.[5] The appeal before us falls into this latter category.

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[2] *Hotel Association of S.R. v S.R. Liquor Licensing Board* 1958 (1) SA 426 (SR) at 429D.
[3] *Tikly and Others v Johannes N.O. & Others* 1963 (2) SA 588 (T).
[4] Id at 590G.
[5] Id at 590H.

[18] A review on the other hand may involve additional evidence or information, with a focus not on whether the decision, order or judgment was right or wrong, but whether the decision-makers 'exercised their powers and discretion honestly and properly'.[6] A reviewing court restricted its focus to the decision-making process and steered clear of examining the decision itself.[7] This very narrow approach to a review was the mark of the law for a long time. However, the law evolved over time, and in the process has moved away from the supine approach of looking only at the 'decision-making process' while ignoring the decision itself. It now scrutinises the decision itself. The extent of the court's scrutinising powers (also referred to as grounds of review) until the early 1990s is best captured in *Johannesburg Stock Exchange*:

> 'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'. … Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. Some of these grounds tend to overlap.' [8] (Case references omitted.)

[19] Proof of a decision-maker erring by 'failing to take into account relevant facts' or incorrectly 'taking onto account irrelevant facts' were accepted as satisfying the requirement that the decision-maker 'failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice'. Over time, these have been treated as independent grounds of review. Still an 'error of

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[6] Id at 590H-591*init*.
[7] *Chief Constable of the North Wales Police v Evans* [1982] 3 ALL ER 141 [HL] at 154d.
[8] *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152A-D.

law' by the decision-maker did not constitute a basis for a court to interfere with the decision-maker's decision. Soon enough, this changed when in the early 1990's Corbett CJ in a landmark judgment addressed the issue directly and decided it. Corbett CJ had this to say on the issue:

> 'To sum up, the present-day position in our law in regard to common-law review is, in my view, as follows:
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> (1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review.
>
> (2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it "the tribunal") has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are limited.
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> (3) Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend basically upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.
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> (4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. *Aliter*, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute"; and that as a result its decision should be set aside on review.

(6) In cases where the decision of the tribunal is of a discretionary (rather than purely judicial) nature, as for example where it is required to take into account considerations of policy or desirability in the general interest or where opinion or estimation plays an important role, the general approach to ascertaining the legislative intent may be somewhat different, but it is not necessary in this case to expand on this or to express a decisive view.' [9]

[20] By this judgment an error of law by an administrative body was now included as a ground for review. However, while the grounds for review were now considerably expanded they, nevertheless, did not transform a review into an appeal. That distinction remained intact. An appeal still remained the more intrusive intervention by a court in regard to the decision taken by an administrative body. An appeal requires a court to consider whether a decision was correct or not. A reviewing court, on the other hand, is not accorded the same power.

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[9] *Hira v Booysen* 1992 (4) SA 69 (A) at 93A–94A.

[21] The enactment of the Constitution impacted considerably on this area of law. Section 33(1) of the Constitution provides that 'everyone has a right to administrative action that is lawful, reasonable and procedurally fair'. Section 33 further enjoined the legislature to enact legislation to give effect to this right. PAJA is the legislature's response thereto. The grounds of review laid out in *Johannesburg Stock Exchange* and *Hira* have now been codified in s 6 of PAJA.

[22] A reviewing court is now enjoined by the Constitution to scrutinise the merits of the decision in a more intrusive manner than was previously allowed.[10] Administrative decisions are now required to be 'reasonable' in order to pass muster. This is so because administrative law assumes special importance in our legal system. In the words of the Constitutional Court (CC):

> '… administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them.'[11]

[23] While a court is now empowered to examine whether a decision is reasonable, the grounds of review remained the same. A reasonableness test has only expanded the scope of a review not created a new ground of review. A detailed exposition of the test and its evolution is to be found in *Black Eagle*.[12] However, just as in the case of an error of law, the distinction between a review and an appeal remains intact. A court exercising review functions is still required to ensure that it does not arrogate for itself powers that have been reserved for the administrative body, as O'Regan J observed:

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[10] See the quote from the speech by Lord Brightman in [18] above.

