COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: **CR129Sep15/PIL162Sep17**

In the *in limine* matter between:

Pickfords Removals SA (Pty) Ltd	Applicant
And	
The Competition Commission	Respondent

in re: the complaint referral between

The Competition Commission	Applicant

and

Pickfords Removals SA (Pty) Ltd	First Respondent
JH Retief Transport CC	Second Respondent
Sifikile Transport CC	Third Respondent
Cape Express Removals (Pty) Ltd	Fourth Respondent

Panel	: Norman Manoim (Presiding Member) : Enver Daniels (Tribunal Member) : Andiswa Ndoni (Tribunal Member)
Heard on	: 26 April 2018
Reasons Issued on	: 28 June 2018

Reasons for Decision

Exception Application

[1] These reasons concern an exception application requiring us to interpret section 67(1) of the Competition Act, 89 of 1998 ("the Act") which imposes a limit on the time the Competition Commission ("Commission") has for initiating a prohibited practice complaint.

[2] The exception has been brought by Pickfords Removals SA (Pty) Ltd ("Pickfords"), a furniture removal firm, which is a respondent in a complaint referral brought by the Commission. Pickfords is alleged to have contravened section 4(1)(b)(iii) of the Act, by engaging in collusive tendering.

[3] The substance of the charges are straightforward; they involve the practice of cover pricing. A firm asked to submit a quotation by a customer, solicits from one or more competitors a fictitious bid, higher than its own quote, in order to win the contract. Pickfords is alleged to have both requested and provided cover bids in response to requests for a quotation from customers.

[4] In the complaint referral, each instance of cover pricing is alleged to constitute a self-standing incident of collusive tendering and separate relief is sought in respect of each one. The implications for Pickfords are very serious. It faces potential liability of up to 10% of its annual turnover in respect of each of the thirty seven (37) it has been charged with.[1]

[5] Pickford's alleges that twenty (20) of these counts should be dismissed; fourteen because they are time barred and the remaining six because they have not been sufficiently pleaded. As we go on to analyse, this distinction in categories does not matter for present purposes. What lies behind the insufficient pleading argument is also the issue of prescription. This prescription argument is based on section 67(1) of the Act, which states that the Commissioner must initiate a complaint not less than three years after the practice in question has ceased.

Introduction

[6] The complaint in this case was referred to the Tribunal on 11 September 2015. The date of the referral is not in dispute. What is in dispute is the date on which the complaint, on which the referral is based, was initiated.

[7] In the complaint referral, the Commission makes the following allegations concerning this:[2]

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[1] While the Commission listed 37 counts in its complaint referral, Pickfords in argument mentions 36 counts. Nothing much turns on this discrepancy for the purpose of this exception.

[2] A complaint *initiation* is a legally distinct procedure from a complaint *referral*. A complaint initiation is the step which the Commissioner takes to commence an investigation. A complaint referral is the document that initiates the prosecution of the firm concerned in the Tribunal. The former precedes judicial proceedings, the latter commences them.

"On 3 November 2010, the Commissioner initiated a complaint into alleged collusive conduct in contravention of section 4(1)(b)(i), (ii) and (iii) of the Act, in the market for the provision of furniture removal services. On 1 June 2011, the Commissioner amended its complaint initiation to include Pickfords under case number 2011Jun0069. The Commissioner initiated the complaint in terms of section 49B(1) of the Act."[3]

[8] What is evident from this paragraph is that two actions were taken by the Commissioner on different dates. According to the Commission, the complaint was initiated on the first date, 3 November 2010, and then amended on the second date, 1 June 2011. Pickfords disputes this characterisation. It argues that the first action, whilst constituting an initiation, did not initiate the present complaint. Rather it was the second action that did. Hence it cannot be characterised as an amendment of the first.

[9] The two candidates for the initiation of the present referral are contained in documents and form part of the record of the current proceedings.[4]

[10] We will refer to these documents, technically Forms CC1 in terms of the Competition Commission's rules, as "*initiation statements*".

