



competitiontribunal
SOUTH AFRICA

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT CASE NO:

STR132Oct20/LM144Jan20

In the striking out application between:

The Competition Commission of South Africa

Applicant

And

South African Energy Forum

Respondent

In the large merger proceedings between:

Thabong Coal (Pty) Ltd

Acquiring Firm

And

South32 SA Coal Holdings (Pty) Ltd

Target Firm

Panel	: AW Wessels (Presiding Member)
	: E Daniels (Tribunal Member)
	: M Mazwai (Tribunal Member)
Heard on	: 16 October 2020
Order Issued on	: 16 October 2020
Reasons Issued on	: 1 April 2021

ORDER AND REASONS FOR DECISION AND COSTS ORDER

1. The Competition Commission of South Africa (“the Commission”), the Applicant, sought an order against the South African Energy Forum (“SAEF”), the Respondent, in the following terms:

- 1.1. Striking out allegations of political interference in SAEF's Form CT 6 dated 23 September 2020;
 - 1.2. Costs of this application on an attorney and own client scale; and
 - 1.3. Granting the Commission such further and/or alternative relief as the Tribunal considers appropriate.
2. On 16 October 2020, after hearing the matter, the Competition Tribunal ("Tribunal") granted the Commission's striking out application and indicated that the issue of costs will stand over to be considered by the Tribunal.
 3. Our reasons for granting the striking out application follow as well as the Tribunal's order regarding costs.

THE PARTIES

4. The Applicant is a statutory body duly established and constituted as a juristic person in terms of section 19(1) of the Competition Act No 89 of 1998, as amended ("the Act"), having its principal place of business at the DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria.
5. The Respondent defines itself as a "*gathering of activists that advocates for equitably involvement in energy and mining technologies and mix of investments that maximise benefits for South Africa and its sister Sub-Saharan African countries*".¹ SAEF is the applicant in an intervention application that it filed with the Tribunal on 24 September 2020, in which it sought to intervene in

¹ SAEF's Reply Affidavit to the merger parties' intervention Answering Affidavit, par 1.

the Tribunal proceedings of the large merger between Thabong Coal (Pty) Ltd (“Thabong Coal”) and South32 SA Coal Holdings (Pty) Ltd (“South32”).

6. The striking out application was heard concurrently with SAEF’s intervention application on 16 October 2020.
7. Although SAEF was notified about the hearing date on 28 September 2020, and notwithstanding that SAEF confirmed availability on 29 September 2020, it subsequently informed the Tribunal that it was unavailable on that date. SAEF did not provide sufficient reasons on why it reneged on its initial commitment to attend the hearings. It merely stated that it had an important meeting, and failed to elucidate the nature of said meeting. SAEF did not attend and were not represented at the hearing.
8. In a Tribunal email that served to provide direction on how the interlocutory matters would proceed², we noted that SAEF had indicated it would no longer be available for the hearings. Following this, we highlighted that it had not filed any postponement application with this Tribunal and iterated that the hearings would proceed as per the Notices of Set-Down. In any event, even if SAEF had filed a postponement application it would have to be present on the day to argue for said postponement.
9. Section 53 of the Act specifically provides that a respondent may participate in a hearing, in person or through a representative. Rule 43 of the Rules for the

² Tribunal Email to Parties, dated 14 October 2020.

Conduct of Proceedings in the Competition Tribunal (“Tribunal Rules”) regulates the representation by representatives of parties to proceedings before the Tribunal. A representative includes a legal practitioner.

10. SAEF were at liberty to appoint a representative to represent them at the hearing or to participate in person but did not do so.
11. The application, referred to in paragraph 1 is made by the Commission in terms of Rule 23(2) of the Uniform Rules of Court read Rule 55(1)(b) of the Tribunal Rules for the striking out of scandalous and vexatious allegations of “political interference” made by SAEF in its Form CT 6 dated 23 September 2020.

