



competitiontribunal
south africa

THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR053Aug10/PIL225Dec16

In the Point in *Limine* Application matter between:

Goodyear South Africa (Pty) Ltd **Applicant**

And

The Competition Commission **Respondent**

And

In the Point in *Limine* Application matter between:

Continental Tyres South Africa (Pt) Ltd **Applicant**

And

The Competition Commission **Respondent**

In *Re*:

The complaint referral between:

The Competition Commission **Applicant**

And

Apollo Tyres South Africa (Pty) Ltd **First Respondent**

Goodyear South Africa (Pty) Ltd **Second Respondent**

Continental South Africa (Pty) Ltd

Third Respondent

Bridgestone South Africa (Pty) Ltd

Fourth Respondent

**South African Tyre Manufacturers
Conference (Pty) Ltd**

Fifth Respondent

Panel : Yasmin Carrim (Presiding Member)
Medi Mokuena (Tribunal Member)
Andreas Wessels (Tribunal Member)

Heard on : 16 March 2017

Order issued on : 02 June 2017

Reasons issued on : 02 June 2017

DECISION AND ORDER

INTRODUCTION

[1] On 16 March 2017, the Competition Tribunal (“the Tribunal”) heard two applications (“the Applications”), wherein Goodyear South Africa (Pty) Ltd (“Goodyear”) and Continental Tyres South Africa (Pty) Ltd (“Continental”) sought an order to set aside a portion of the Competition Commission’s (“the Commission”) complaint referral.

[2] The Applications were brought by way of special pleas which Continental and Goodyear raised in their answering affidavits. The essence of the special pleas is that a portion of the Commission’s complaint referral against Goodyear and Continental ought to be dismissed *inter alia* because it did not comply with section 50(2)(a) read with section 50(4) of the Competition Act (“the Act”)¹ and rules 4(1) and 6(4) of the Competition Tribunal rules (“Tribunal rules”). Goodyear also relied on rule 14 and rule 8 of the Tribunal rules to advance its case as to why a portion of the Commission’s complaint referral ought to be dismissed.

Background

[3] In 2010 the Commission referred a complaint to the Tribunal against four tyre manufacturers namely Goodyear, Continental, Apollo Tyres South Africa

¹ Act 89 of 1998 as amended.

(Proprietary) Limited ("Apollo"), Bridgestone South Africa (Proprietary) Limited ("Bridgestone") and the South African Tyre Manufacturers Conference (Propriety) Limited ("SATMC"), which is the industry association.

[4] The referral was sparked by a complaint lodged to the Commission on 02 October 2006 by Parsons Transport (Pty) Ltd ("Parsons"), a firm which is a specialised transporter to the mining industry. In its complaint Mr Frans Stephanus Parsons ("Parsons the father"), in his representative capacity on behalf of Parsons, alleged that the tyre manufacturers simultaneously adjusted prices on the same date and for the same reasons such as change in exchange rate or costs of raw materials. Parsons further alleged that the tyre manufacturers used clever tactics to disguise their price fixing and cooperated with each other in what is known in the industry as 'coffee table talks'.

[5] As a result of the Parsons complaint, the Commission then initiated its own complaint in 2009 (Commission's complaint"). The Commission's actions included a dawn raid on the premises of Bridgestone, Apollo and SATMC. Bridgestone applied for and was granted leniency through the Commission's Corporate Leniency Policy ("CLP").

[6] The Commission then referred the complaint to the Tribunal in 2010, which consisted of a combination of the Parsons complaint and the Commission's complaint, against the remaining tyre manufacturers Apollo, Goodyear and Continental and the SATMC in which it alleges that the respondents contravened section 4(1)(b)(i) of the Act. Apollo has since settled with the Commission.²

[7] Since the Commission's referral in 2010, various interlocutory applications have taken place, which have resulted in Goodyear, Continental and SATMC only filing their answering affidavits to the main matter in 2016 respectively. It started with an exception application that was filed by SATMC on 25 November 2010, in relation to the Commission's complaint, alleging that the complaint had prescribed and was