[11] Seven months elapsed between the date of the first initiation statement (3 November 2010), and the second initiation statement (1 June 2011). This gap in time, as we go on to explain, matters for the fate of the twenty counts Pickfords seeks to have dismissed.

[12] There is no dispute between the parties that the dates contained on the face of the documents were the dates on which an initiation occurred. There is also no dispute that a valid initiation is a prior jurisdictional fact for the valid referral of a claim. There the agreement ends.

[13] To summarise the position; the Commission argues that the first initiation statement i.e. 3 November 2010, serves to initiate the present referral. Pickfords argues that it is the second i.e. 1 June 2011. If Pickfords is correct in this contention, then it argues that several of the counts will have prescribed.

[14] But deciding this debate does not end the dispute. The Commission argued that even if we find that the second initiation founds the current referral, this does not, *ipso facto,* extinguish

[3] Complaint referral paragraph 13, Record page 11.
[4] See record pages 135-140.

these counts. This is because it argued that the three year prescription period should run from the date when the Commissioner acquired knowledge of the existence of the prohibited practice, not from the date on which it had ended.[5] If the second initiation thus reflected the date on which the Commissioner acquired knowledge of the identity of Pickfords as the perpetrator, then on a proper interpretation of section 67(1), he initiated the complaint in time, even if this was on 1 June 2011.

[15] This is a novel argument not previously raised in earlier cases concerning section 67(1), which we deal with later.

[16] We first deal with the argument around which date is the correct date on which the initiation took place.

Correct initiation date

[17] On 3 November 2010 the Commissioner initiated a complaint against several firms in the furniture removal industry, whom he alleged had contravened section 4(1)(b) (i) (ii) and (iii) of the Act by having:

> *"...colluded to fix the price at which they render their services, divided markets and/or alternatively engaged in collusive tendering in respect of tenders issued by the State and private enterprises."*[6]

[18] Several firms were named in the complaint but Pickfords was not amongst them. However, it appears from the language used in the initiation statement that the Commissioner did contemplate the possibility of other firms being named. He stated in the November statement that:

> *"The main companies implicated in the alleged conduct include ..."*[7]

[19] The use of the terms *"the main companies"* and the term *"include"* suggest that the list of names of firms that appeared in the referral was not intended to be the complete list of alleged respondents.

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[5] The Commission does not tell us when it acquired this knowledge but would like to be given this opportunity to make these allegations.
[6] Record page 135.
[7] Record page 136.

[20] Subsequently, on 1 June 2011, the Commissioner again initiated a complaint into furniture removal companies. This time Pickfords was named in the initiation statement.[8]

[21] As noted, in the present matter, the Commission refers to both initiation statements in the complaint referral, but describes the second initiation statement as an amendment of the first initiation.

[22] Why the date of the initiation matters is because of the provisions of section 67(1) of the Act, which states as follows:

> *"67(1) A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased."*

[23] What the operation of section 67(1) does is to make the date of the initiation the endpoint of the three year period referred to. This means that if a complaint is initiated on 3 November 2010, any conduct that has ended more than three years prior to that date would be subject to the limitation on action. Up until now this has been understood in the case law as a prescription provision despite the fact that the section itself does not expressly use this term.

[24] Since a number of counts would be within time if 3 November 2010 is the endpoint but out of time if 1 June 2011 is the endpoint, we can now understand why the legal effect of the two initiations matters.[9]

[25] Pickfords' argument is that since only the later 1 June 2011 initiation ("the second initiation") refers to it specifically only the June date is relevant date for initiation against it. It refers to this as the 'trigger date', a term that we will use as well. It argues that there would have been no need for the second initiation if Pickfords was contemplated in the 3 November 2010 initiation ('the first initiation'). The only reasonable explanation for the existence of the second initiation was that it was a new, self-standing initiation.