The proposed merger transaction³

12. On 10 December 2019, Thabong Coal (Pty) Ltd (“Thabong Coal”) and South32 SA Coal Holdings (Pty) Ltd (“South32 SA Coal”) jointly notified the Commission of a proposed merger in terms of which Thabong Coal intends to acquire 81.835% of the issued share capital of South32 SA Coal from South32 SA Holdings Limited. South32 SA Holdings Limited held 91.835% of the issued share capital in South32 SA Coal and the remaining shareholding of 8.165% in South32 SA Coal was held by a BEE shareholder, Phembani Group (Pty) Ltd (“Phembani Group”). Thabong Coal is a wholly owned subsidiary of Seriti

³ Ms Portia Bele, a Senior Analyst in the Mergers and Acquisitions Division of the Commission, deposed to the Commission’s Founding Affidavit in support of the application. The factual background information on the merger is contained in paras 8 – 11 of that affidavit and has been reproduced here.

Resources Holdings (Pty) Ltd (“Seriti”). Post-transaction, South32 SA Coal will be solely controlled by Thabong Coal (and indirectly by Seriti).

13. In or about June 2020, whilst the Commission was still investigating the transaction, the Phembani Group elected to sell its 8.165% shareholding in South32 SA Coal to South32 SA Holdings Limited in a separate non-notifiable transaction and will not remain a minority shareholder in South32 SA Coal. The effect of the sale of shares by Phembani Group to South32 SA Holdings Limited, resulted in the latter holding 100% of the issued share capital of South32 SA Coal.
14. Consequently, following the exit of the Phembani Group from South32 SA Coal, the proposed transaction now entails the following:
 - 14.1. Thabong Coal will acquire 90% of the issued share capital of South32 SA Coal; and
 - 14.2. The South32 Community Trust and South32 Employee Trust (being trusts that are to be formed by Thabong Coal) will each acquire 5% of the issued share capital of South32 SA Coal, respectively.
15. Following a relatively lengthy investigation of the merger, the Commission recommended to the Tribunal that the merger be approved with certain conditions.
16. SAEF which had made submissions to the Commission regarding the merger, instead of providing detailed evidence, if it had any, to the Commission in a

constructive way which would have assisted the Commission in its investigation, launched a number of unsubstantiated attacks on the Commission and its employees in ways which the Commission describes as xenophobic, abusive and vitriolic.

Abusive and vitriolic attacks against the Commission and its officials

17. In a letter dated 12 August 2020, SAEF makes abusive and xenophobic attacks against the Commission's officials.

18. In that letter SAEF says:

"The following have not been addressed:

• Who are the ultimate beneficial owners Seriti Resources/Thabong Coal? This has not been made clear and we take offense to the Non-South African members of the Commissions team Nelly & Grashum ignoring our requests for disclosure of the ultimate beneficiaries and insisting that we believe their disclosures. We require names, ID's and South African certification for a deal the size of this under Government procurement. The Commission also needs to explain why Non-South Africans are handling BEE deals and refuse to carry out and disclose BEE ownership thereby supporting fronting. (own emphasis)"⁴

⁴ Founding Affidavit by Ms Portia Bele. Para 12. We have retained the emphasis placed by Ms Bele on the offending remarks made by SAEF in this paragraph to highlight the serious nature of the attacks on the Commission and its personnel.

19. On 14 September 2020 SAEF posted a tweet insinuating that the Commission's recommendation was influenced by political interference. The tweet was reproduced in paragraph 14 of the Founding Affidavit.⁵

20. According to the Commission, on 15 September 2020, SAEF addressed a letter to the Tribunal in which it brought to the Tribunal's attention an article published in *The Star* newspaper on Monday, 14 September 2020, entitled "*CR17 donor scores R1.5 bn Eskom contract.*" The Commission stated that in the letter, dated 15 September 2020, SAEF alleged, *inter alia*, that:

20.1. "it did have suspicions about an alleged conflict of interest and political interference when the Commission released its recommendations on a Sunday morning, and its suspicions have been confirmed upon further information being made available to them as part of the process;

20.2. it has on numerous occasions requested for the ultimate beneficial ownership of Seriti to be made public and was ignored by the Commission. It is of the opinion this is due to political interference as well as a conflict of interest;

20.3. it is '*now in possession of information that explicitly shows the conflict of interest and political interference that has occurred:*

•*Seriti's Shareholders is also Eskom Suppliers and that the 8% BEE Partner of South32 being Pembani Holdings own and control the Shanduka Coal BEE Portfolio of 48% in Glencore,*

⁵ Founding Affidavit. Para 14.