² Apollo settled with the Commission in December 2011 for R45 000 000, which represents 4.75% of Apollo's turnover for its 2008 financial year.

vague and embarrassing. SATMC however later amended its exception application to limit it only to the vague and embarrassing allegation. In response to this, the Commission then filed a supplementary founding affidavit. The Tribunal heard SATMC's exception application in 2013 and ordered the Commission to file a further supplementary affidavit to clarify material facts it relied upon in its complaint against SATMC. Continental and Goodyear also filed interlocutory applications in 2012 requesting access to the Commission's record, including access to Bridgestone's CLP application documents and documents that were seized by the Commission during its dawn raid. Goodyear's application for Bridgestone's CLP documents was in the form of early discovery and relied upon High Court Rule 35(12), whilst Continental relied upon Commission rule 14(1) and High Court Rule 35(12) for its application.³ What followed thereafter was the discovery by the Commission of some of the requested documents. Continental and Goodyear's applications were only finally heard by the Tribunal in 2016 after various correspondence and exchange of documents between the Commission, Continental and Goodyear. The Tribunal partially granted Continental and Goodyear's applications, and ordered the Commission to handover some of the requested documents, to the extent that it is in possession of such documents. Further, the Tribunal ordered Continental and Goodyear to file their answering affidavits within twenty business days upon receipt of the documents.

[8] When Continental and Goodyear eventually filed their answering affidavits, some 6 years hence, they raised as special pleas the issues for consideration in these Applications.

[9] The Commission filed replies to the special pleas supported by two affidavits by its Principal Legal Counsel, Ms Nelly Sakata ("Ms Sakata"). Goodyear then filed a late supplementary affidavit to which the Commission responded by way of filing two additional affidavits, one by Mr Jan Alwyn Parsons ("Parsons the son"), the son of Mr Fran Stephanus Parsons and the other by Mr Christoffel Johannes Oelofse ("Mr Oelofse"), the Chief Financial Officer of Parsons Transport. The Commission also

³ By the time the Goodyear and Continental's applications were heard in 2016, Continental was no longer persisting with the Commission rule 14 argument and only relied upon HCR 35(12).

filed a further supplementary affidavit by Ms Sakata in response to Goodyear's supplementary affidavit.

In Limine Applications

[10] The special pleas raised by both the applicants can be categorised as follows

—

- 10.1. The invalid extension plea; and
- 10.2. Non-compliance with rule 4(1) and rules 14 and 8 of the Tribunal rules.

Invalid extension plea

[11] The essence of the challenge brought on the basis of the invalid extension plea is that the Commission when it sought extensions as contemplated in section 50(4) of the Act from the complainant, the persons (other than Parsons the father) who had signed on behalf of the complainant, were not authorised to do so and accordingly the extensions were invalid. Since the extensions were invalid, the complaint had lapsed after one year from date of being lodged (or we assume upon the expiry of any extension that had been validly granted by Parsons the father) by virtue of the operation of section 50(2). Accordingly, it was not competent for the Commission to refer a complaint to the Tribunal in respect of the Parsons complaint because that complaint had lapsed and consequently the Tribunal lacked jurisdiction in respect thereof.

[12] At the commencement of the hearing Goodyear indicated that it no longer persisted with this point.

[13] Continental on the other hand did not abandon its reliance on whether the complainant (Parsons) indeed validly authorised all the extensions received by the Commission during its investigation. Continental argued that not all the extension agreements were duly signed by the complainant - some were signed by the complainant's legal representative whilst others were signed by the complainant's financial manager. In addition to this, Continental submitted that the Commission did not follow proper procedure when obtaining the required extensions from

Parsons. One extension agreement, Continental argued is worded as Parsons the father being 'agreeable to an extension' (not agreed to extend), whilst another extension agreement was only signed a month later after the preceding agreement had expired. The rest of the extensions either have no cover documents or there is no clear fax date on them to ascertain when exactly the extensions were granted by Parsons the father. Continental further submits that the Commission's complaint was initiated at the time when no extension agreement had been received, which means that the Commission may have initiated its complaint so as to secure continued investigation of the tyre manufacturers, knowing that it no longer had the required extension under the Parsons complaint. Continental therefore concludes that based on the above observations from the Commission's extension agreements, it is clear that the Parsons complaint cannot be treated as having been validly extended given all the flaws that the various extensions contain.