[11] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) at [45].

[12] *Black Eagle Project Roodekrans v MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Department and Others* [2019] 2 All SA 322 (GJ) at [32] – [38].

> 'Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'[13]

[24] Finally on this issue, the test of reasonableness is not applicable in all review cases brought before the court. In some the test is much narrower. This is so when the review is brought under the principle of legality, as it is in this case. In such a case the test is one of rationality and not reasonableness.

Appeal and review simultaneously in the same case

[25] The issue to consider in a matter where the review and the appeal are simultaneously brought is which application should be considered first. This would depend on the grounds relied upon in each application. If the review involves a complaint only about the process, or if the challenge therein is against the jurisdiction of the administrative body to entertain the matter, while the appeal is against the merits of the decision, it would make sense to consider the review first and if it is successful, the appeal would be redundant. However, in this case, Takata SA's grounds of appeal and review are largely the same. It indicated that its appeal is the primary case before the Court, and that the review should only be considered if the appeal is disallowed or is dismissed. We adopted the approach suggested. In any event, it made no significant difference as to which application was considered first as the grounds of appeal and review are identical. What Takata SA has done is repeat the same grievances it raised in the appeal in its review, only this time it characterised them as 'failure to take into account relevant factors', and 'error of law'. But the substance of the complaint is the same as it raises under the appeal where it says, 'the Tribunal committed the following misdirections' and then lists them. The list consists of alleged facts the Tribunal ignored or failed to give sufficient

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[13] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at [45].

weight to, and of an allegation that the Tribunal made an incorrect legal finding, or failed to make the correct one.

[26] More importantly, we hold that where an appeal and a review are simultaneously brought the complaint in each case must be different, failing which the party should be allowed to institute only the appeal or the review proceeding. It must make an election to that end and be bound by it. To expand: assume the appeal is heard first and is granted, the review would automatically fall away as the decision would have been set aside and corrected. On the other hand, should the appeal fail, the effect is that the decision is found to be correct. It cannot thereafter be reviewed – by applying the review tests of rationality or reasonableness – set aside and sent back to the administrative body (which is the normal remedy in a review), or even replaced by the reviewing court, as that court had just found the decision to be correct. In short, it makes no sense and serves no purpose in traversing the grounds raised in an appeal, and if found to be either correct or wanting, re-traverse the same grounds in a review.

Appealability

[27] In our law, interlocutory rulings, including the rulings on exceptions, are ordinarily not appealable primarily because they are interim in nature.[14] By way of the most recent authority to that effect, we were referred by Mr Ngcukaitobi for the Commission, to *Ciba Packaging* where the Supreme Court of Appeal (SCA) held:

> 'The general principle is that the dismissal of an exception is not appealable, save where the exception challenges the jurisdiction of the court. This Court, in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*, recently confirmed this.'[15]

[14] See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A.
[15] *Ciba Packaging (Pty) Ltd t/a Cibapac v Timelink Cargo (Pty) Ltd* [2023] ZASCA 161 para 9

[28] However, the test of the appealability of an interlocutory decision has since advanced following the judgement of the CC in *Lebashe*.[16] Currently, 'the test of appealability is the interest of justice, and no longer the common law test as set out in *Zweni*'.[17] In fact, it was on the basis of the appealability test applied in *Lebashe* that this Court held in *Forex* that an interlocutory decision of the Tribunal is only appealable if the interest of justice would be served by allowing the appeal.[18]

[29] It was argued by Mr Wilson, for Takata SA, that many of the factors taken into account by this Court in *Forex* are equally applicable in this case. These include, so he argued, the reputational risk arising from the alleged collusion, which Takata SA is likely to suffer if its exceptions are not upheld, and which will result in Takata SA effectively having to defend itself in 21 trials. This, submitted Mr Wilson, tips the interests of justice scales in favour of allowing the appeal.