[26] Apart from claiming in the referral that the second initiation was an amendment of the first initiation the Commission does not give any rationale for why an amendment was necessary. Counsel for the Commission suggested this may have been done from an abundance of

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[8] Record page 138.

[9] For example if the conduct had ceased on 4 November 2007 it would be in time on the first initiation (by one day) but out of time on the second initiation (by about seven months).

caution. As we understand counsel, what he means is that because certain firms were not listed in the earlier initiation, the second initiation served to name them expressly.

[27] Although there has been much case law on initiations, this particular point on the trigger date has not yet been decided. The leading decision on the content of a valid initiation is the Supreme Court of Appeal decision in *Woodlands*.[10] Here, the court held that an initiation could be amended. It did not however need to decide what the consequences of an amendment were for the trigger date.

[28] More recently in *Power Construction*, the Competition Appeal Court ("CAC") had to consider which document served as the initiating document for a complaint.[11] The CAC referred to *Woodlands* as authority for the proposition that an initiation could be amended. However, the CAC came to the conclusion that the earlier candidate for an initiating document in that case was too widely framed to constitute a valid referral, and it relied on later correspondence from the Commission as evidence of a subsequent, tacit referral.

[29] Thus, as in *Woodlands,* the *Power Construction* decision is authority for the proposition that a complaint can subsequently be amended, but it does not address the problem of the effect of an amendment on the trigger date. This problem, succinctly stated is: does the trigger date become the date of the amendment or does it remain the date of the original complaint initiation? Neither case had to decide this point as the earlier initiation was found not to be valid.

[30] For the Commission to succeed it needs to establish that;

a) the second initiation is merely an amendment of the first initiation; and
b) as a matter of law, the correct trigger date is determined by the date of the first initiation.

[31] We will first consider whether the second initiation is an amendment of the first initiation or a *de novo* initiation.

[32] Nowhere in the second initiation statement does the Commissioner suggest that it serves as an amendment of the first initiation as one might expect.

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[10] *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* (2011] 3 All SA 192 (SCA).
[11] *Power Construction (Pty) Ltd and the Competition Commission* 145/CAC/Sep16.

[33] However this observation may not be decisive of the issue. The Commissioner does refer to the first initiation in the second initiation. He states in the first paragraph of the second initiation that:

> *"On 3 November 2010 I initiated a complaint in terms of section 49(B)(1) of the ..Act against...* [he then lists the names of the all the firms]"[12]

[34] He goes on to state in the next paragraph:

> *"Following the aforesaid initiation, further information has come to light indicating that the following companies have also been involved in price fixing, market allocation and/or collusive tendering in respect of the provision of furniture removal services to state departments, private enterprises and individuals in contravention of section 4(1)(b)(i), (ii), and (iii) of the Act, namely..."*[13]

[35] The Commissioner then lists the names of several firms, *inter alia*, Pickfords.

[36] He goes on to state that all the firms are members of the Professional Movers Association ('PMA') and suggests that:

> *"...all present members of the... PMA are familiar with tender collusion and could potentially be part of it."*[14]

[37] In the final paragraph the Commissioner states:

> *"In the light of the above and in terms of section 49(B)(1) of the Act, I initiate a complaint against the abovementioned firms for alleged contravention of section 4(1)(b)(i)(ii), and (iii) of the Act."*[15]

[38] From the paragraph cited above two readings of this second initiation are thus possible.