[14] The Commission's representative Mr Berger accepted that the Commission bore the *onus* to prove on a balance of probabilities that *prima facie* it had obtained the required extensions validly in terms of section 50(2) of the Act and submitted that it had indeed discharged this burden. The Commission first pointed to the fact that the complaint had not been filed by Parsons the father in his personal capacity but on behalf of Parsons Transport (Pty) Ltd, and the entire Parsons Group of Companies which included Parsons Transport Holdings (Pty) Ltd and Parsons Transport Operations (Pty) Ltd. This meant that technically any person with the necessary authority within the Group could grant the extension. When addressing the issue of different signatories to the extension agreements, the Commission submitted that all the signatories were representatives of Parsons and were thus duly authorised to sign the extensions. Furthermore all extensions that were received orally were eventually reduced to writing.

Our analysis

[15] Section 50(4)(a) provides that

(1) *In a particular case -*

(a) *the Competition Commission and the complainant may agree to extend the period allowed in subsection (2);*

[16] Hence the Commission and the complainant may agree to extend the investigation period of one year contemplated in section 50(2).

[17] While section 50(4)(a) does not provide for any formalities regarding this agreement to extend or that it should be reduced to writing, the Commission has developed a practice of requesting extensions from complainants by first obtaining these verbally and then reducing them to writing.

[18] The first category of extensions which related to the question of wording and timing were dealt with by the Commission's supplementary affidavit in fair detail. The Commission explained that its practice in relation to the extensions was that it would first contact the complainant (or its authorised personnel) and obtain the agreement to extend verbally. It would thereafter follow this up by sending a request in writing to be signed and returned by the complainant. It was often the case that the signed document would be sent back by the complainant after the date on which the agreement was obtained and at times even dated on the day it was sent rather than the date on which the agreement had been obtained. For these reasons it has become the practice of the Commission to keep a file note of when the actual extension was obtained. In this category of extensions the Commission was able to produce records of emails to show that the actual agreements were obtained within the permissible time period.

[19] In relation to what was alleged to be by Continental an invalid extension due to the fact that it contained the wording that Parsons was 'agreeable to an extension' as opposed to "agreed to extend", the Commission had put up a dated handwritten file note that recorded the conversation between the Commission's legal counsel and Parsons on that day and the fact that he had agreed to an extension. In our view this is more than sufficient proof that the Commission had indeed obtained the extension on the date and that the use of the words "agreeable to an extension" simply cannot be said to be lacking of an 'agreement'.

[20] In relation to the one extension alleged to have been signed a month later after the preceding agreement had expired, the affidavit by the Commission's legal counsel and the extension agreement attached thereto provided sufficient proof that the extensions were validly obtained during the preceding period.

[21] As far as the category relating to the identity of the signatory or status of the entity, Parsons the son, in his affidavit explains that all the people who signed the extensions had been authorised to do so by his father and himself, as directors of Parsons Transport. In a separate affidavit Mr Oelofse, the Financial Manager of Parsons also explains that at the time when the Parsons complaint was lodged, three companies actually existed under the Parsons Group of companies, namely; Parsons Transport Holdings, Parsons Transport Operations and Wilroux Transport. Wilroux Transport was later liquidated in November 2006 but this was for purposes of internal restructuring.

[22] In our view, all of the above documentation is sufficient enough for us to conclude on a balance of probabilities⁴ that the extensions to the Parsons' complaint were validly obtained by the Commission and Continental's challenge to the referral on the basis that the extensions to the investigation period were not validly obtained does not hold water.

Non-compliance with Tribunal rule 4 (1) and rules 14(3), 8(2) and application of Tribunal rule 6

[23] Both Continental and Goodyear want us to set aside the Parsons complaint, on the basis that it was filed at 16h50 on 31 August 2010, which was outside of the Tribunal office hours of 8h30 to 13:00 and 13:30 to 15h30 as prescribed by Tribunal rule 4(1). Goodyear proffered an additional ground of challenge namely that the Commission had failed to serve its referral on the parties as required by rule 14 (3) and rule 8(2).