[30] In our view, the reliance on the factors taken into account in *Forex* is not helpful. The facts of this case are clearly distinguishable from those in *Forex*. As correctly pointed out by Mr Ngcukaitobi, the appeals in *Forex* were brought by, *inter alia*, the *peregrinus* parties who challenged the jurisdiction of the Tribunal over them. Takata SA, on the other hand, is an *incola* and, as such, is clearly subject to the jurisdiction of the Tribunal. Thus, there can be no controversy over the jurisdiction of the Tribunal.

[31] In the present case, Takata SA has failed to show that the interests of justice warrant an appeal being entertained for the following reasons:

1 The decision that is sought to be appealed against falls outside the perimeters of s 37(1)(b)(i) of the Act, which requires that the decision of the Tribunal be 'final';

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[16] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Limited and Others* (2023) (1) SA 353 (CC).
[17] Id at [43].
[18] It needs to be pointed out that the quotation in *Forex* at [59] is inaccurate. The word 'not' between the words 'certainly' and 'opened' has been erroneously omitted.

2 It was held by this Court in *Shoprite*[19] that the interests of justice test has not made the requirements of appealability set out in *Zweni* redundant.[20] The fact that the decision of the Tribunal herein is not final in effect, not definitive of the rights of parties and, does not have the effect of disposing of, at least, a substantial portion of the relief claimed in the main proceedings, means that Takata SA will not suffer irreparable harm if the appeal is not granted by this Court;[21]

3 It is our considered view that it is neither desirable nor in the interests of justice to delay the proceedings in this matter any further, particularly as the matter has already been subjected to an inordinate delay of more than 12 years since its inception.

[32] For these reasons, we hold that the question posed in the preceding paragraphs regarding the appealability of the Tribunal decision must be answered in the negative.

Reviewability

[33] Having concluded that the decision of the Tribunal is not appealable on the facts and circumstances of this case, the next question is whether the same decision is reviewable on the grounds relied upon by Takata SA. Takata SA relies on the same grounds in support of both the appeal and the review. That, as we say in [26] above cannot be allowed. A review on grounds different from that of the ones raised in the appeal may well be competent, but this has not occurred here. Allowing the review in these circumstances would result in subverting the law regarding appealability of interlocutory

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[19] *Competition Commission v Shoprite* (183/CAC/Apr20CT).

[20] Id at [20].

[21] See *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) where the CC, at [23], held:

> 'The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted. The applicant would have to show that irreparable harm would result if the interim order were to be granted. A court will have regard to the possibility of irreparable harm and the balance of convenience'.

orders. Takata SA's attempt to circumvent the insurmountable difficulty of the non-appealability of an interlocutory order by seeking to rely on the review should the appeal fail or be disallowed is tantamount to abusing the process of court.

Conclusion

[34] For the reasons set out above, we conclude that Takata SA's appeal as well as its review application should be dismissed.

Costs

[35] On the question of costs, it is of note that in the experience of this Court that parties habitually appeal against the decision of the Tribunal or seek to review it, even in circumstances where there is absolutely no merit in challenging the decision of the Tribunal either on appeal or by way of review. In our view, this is one such case. In the circumstances, the Commission should not be deprived of its costs, such costs should include the costs of two counsel, where employed.

Order

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

1 The appeal is dismissed.

2 The review is dismissed.

3 The appellant is to pay the costs of the appeal as well as the costs of the review, including the costs of two counsel where employed.

B Vally

Acting Judge of Appeal

Competition Appeal Court of South Africa

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M E Nkosi

Acting Judge of Appeal

Competition Appeal Court of South Africa

pp

J Murphy

Acting Judge of Appeal

Competition Appeal Court of South Africa

APPEARANCES

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