[39] The first (the one favourable to the Commission) is that the second initiation does no more than add names of previously unidentified conspirators to the first initiation. Hence it is in substance, even though not labelled as such, an amendment. The first initiation had

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[12] Record page 138.
[13] *Ibid.*
[14] Record page 139.
[15] *Ibid.*

contemplated that there were other firms involved. This means the Commissioner did not limit the possible participants to only those he had expressly named. If that is so, there is a good argument for suggesting that this is not to be considered a *de novo* initiation, but an amendment that serves to identify new conspirators, but not a new conspiracy. Put differently, the concerted practice remains the one alleged to exist earlier – the only change is that the scope of participants has been expanded through the second initiation. Since section 67(1) refers to the practice, not the firms, this does not alter the trigger date - it remains the earlier date, i.e. of the first initiation.[16]

[40] The contrary argument (the one favourable to Pickfords) is to state that the second initiation statement is a *de novo* complaint initiation and the reference to the first initiation, serves only to provide context to the second initiation, not to amend it. Put differently, the Commissioner is saying that in the course of investigating conspiracy A, we discovered, in the same industry, conspiracy B, which had similar features.

[41] On this argument since A and B relate to different conspiracies, they constitute distinct concerted practices for the purpose of section 67(1). The fact that they may involve some of the same conspirators and a similar *modus operandi* does not alter this conclusion.

[42] If they are not the same concerted practice, then this second initiation is not an amendment, but a self-standing initiation, and the implication is that the trigger date is thus 1 June 2011.

[43] We have to decide which of these two readings makes for a more probable interpretation.

[44] Pickfords argued that the ordinary language utilised in the second initiation is definitive on the point that it is self-standing. It argued that the Commissioner in unequivocal language states that he *"... hereby initiates a complaint against the aforementioned firms."* This makes it a new initiation because the Commissioner has said as much.

[45] This argument is overly formal. The use of the word initiation in this context is neutral. Perhaps more convincing if this was an amendment in the absence of any express language to indicate that this is the case. The Commissioner having referred to the first initiation does not indicate that the subsequent initiation served only to amend the first. Note, that included in the record

[16] Compare the language in section 67(1) with the other limitation provision in the Act, section 67(2) which refers to the firm not the practice and states: *"(2) A complaint may not be referred to the Competition Tribunal against any firm that has been a respondent in completed proceedings before the Tribunal under the same or another section of this Act relating substantially to the same conduct."* (Our emphasis).

is a still later, and third initiation, dated 13 June 2013. This third initiation has interesting language.

[46] Here the Commissioner expressly uses the term 'amendment'. He refers to the second or June 2011 initiation as the first amendment and the third initiation as a "*...further*" amendment. Whether this third document (13 June 2013) can serve retrospectively as a tool to interpret the first and second, seems doubtful. They must be judged by the language the Commissioner used at the time he issued them. But significantly the third document refers to the conspiracy as 'ongoing', thus conceptually tracking the language of the first initiation, but not the language of the second or that used in the referral.

[47] This is more than a purely technical distinction. A single over-arching ongoing conspiracy between a multiplicity conspirators is a distinct concerted practice, distinguishable from discrete, finite conspiracy, between a limited number of conspirators.[17]

[48] In the first initiation statement, the Commissioner expressly identified a 'single over-arching conspiracy', which importantly, he alleged is still 'ongoing'.[18] These two features are absent in the second initiation. Here there is no reference to a single conspiracy or that the conduct is still ongoing. The third amendment statement returns to the theme of an ongoing conspiracy which begs the question again if that was always the case why is this feature absent in the second initiation.

[49] The present referral, as we noted, does not allege a single ongoing conspiracy. On the contrary, each count constituted a separate, discrete, bilateral conspiracy, none of which are alleged to be ongoing. In a paragraph in the referral which comes under the heading of *"Basis of the Referral"* the Commission makes the following general point before it elaborated on each of the separate counts:

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[17] See for instance the approach taken by the [2007] ECR II4949, paragraph 209 where the issue also involved time barring and the court held inter alia, *"it must be concluded that the European producers committed two separate infringements ... and not a single and continuous infringement."*

[18] He refers in the singular to the existence of an *"arrangement"* and then later alleges that the collusion is *"still ongoing"*.