⁴ See *Competition Commission v Allens Meshco (Pty) Ltd*;09/CR/Jan07 at paragraph 24.

Rule 4(1) and rule 6(4)

[24] In relation to the rule 4(1) challenge both Goodyear and Continental essentially argued as follows. Rule 4(1) provides that the Tribunal's office hours are 8h30 to 13:00 and 13:30 to 15h30. In terms of section 50(2)(a) the Commission must refer a complaint within one year of receiving it, or within the extended period agreed between it and a complainant as provided in section 50(4)(a) of the Act. On the basis of the last extension received from Parsons the complaint was set to expire on 31 August 2010 at 15h30. The Commission had filed its referral on 31 August 2010 but at 16h50 and not at 15h30. This meant that the referral was filed outside of the office hours of the Tribunal. The fact that the referral was filed after the Tribunal's office hours triggered the operation of the deeming provision in Tribunal rule 6(4). Rule 6(4) provides that when a document is filed after hours, it is deemed have been filed on the following day, which in this case would be 01 September 2010.

[25] In other words the respondents submit that when Tribunal rule 4(1) is read together with Tribunal rule 6(4) the Commission is deemed to have filed its referral on 01 September 2010, a day after the expiry of the permissible period for referring. The Parsons complaint had thus expired and the Tribunal therefore has no jurisdiction to adjudicate the complaint and should dismiss it.

[26] The Commission offered in essence three grounds of opposition. Firstly, it argued that Tribunal rule 4(1) applies only to the public, which the Commission is not, as it is a statutory institution established in terms of the Act and Tribunal rule 6(4) is thus not applicable to the Commission. Secondly, the fact that the registrar⁵ accepted the referral on 31 August 2010, means it was filed on 31 August 2010 and the registrar clearly applied Tribunal rule 4(2)(a), and there is thus no need to apply Tribunal rule 6(4). Lastly, the Commission submits that Tribunal rule 6(4) should not be applied in circumstances where its application will result in the Tribunal not having jurisdiction to hear a given complaint or would limit the Commission's investigation period permitted in the Act. Such an outcome would

⁵ For purposes of these reasons, the registrar refers to Ms Tebogo Mputle who accepted the filing on behalf of the Tribunal on 31 August 2010.

be *ultra vires* the empowering legislation because rule 6 is sub-ordinate legislation and cannot be relied upon by the Tribunal to interpret (and limit) the Commission's investigative powers for the period contemplated in section 50(2) read with section 50(4). The Commission thus submitted that if we applied section 50(2), read with rule 6(4), the time period would have ended at 15h30 on the last day, which would oust the jurisdiction of the Tribunal in a manner that is not contemplated by the Act. The Commission thus submits that the special plea raised by the respondents that the Parsons complaint has lapsed should be dismissed.

Our Analysis

[27] It is common cause between the parties that the referral was filed with the Tribunal at 16h50 on 31 August 2010. It is also common cause between the parties that the registrar accepted the filing of the complaint and stamped it with the Tribunal stamp dated 31 August 2010.

[28] In our view the respondents' arguments stand to fail both as a matter of law and a matter of fact.

[29] As a matter of law the respondents ignore completely the existence of rule 4(2), to which both rule 4(1) and rule 6(4) are explicitly linked.

[30] Tribunal rule 4 stipulates as follows:

(1) "The offices of the Tribunal are open to the public every Monday to Friday, excluding public holidays, from 08h30 to 13h00 and from 13h30 to 15h30.

(2) Despite sub-paragraph (1)—

(a) in exceptional circumstances the registrar may accept documents for filing on any day and at any time; and

(b) the registrar must accept documents for filing as directed by either the Tribunal or a member of the Tribunal assigned by its chairperson."

[31] We note the use of the word "and" rather than "or" between rules 4(2)(a) and 4(2)(b). However were we to read the two sub-rules in conjunction, rather than in

the alternative, this would lead to an absurdity. The registrar on the one hand cannot be compelled to accept documents as contemplated by use of the word "must" in rule 4(2)(b) and on the other hand still retain a discretion to accept documents as contemplated in the use of the word "may" in rule 4(2)(a). The word "and" therefore can only be understood to list the different ways in which documents can be accepted by the registrar.