*Xstrata and Umchebu Coal that is also Eskom Coal Suppliers’.*⁶

21. The Commission adds that “In the same letter of 15 September 2020, SAEF accused the Commission of being compromised in its judgement and in its role to act in the public interest and requested guidance from the Tribunal on how to proceed.”⁷
22. “On 16 September 2020, the Commission responded to SAEF’s letter by way of a letter addressed to the Tribunal in which it took exception, in the strongest of terms possible, against SAEF’s continued peddling of unfounded allegations of political interference. Most importantly, in the letter dated 16 September 2020, the Commission indicated that should SAEF continue making unfounded allegations of political interference, the Commission will have no option but to ask for costs on an attorney and own client scale.”⁸
23. On 18 September 2020, SAEF responded as follows:
- “The Commission as an organ of state should not refer to objecting bodies as “styling”, “scurrilous”, “spurious and gratuitous”; these terms and the manner in which they are applied are disrespectful and unbecoming of an organ of state, the Head of Legal should be reminded that he serves the public interest and the public interest. The general*

⁶ Founding Affidavit. Para 15.

⁷ Ibid. Para 16.

⁸ Founding Affidavit. Para 18.

attitude of the Commission towards the various objections to this merger are typical of this general attitude.”

“It is clear from the above that there is a clear and rather serious breakdown in the functioning of the Commission if the Head of Legal is referring to statements made in the Commission’s own report as “vast and wild conclusions from very scant premises.”

This attitude of the Commission towards the objections to this particular merger where material matters and pending legal cases are completely ignored can only be due to political interference as alluded to by the article in the Star.

The assertion that there is political influence at the level of the Commission remains, not to mention the obvious conflict of interest that, had the Commission been acting in the public interest rather than any other political interests would have become apparent when the above mentioned ownership structure been reviewed by the Commission.

(...)

We are still of the view that the Competition Tribunal opine on the situation where the Commission has been comprised (sic) politically as is the case here; to reiterate the Commission has not engaged with the Star rather has cast aspersions in the direction of SAEF. We await the Tribunal in this regard.

In the interim we will be lodging a complaint about the Commission with the Public Protector given the now known political influence and conflict of interest; for example the Mining Charter stipulates a minimum Black Economic Empowerment (BEE) ownership of 30% yet South32 is 8%

which points to a compliance failure at both the Commission and more importantly Eskom.

Once again there is a spectre of political influence for which we require the Tribunals view as the Commission is seemingly compromised in this instance.”⁹

24. The tone of SAEF’s response is combative and argumentative. The Commission argues that its application must be viewed against the backdrop of SAEF’s attacks on the Commission and its officials. The Commission also states that the xenophobic attacks by SAEF against the Commission’s officials are hurtful and inflammatory and that the unfounded allegations of political interference are reckless and irresponsible.

25. The Commission is, therefore, of the view that a striking out application is necessary to protect the Commission and its officials against the abuse by SAEF.

Alleged political interference

26. In its Form CT 6 SAEF alleges:

“Lastly, we have been made aware by an article in the Star on Monday the 14th of September 2020 which referes (sic) to the CEO of Seriti contributing to the Presidential campaign, this has led us to the conclusion that the reason all of the above objections were completely ignored by the Competition Commission is due to political interference which was further confirmed when we were made

⁹ Founding Affidavit. Para 20.

aware of a case lodged with the Public Protector around the Sec 11 which was ignored by the Commission. The Sec 11 should have followed the approval by the Competition Commission, therefore this is yet another irregularity ignored by the Commission.”¹⁰

27. Masedi Matlala (“Matlala”) deposed to a document purporting to be an answering affidavit on behalf of SAEF, stating that he/she is duly authorised to do so.¹¹ This document was not signed and had clearly not been sworn to before a Commissioner of Oaths and is in effect a statement and not an affidavit. The Commission takes issue with some of the averments made in the statement and seeks to have those struck out.

28. We have not been provided with any details about Matlala who has provided only sparse information about the SAEF.

29. According to Matlala:

“SAEF engages in all matters relating to the energy sector in South Africa with a primary view of transforming the sector and ensuring South Africa maintains energy security and the policy of Free Basic Electricity.

SAEF participates in the policy environment to ensure the above are prioritised in the South African Energy sector.”¹²

30. Matlala further describes SAEF in the following terms:

¹⁰ Founding Affidavit. Para 23

¹¹ The document is headed “SAEF’S RESPONSE TO STRIKE OUT APPLICATION OF COMPETITION COMMISSION RELATING TO POLITICAL INTERFERENCE”.