"This complaint referral is based on the Commission's findings and conclusions that Pickfords International entered into discrete bilateral collusive agreements with each of the other respondents in respect of furniture removal tenders."[19]

[50] This suggests that it is more probable that the two initiations contemplate separate conspiracies and that the referral is more probably linked to the second initiation. This conclusion is bolstered by the fact that in the second initiation, unlike in the first, Pickfords is expressly identified.

[51] Finally, and as a matter of fairness, since the Commissioner is the author of the initiations, to the extent ambiguity in interpretation remains, it should be decided in favour of the respondent.

[52] We therefore conclude that the second initiation i.e. the one dated 1 June 2011, is not an amendment of the first November initiation, it is a self-standing initiation, and therefore it is the initiation that founds the counts in the present referral.

[53] We therefore do not need to decide the legal issue of what the trigger date is when there is an amendment to an earlier initiation i.e. is it the first date or the second.

[54] Nevertheless this finding does not conclude the matter.

[55] To decide whether the provisions of section 67(1) apply, one also has to know when the concerted practice ceased. Put differently the section requires one to ask if more than three years have elapsed between the date of cessation of the practice and the date of initiation of the complaint.

[56] We turn now to the question of what we will refer to as the cessation date.

[57] Pickfords argued that in respect of one-off, episodic instances of cover pricing the practice cannot be said to *"... have continued beyond the date on which the exchange of cover quotes was agreed."*[20]

[58] However Pickfords did not seem to be aware of the CAC decision in *Power Construction*. Here the CAC held on the facts of that case that the cessation date was the date on which the last payment was made to the party that had won the rigged bid:

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[19] Complaint referral paragraph 16, Record page 13. Our emphasis.
[20] See first respondent's heads of argument in reply, paragraph 87.

"The contract that flowed from this practice and was inextricably linked to the prohibited practice ended when the last act relating thereto was performed, namely the receipt of the final payment to H & I: this payment was the completion of obligations in terms of a contract which was the product of a prohibited practice that occurred on 17 February 2009. It follows that the prohibited practice ceased on 17 February 2009."[21]

[59] There is no reason not to apply this approach to the facts of the present case. *Power Construction* also dealt with the question of bid rigging and cover pricing. The fact that the cases involve different industries does not seem a convincing reason for distinguishing them. We thus conclude that in this matter the practice ceases when the last payment is made in respect of the alleged rigged bid.

[60] We have now decided as a factual matter when the complaint in this matter was initiated and the legal principle to be applied for the determination of the cessation date.

[61] However factually the cessation date is not clear from the pleadings.

[62] The Commission has not alleged when the last payment was made, either in its referral or in the further particulars it was ordered to provide. Some context is required in relation to how these further particulars came to be ordered.

[63] The Commission has brought a similar complaint referral against a firm called AGS Frasers, also a furniture removal company represented by the same legal team who represents Pickfords. AGS Frasers had brought the same exception based on section 67(1) that Pickfords brings in the present matter. The Commission and Pickfords' legal team agreed that they would abide by whatever was decided in the *AGS Fraser's* case in relation to the exception in the Pickfords case.

[64] In the *AGS Frasers* case, insofar as it is relevant to the present case, we required the Commission to provide, inter alia, further particulars as to *"... what practice by the first respondent still subsisted at the date of initiation."*[22]

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[21] *Power Construction, supra,* par 49.
[22] See order of the Tribunal in *AGS Fraser International (Pty) Ltd and The Competition Commission* CR025May15/DEF098Aug15/EXC099Jul15, dated 4 March 2016, paragraph 2.1.3 at record page 98.

[65] The Commission has provided further particulars in the Pickfords case purporting to comply with this order. However the Commission has not indicated what practice it relies on to show what practice subsisted. The closest we get to an answer is the following allegation:

> *"The Commission suspects that at the date of initiation of the complaint against it, Pickfords continued to provide cover quotes it had done in relation to other contracts. It does however not make any allegation to that effect."*

[66] Since by its own admission the Commission is not making any allegation to this effect, it has not provided the further particulars it was ordered to by virtue of AGS Frasers' order.