[32] The use of the word "*Despite*" in rule 4(2) is noteworthy. On a plain reading of rule 4(1) and rule 4(2)(a) taken together the following can be inferred. The Tribunal's office hours are between 8h30 and 15h30. Notwithstanding these office hours, the registrar, at his or her discretion may accept documents for filing on "any day and at any time". Rule 4(2)(a) thus confers a wide discretion on the registrar to accept documents at any time of any day, the only requirement being that the circumstances be exceptional. The assessment of whether the circumstances are exceptional or not also lie within the discretion of the registrar. Were it not so then there would be no need for rule 4(2)(b) which stipulates that the registrar must accept documents for filing as directed in that rule. Hence rule 4(1) (which stipulates the office hours of the Tribunal) cannot be interpreted so as to place limitations on the registrar's wide discretion to accept documents at "any time and any place" simply because that wide discretion is qualified by the rule itself namely the existence of exceptional circumstances.

[33] The rules do not define what "exceptional circumstances" the registrar must have regard to. At the level of principle we can surmise these would include such circumstances which preclude a party from filing during the stipulated office hours. Thus "exceptional circumstances" could include a wide range of events ranging from a breakdown of a photocopier machine, a traffic jam, a delay in obtaining a signature and so forth. Most importantly however is that the circumstances must be those that the registrar finds acceptable for purposes of a filing under rule 4(2)(a).

[34] The rationale for the existence of rule 4(2)(a) and (b) is obvious. These rules permit the filing of urgent applications, filing by electronic service and significantly the filing of documents outside of the official hours of the registrar. They serve to expand the public's Constitutional right of access to the Tribunal.

[35] In summary, on a plain reading of rule 4, documents can be accepted by the registrar in the following three ways: first the registrar can accept documents during the office hours of the Tribunal, second the registrar can accept documents outside of the office hours of the Tribunal, in his or her discretion, at any time and on any day and third the registrar may accept documents at the direction of the Tribunal or member of the Tribunal assigned by its chairperson.

[36] The registrar in this case accepted the Commission's referral at 16h50 on 31 August 2010. She was empowered to do so in terms of rule 4(2)(a). The Commission's referral was thus filed in accordance with the rules of the Tribunal on 31 August 2010.

[37] Not unsurprisingly there was no suggestion by the respondents that the registrar's acceptance of the referral was not in compliance with rule 4(2)(a). On the contrary they sought, in support of their own arguments, to ignore the existence of rule 4(2) in its entirety and relied on a blinkered reading of rule 4 so as to suggest that only rule 4(1) prescribes the time and manner in which documents could be filed with the Tribunal. Evidently this is not the case as is demonstrated by the existence of rules 4(2)(a) and (b).

[38] This then brings us to consider the relationship between rule 4 and rule 6(4).

[39] Rule 6(4) provides as follows –

“Subject to Rule 4 (2), if the date and time for the delivery of a document referred to in Table CTR I is outside of the office hours of the Tribunal as set out in Rule 4(1), that document will be deemed to have been delivered on the next business day”.

[40] Having regard to Table CTR 1, the deeming provision in rule 6(4), if read selectively would indeed have the effect of deeming the referral to have been filed on 1 September 2010.

[41] We say selectively because the interpretation pressed upon us by the respondents and the conclusion they would have us arrive at can only be permissible if we ignored the first three words of rule 6(4) namely "*Subject to Rule 4(2)*".

[42] In reading rule 6(4), the words "Subject to Rule 4(2)" at the beginning of the sentence immediately alerts the reader that the remaining words in rule 6(4) must be read with regard to rule 4(2). The remaining words contain the deeming provision that the respondents urge us to adopt. However the deeming provision cannot be adopted without first looking to the provisions of rule 4(2).