¹² Ibid. Para 2.

3. *“SAEF participates in the policy environment to ensure the above are prioritised in the South African energy sector.”*¹³

31. Matlala then explains that SAEF’s belief that political interference had influenced the Commission’s investigation stems from a newspaper article in the Star newspaper on 14 September 2020, that the CEO of Seriti had donated to the presidential CR17 campaign.¹⁴ That belief is not grounded in reality.
32. It is difficult to understand how SAEF could have concluded from a newspaper article relating to a donation to a political campaign that that had somehow influenced the very important investigation conducted by the Commission into the merger.
33. SAEF should have provided evidence to substantiate its belief that the Commission’s investigation was tainted but did not do so. The failure by SAEF to provide such evidence leads us to conclude that it has none and that its belief about the alleged political interference is based on unfounded speculation and conjecture.
34. In any event, anyone is free to make donations to a political party and its members in furtherance of its political aims and ambitions.¹⁵

¹³ Answering response. Paras 1,2 and 3.

¹⁴ Ibid. Paras 6 -8.

¹⁵ In this regard, section 19(1) of the Constitution states:

(1) Every citizen is free to make political choices, which includes the right –
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.

35. Matlala also states that its view about the alleged political interference in the Commission's investigation is fortified by "*this attempt by Commission to block SAEF from participating in the Tribunal; since when is an organ of state allowed to ignore the public and then actively prohibit the public from participating in a Government process such as the Competition Tribunal and impose cost orders.*"¹⁶
36. Matlala then expresses an opinion that the Commission does not have "*internal processes and policies*" in place to deal with "*Politically Exposed persons (PEP's)*" and "*the Commission is therefore open to political interference.*"¹⁷
37. SAEF has also, apparently, lodged a complaint against the Commission with the Public Protector. The Commission takes issue with the allegations made on behalf of SAEF and takes strong exception to the xenophobic statements made by SAEF.¹⁸

STRIKING OUT APPLICATIONS

38. Uniform Rule 23(2) states that:

"Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter, and

¹⁶ Answering response. Para 10.

¹⁷ Ibid. Para 11 read with para 12.

¹⁸ The allegations which the Commission takes issue with and seeks to have struck out are mentioned earlier in these reasons.

may set such application down for hearing within five days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of the time limit for delivery of a replying affidavit, referred to in rule 6(5)(f):
Provided that—

- *the party intending to make an application to strike out shall, by notice delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and*
- *the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.”*

39. The Commission correctly states that Rule 23(2) applies to Tribunal proceedings by virtue of the provisions of Rule 55(1)(b) of the Tribunal’s Rules.¹⁹

40. The Commission also notes that two requirements must be met before a striking out application can succeed, namely:

40.1. the averments sought to be struck out must be scandalous, vexatious or irrelevant; and

¹⁹ Founding Affidavit. Para 26.

40.2. the court must be satisfied that if such averments are not struck out the party seeking such relief would be prejudiced.²⁰

THE POLITICAL INTERFERENCE ALLEGATIONS

41. Before dealing with the requirements which must be met before a striking out application may succeed, we need to consider the legislative provisions which establishes the Commission.

42. The Commission, which is a juristic person, was established by section 19 of the Act and has jurisdiction throughout the Republic and performs its functions in accordance with the Act.

43. In terms of section 20 of the Act:

(1) The Competition Commission –

(a) Is independent and subject only to the Constitution and the law; and

(b) Must be impartial and must perform its functions without fear, favour, or prejudice.

44. The Commissioner, each Deputy Commissioner and each member of the staff of the Competition Commission are enjoined not to engage in activities which may undermine the integrity of the Commission or to participate in any investigation, hearing or decision concerning a matter in respect of which that person has a direct financial interest or any similar personal interest.²¹

²⁰ Founding Affidavit. Para 27.

²¹ Section 20(2)(a) and (b) of the Act.