[43] On a plain reading the reasonable interpretation to be drawn from reading the two rules together is that the deeming provision provided for in rule 6(4) can only kick in when the registrar has not exercised his/her discretion under rule 4(2)(a) or had not been directed as provided in rule 4(2)(b). Put another way, once the registrar exercises his/her discretion under rule 4(2)(a) or accepts a document as directed under rule 4(2)(b), the deeming provision in rule 6(4) does not apply.

[44] Continental suggested that we should understand the words "*Subject to Rule 4(2)*" to mean that rule 4(2) does give the registrar the ability to accept documents after the Tribunal office hours and what follows then is the presumption that the document was filed the following day. In other words, the phrase 'subject to' refers to curtailing an entitlement by reference to what follows it. Goodyear on the other hand did not address the issue but simply submitted that if the Commission wanted the application of rule 4(2) it had to specifically plead the application of such rule to its exceptional circumstances.

[45] Continental during the hearing submitted that it has a slightly different view on the inter-link between Tribunal rules 4(2) and 6(4). It submitted that Tribunal rule

6(4) has the deeming provision that allows one to file outside of the office hours as the Commission did in this case. This Continental argued means that you don't even need to ascertain what exceptional circumstances existed as required by Tribunal rule 4(2)(a), because the Tribunal rules allow for one to file outside the office hours. However once you file outside office hours (as permitted in rule 4(2)(a)), then the deeming provision would kick in and the date for filing outside office hours would be deemed to be the next day.

[46] Were we to adopt the approach advanced by Continental we would be faced with the bizarre situation that a party that filed its document between 13h00 and 13h30, a time that is excluded from the office hours provided for in rule 4(1), would find that its document would, by the provision in rule 6(4), be deemed to have been delivered the following day.

[47] The only reasonable - and sensible - interpretation of rule 6(4) read together with rule 4(2) is that the deeming provision would kick in only when the registrar has not accepted a document in terms of his or her discretion under rule 4(2)(a). In other words the deeming provision in rule 6(4) is suspended in the event that the registrar accepts the document under rule 4(2)(a). Thus the words "Subject to Rule 4(2)" would have the effect of suspending the deeming provision in rule 6(4) in favour of rule 4(2). This interpretation would be in accordance with the approach of the high court in interpreting the words "subject to".⁶

[48] On such an approach we can expect the deeming provision to apply to documents that might have been placed in the registrar's window or email without any arrangement being made by that party for acceptance by the registrar outside office hours but not to documents that the registrar accepted in terms of rule 4(2)(a) or (b).

[49] Turning to the facts of this case we see that the registrar did place her stamp on the referral. The stamp reflects that the registrar accepted the document on 31

⁶ See *Pangbourne Properties Limited & Gill & Ramsden (Pty) Limited*; 142/94; *Awumey & Another v Fort Cox Agricultural College & Others* 2003 (8) BCLR 861 (CK).

August 2010 at 16h50. Although 16h50 was after the 15h30 office hours of the Tribunal the registrar was entitled, in terms of rule 4(2)(a), to accept the document on 31 August 2010. Unbeknownst to the respondents at that time, but a fact which emerged later, the registrar had also allocated a case number to the matter on 31 August 2010, the relevance of which is discussed later.

[50] In conclusion, having regard to the provisions of rule 4(1) and rule 4(2) read together, and rule 6(4) read with rule 4(2), we find that the Commission's complaint referral was filed in time by the Commission on 31 August 2010 in compliance with the provisions of rule 4.

[51] In light of our conclusion above there is no need for us then to consider the additional arguments put up by the Commission in support of their case that the referral was not out of time. At the level of principle however we accept the proposition put up by the Commission that the rules of the Tribunal, which are subordinate legislation, cannot be interpreted to place limitations on the provisions of sections 50(2) and 50(4) which entitle the Commission to refer a complaint to the Tribunal within the full period contemplated in those sections. In other words if the permissible period for the Commission to refer a complaint to the Tribunal was until midnight of a particular day under section 50, the rules of the Tribunal could not limit that entitlement to 15h30 of that day. Obviously such argument would be relevant if for some reason we found there to be ambiguity or a *lacuna* in the rules. As it stands, in light of our conclusion above, there is no need for us to consider this argument any further.

[52] This then leaves us with the last ground of challenge put up by Goodyear namely that the complaint was not validly referred because the Commission did not comply with the requirements of rule 14 and rule 8.

Non-compliance with Tribunal rule 14 and rule 8

[53] Goodyear's further challenge is premised on Tribunal rule 14 and rule 8 (2) which deal with how a complaint should be filed and referred to the Tribunal. Goodyear submits that if one properly scrutinises Tribunal rule 14, a referral is only initiated once it has been properly filed and served in terms of Tribunal rule 14(3). Tribunal rule 14(3) stipulates that when a person refers a complaint to the Tribunal, it must serve a copy within three business days after filing, on the respondent, whilst Tribunal rule 8(2) stipulates that when a person serves such a copy to a respondent, the person must first obtain a case number for the document from the registrar. Goodyear therefore submits that the Commission failed to comply with these Tribunal rules as Goodyear received a copy of the referral document but it had no case number assigned and even the document it received was only emailed on 01 September 2010 at 11h00.

[54] Goodyear submitted that because the Act does not define what a 'referral' is, or what it means to properly 'refer a complaint', we need to look to the Tribunal rules for assistance. Goodyear submitted that the relevant rule is Tribunal rule 14, and that the Commission ought to have complied with Tribunal rule 14 in order for it to have validly referred the Parsons complaint.

[55] In response to Goodyear's argument on rule 14, the Commission argued that the Tribunal need not look at the Tribunal rules to interpret what is meant by a 'referral' under section 50 of the Act. This, the Commission submitted is because all that is needed is the referral of a complaint to the Tribunal. Furthermore section 50 does not stipulate that such referral must be subject to the Tribunal rules. Once the matter has been referred to the Tribunal, the requirements of section 50 were met. In addition to this, the Commission submitted further that section 50 is for the benefit of the complainant and not the Commission or the respondents and therefore the question of whether a referral has been timeously made can only be answered by referring to section 50 and not to the Tribunal rules. Lastly, the Commission argued that even if it had not complied with Tribunal rule 8, the condonation route is still open to the Commission, and that the Tribunal can

exercise its powers in terms of section 58 of the Act, to condone any non-compliance with its rules.

[56] Tribunal rule 14 prescribes as follows;

14.1

(1) *"A Complaint Referral may be filed—*

(a) by the Commission, in terms of section 50 (1) or 50 (2) (a), in Form CT 1 (1);

(b) by a complainant, in terms of section 51 (1), in Form CT1 (2) within 20 business days after the Commission has issued, or has been deemed to have issued, a Notice of non-referral to that complainant; or

(c) by any party to an action in a civil court that has been referred to the Tribunal in terms of section 65 (2), in Form CT 1 (3).

(2) If, in respect of a particular matter, more than one person files a Complaint Referral in terms of sub-rule (1), the registrar must combine those referrals under a common case number.

(3) The person who files a Complaint Referral must serve a copy of it within 3 business days after filing on—

(a) The respondent;

(b) The Commission, if the Commission did not file the Referral; and

(c) On each other person who has previously filed a Complaint Referral in that matter."

[57] The relevant rule in this case is rule 14(3).

[58] Rules 8(1) and (2) provide –

58.1. *"(1) The registrar must assign distinctive case numbers to each initiating document."*

58.2. *(2) Before serving a copy of an initiating document on any person, the initiating party must-*

58.3. *(a) obtain a case number for that document from the registrar;*

and

(b) note the case number on every copy of that document.

[59] The relevant facts of this case are that the registrar after accepting the referral allocated a case number to it on 31 August 2010, i.e. CR053Aug10. The Commission, after having filed the referral on 31 August 2010, sent an electronic version of the referral to the respondents via e-mail on 1 September 2010 with the accompany message;

59.1. *"Dear All, Herewith the Commission's referral affidavit."*

[60] The respondents were thus made aware of the fact that the Commission had filed a referral with the Tribunal on 31 August 2010 one day thereafter. Hence the Commission had complied with the provisions of rule 14(3)(a) which required it to serve the referral on the respondent within three (3) days of filing it with the Tribunal. The attached document however did not reflect a case number, although the registrar had in fact allocated such on 31 August 2010 as contemplated in rule 8(2).