45. In addition, they are also prohibited from privately using or profiting from or disclosing confidential information, except, in respect of the latter, as provided for in the Act.²²
46. The independence of the Commission is akin to those of the Chapter 9 institutions listed in the Constitution, which strengthen constitutional democracy.
47. While the Commission is not such an institution, each organ of state²³ must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties,²⁴ just as organs of state have to take legislative and other measures to assist and protect the Chapter 9 institutions to ensure their impartiality, dignity and effectiveness.²⁵
48. With reference to an anti-corruption agency, the Constitutional Court stated that *“independence requires that the anti-corruption agency must be able to function effectively without undue influence”* and that *“the appearance of perception of independence plays an important role in evaluating whether independence in fact exists.”*²⁶

²² Section 20(2)(c) and (d) of the Act

²³ “organ of state” is defined in the Constitution and means –

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

²⁴ Section 20(3) of the Act.

²⁵ Section 181(3) of the Constitution.

²⁶ *Hugh Glenister and President of the Republic of South Africa and others* [2011] ZACC 6 Paras [206] and [207] (Glenister 2).

49. This theme was repeated by the Constitutional Court in a later judgement when it stated again with reference to an anti- corruption agency that “*The public perception of independence in Glenister II relates to whether a reasonably informed and reasonable member of the public will have confidence in an entity’s autonomy- protecting features.*”²⁷

50. The Constitutional Court added:

*“This court has indicated that ‘the appearance of or perception of independence plays an important role’ in evaluating whether independence in fact exists... We say merely that public confidence in mechanisms that are designed to secure independence is indispensable ... Hence, if Parliament fails to create an institution that appears from the reasonable standpoint of the public to be independent, it has failed to meet one of the objectives benchmarks for independence. This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.”*²⁸

51. The Constitutional Court made those comments, during its consideration of the constitutionality of the South African Police Service Act 1995 (Act No. 68 of 1995) which was amended by the South African Police Service Amendment Act 10 of 2012, with reference to the location and the independence of the Directorate of Priority Crime Investigation(“DPCI”).

52. However, the Constitutional Court’s comments about public confidence in independent institutions applies to all independent institutions, including the Commission. Unsubstantiated allegations of political interference in the work

²⁷ *Helen Suzman Foundation and President of the Republic of South Africa and others* (CCT 07/14) and CCT 09/14 [2014] ZACC 42; 2015 (1) BCLR; and *Hugh Glenister and President of the Republic of South Africa and others* 2015 (2) SA 1 (CC) 27 November 2014. Para [31]

²⁸ *Helen Suzman Foundation* supra Para [31].

of the Commission undermines its independence, erodes public trust in the investigations the Commission undertakes and are prejudicial to the Commission.

53. An allegation, according to the Commission, is scandalous when it is abusive or defamatory. Similarly, an allegation is vexatious if it harasses or annoys²⁹ and “*SAEF’s unfounded allegation of political interference neatly fits both requirements of scandal and vexation.*”³⁰
54. With reference to the donation referred to which aroused SAEF’s suspicion of political interference, the Commission states that no evidence was produced and, in any event, SAEF’s submissions were considered by the Commission and were dealt with in its recommendations.³¹
55. According to the Commission, “The Commission’s merger investigation process is conducted in a transparent manner. In accordance with section 13B (1) of the Act, a team of economists and lawyers was appointed to investigate the merger transaction and to prepare a recommendation to the Tribunal. The team conducted an extensive and comprehensive investigation of the transaction for a period exceeding seven (7) months. The investigation procedure followed and third parties who were engaged is set out in greater detail in section 6 of the Commission’s recommendation to the Tribunal. The Commission’s recommendation also set out in greater detail the competitive assessment and the public interest analysis. There is absolutely nothing in the Commission’s report to even remotely suggest that there was political

²⁹ Founding Affidavit. Page 12. Para 28.

³⁰ Ibid. Para 29.

³¹ Ibid. Paras 30 and 31.

interference in the Commission's investigation process. The Commission's role in a large merger proceeding is advisory.³² It will be prejudicial to the Commission in the course of discharging its statutory duties to the Tribunal to be tarnished with abusive and unfounded allegations of political interference."³³

56. Furthermore, SAEF has not substantiated its criticism of the Commission's investigation. At best, in its CT6 Form SAEF intimated that the Commission has been negligent in certain aspects of the Act when investigating the merger, *inter alia*, the ignorance of concentration risk and being politically compromised. SAEF has not provided evidence to substantiate its allegations.
57. In other words, there is no evidence of any political interference in the investigation.