[61] In essence, Goodyear seeks to have the complaint referral set aside on the basis that the document which the Commission served on it, which Goodyear had understood and accepted as being a complaint referral at that time and for seven years hence, did not reflect a case number. Had it been otherwise Goodyear would have at that time ignored the document on the basis that it had not been properly served in compliance with rule 8(2). Instead what we see is Goodyear engaging with the referral by embarking on a series of interlocutory applications over a period of seven (7) years pertaining to the production of documents.

[62] It is only now when Goodyear is faced with having to file an answer to the referral and seemingly in an attempt to prevent the matter going to trial that we see this challenge emerging.

[63] In our view the failure by the Commission to place the case number on the electronic version of the referral sent to the respondents on 01 September 2010 does not amount to a grievous non-compliance with the rules so as to warrant a dismissal of the complaint referral. The Commission had only omitted to place the

case number on the document it had served on the respondents on 01 September 2010. Since then however all the material documents in this matter have reflected the case number, the respondents had accepted service of the referral at that time and that acceptance has been amply demonstrated by the fact that they have embarked on extensive litigation over a period of seven years regarding the referral. Clearly no prejudice can adduce to the respondents were the Tribunal to condone the Commission's omission. Moreover the allegations against Goodyear and Continental are of a grave nature. They are accused of engaging in collusive conduct in contravention of section 4(1)(b)(i) of the Act, conduct that is considered to be the most harmful to competition and consumers and which under our Act is a *per se* offence. Thus both fairness and the public interest serve as considerations in support of us condoning the Commission's omission under rule 8(2).

[64] Section 58(1)(c) of the Act prescribes as follows:

"In addition to its other powers in terms of this Act, the Competition Tribunal may -

- (a) *subject to sections 13(6) and 14(2), condone, on good cause shown, any non-compliance of –*
 - (i) *the Competition Commission or Competition Tribunal rules; or*
 - (ii) *a time limit set out in this Act."*

[65] Section 55 (2) read together with rule 55 (3) confer a wide discretion on the Tribunal to condone any technical irregularities arising in its proceedings.

[66] Thus in terms of the Tribunal's statutory powers conferred in section 58 and 55 of the Act, the Tribunal has the powers to condone any non-compliance with its rules.⁷

⁷ See *Mpho Makathini & others v Glaxosmithkline South Africa (Pty) Ltd & another*; 34/CR/Apr04; *Directory Solutions v Trudon (Proprietary) Limited & another*; 77/IR/Nov09; *Massmart Holdings Limited v ShopRite Checkers Proprietary Limited*; CRP034Jun15/CON211Nov16. *The Competition Commission v Serwes Limited*; CCT 61/11 [2012] ZACC 6.

[67] Accordingly the non-compliance of the Commission with the provisions of rule 8(2) is condoned.

Conclusion

[68] Based on our analysis above, we are of the view that the Commission validly referred the Parsons complaint. The extensions obtained by the Commission were all validly obtained and signed by the relevant authorised persons. The referral was not lodged out of time because the registrar in her discretion under rule 4(2)(a) had accepted the documents on 31 August 2010 and had allocated a case number on that day. To the extent that the referral was served on the respondents by the Commission in non-compliance with the provisions of rule 8(2) and 14(3), such non-compliance is condoned.

[69] The Applicants' *In Limine* Applications are therefore dismissed.

ORDER

1. Goodyear and Continental's *In Limine* Applications under case number CR053Aug10/PIL225Dec16 are hereby dismissed.
2. There is no order as to costs



02 June 2017

Ms Yasmin Carrim

Date

Mr Andreas Wessels and Ms Medi Mokuena concurring

Tribunal Researcher: Ms Caroline Sserufusa

For the Commission: Adv D Berger SC and Ms. S Kazeem instructed by the state
attorney

For Goodyear: Adv A Gotz and Ms N Lewis instructed by Judin Combrinck
Incorporated

For Continental: Adv M Engelbrecht instructed by Bowman Gilfillan