XENOPHOBIC COMMENTS

58. Our country faces a serious challenge with xenophobia. From time to time, South Africans demonstrate hostility towards foreigners, mainly, it seems from the African continent, through both their actions and their words by destroying the property of such people and by demanding that they leave the country.
59. SAEF demonstrates the same hostility towards two employees of the Commission who may be of foreign origin, "Nelly" and "Grashum."

³² *Competition Commission v Distillers Corporation (SA) Limited and Another* (31/CAC/Sep03) [2003] ZACAC 10; [2004] 1 CPLR 14 (CAC) (11 December 2003) at page 6

³³ Founding Affidavit. Paras 35 and 36.

60. Presumably, SAEF is referring to Ms Nelly Sakata and Mr Grashum Mutizwa, who are employed by the Commission at hearings when they state that:

“... we take offence to the Non-South African members of the Commission team Nelly and Grashum ignoring our request for disclosure of the ultimate beneficiaries and insisting that we believe their disclosures” and “The Commission also needs to explain why Non-South Africans are handling BEE deals and refuse to carry out and disclose BEE ownership thereby supporting fronting.”³⁴

61. What is particularly puzzling is that SAEF claims to be *“an advisory non-profit organisation founded by a diverse group of energy stakeholders”* which *“represents the interests of energy stakeholders across energy technologies in the RSA, SADC and SSA”* and embraces *“all energy technologies and mineral economy in respect of countries’ national endowments, competition advantages and comparative advantages.”³⁵*

62. Masedi Matlala, as indicated in paragraph 29 above, makes similar claims (about SAEF) in the SAEF answering response.

63. Despite its apparent African footprint, SAEF finds nothing wrong in being xenophobic and has neither expressed remorse about those comments nor tendered an apology.

³⁴ Letter from SAEF dated 12 August 2020.

³⁵ “About us SAEF – South African Energy Forum” statement at the bottom of its letterhead.

64. Masedi Matlala has read the Commission’s application and could have and should have apologised for the comments made about Ms Nelly Sakata and Mr Grashum Mutizwa, but chose not to do so.
65. SAEF’s questions about people whom they regard as “Non- South Africans” have been made gratuitously and recklessly and amount to posturing. Those are also demeaning and hurtful and have the potential, if allowed to remain part of the record, to embolden others to behave in a similar manner in future matters which may be heard by the Tribunal and which may involve foreigners.
66. The Tribunal will not permit this.
67. Everyone in South Africa enjoys the constitutional rights to equality³⁶ and human dignity³⁷ and that includes Ms Nelly Sakata and Mr Grashum Mutizwa, the employees of the Commission singled out for attack by SAEF.
68. In *Glenister*, the Constitutional Court said with reference to allegations made by Mr Glenister, that “*These assertions or conclusions are scandalous, vexatious, or irrelevant. Courts should not lightly allow vitriolic statements of this kind to form part of the record or as evidence. And courts should not be seen to be condoning this kind of inappropriate behaviour, embarked upon under the guide of robustness*”.³⁸

³⁶ Section 9 of the Constitution.

³⁷ Section 10 of the Constitution.

³⁸ *Hugh Glenister and President of the Republic of South Africa and others* 2015 (2) SA 1 (CC) 27 November 2014. Para [30]

69. Regarding costs in that case, the Constitutional Court said, “*If ever there was a fitting case for a costs order, this is it.*”³⁹
70. In the light of these statements by the Constitutional Court, this is a matter which warrants that an adverse order for costs be made against SAEF.
71. We have carefully considered SAEF’s xenophobic statements and the adverse comments made about the Commission.
72. These have the potential to prejudice the Commission and undermine both its ability to perform its functions independently and without fear or favour and its public standing or image as a statutory body.

COSTS ORDER

- 72.1. The respondent is ordered to pay the costs of this application on an attorney and own client scale.

Mr Enver Daniels

1 April 2021
Date

Mr Andreas Wessels and Ms Mondo Mazwai concurring.

Tribunal Case Managers : Mr Kgothatso Kgobe and Ms Busisiwe Masina
Tribunal Economist : Ms Karissa Moothoo Padayachie
For the Applicants : Mr Bukhosibakhe Majenge
For the Respondents : No appearance.

³⁹ Ibid. Para [38]