[67] This is the reason that Pickfords argues that the complaint referral should be dismissed in respect of certain of the counts on the basis of non-compliance with Rule 15 of the Tribunal rules, the one that deals with the particularity required of a referral.[23]

[68] In fairness to the Commission it should be noted that at the time we gave the decision in *AGS Frasers* we did not give it more guidance on the issue of the cessation of the practice. Since that date we now have the benefit of the decision of the CAC in *Power Construction.*

[69] In the course of argument the Commission, whilst conceding it had not provided these particulars, now argues that the onus is on Pickfords to allege when the practice ended, as it contends it is for the respondent to place these facts before the Tribunal.

[70] The Commission relies for this argument on our decision in *Pioneer Foods* where we held as follows:

> *"Section 67(1) is silent on the issue of onus. ...In other words if a party wishes to rely on prescription then it is required to raise it as a special plea. Moreover it is for the party invoking prescription to allege and prove the date of inception of the period of prescription. Hence Pioneer, if it wishes to rely on the provisions of section 67(1) is required to allege*

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[23] *"15(1) A complaint proceeding may be initiated only by filing a Complaint Referral in Form CT 1(1), CT 1(2) or CT 1(3), as required by Rule 14.*
(2) Subject to Rule 24 (1), a Complaint Referral must be supported by an affidavit setting out in numbered paragraphs-
(a) a concise statement of the grounds of the complaint; and
(b) the material facts or the points of law relevant to the complaint and relied on by the Commission or complainant, as the case may be.
(3) A Complaint Referral may allege alternative prohibited practices based on the same facts."

and prove, on the balance of probabilities that the conduct complained of by the Commission in its complaint referral of 2007 ceased three years before this date."[24]

[71] In *Pioneer,* we made it clear that the reason for adopting this approach was that the secretive nature of cartels meant that proof of these arrangements was solely within the knowledge of the co-conspirators. Importantly, in *Pioneer,* the Tribunal observed that:

"...meetings and discussions between employees of the respondents continued to take place in the various regions."[25]

[72] Should the approach we adopted in *Pioneer* be followed in all cases where a respondent raises an issue of prescription?

[73] The Constitutional Court has made it clear that in civil matters there is *"...nothing rigid or unchanging in relation to the question of the incidence of the onus of proof in civil matters, no established 'golden thread' like the presumption of innocence that runs through criminal trials. As Davis AJA, quoting Wigmore, put it: ...all rules dealing with the subject of the burden of proof rest 'for their ultimate basis upon broad and undefined reasons of experience and fairness."*[26]

[74] The approach to who bears an evidential onus in a Tribunal case should follow this approach. We should avoid rigidity in determining who bears an onus and rely on experience and fairness.

[75] In *Pioneer,* the Commission was dealing with what it alleged, was an ongoing pricing and market division conspiracy.

[76] Given those facts it was fair for the evidential onus to shift to the participants who had raised a point of prescription, since it was only they who could allege that the ongoing agreement had ended by a certain date, to rebut the Commission' s case of an ongoing conspiracy.

[77] In this case had the Commission relied on the first initiation and alleged an ongoing conspiracy we, following *Pioneer*, would have agreed with it that the onus would have shifted to Pickfords.

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[24] *The Competition Commission and Pioneer Foods (Pty) Ltd* 15/CR/Feb07 & 50/CR/May08 at par 86.
[25] *Pioneer, supra*, par 81.
[26] *Willem Prinsloo v Van der Linde and the Ministry of Water Affairs* 1997 (6) BCLR 759 at par 38.

[78] However the present case is not about an ongoing conspiracy, but several discrete conspiracies, which ended, at best for the Commission, when the last payment was made by the affected customer in respect of each count. In a number of these counts Pickfords is alleged to have given a cover bid to another firm and hence would be unlikely to know when the last payment was made. Here it would not be unfair for the Commission to bear the onus, to the extent this information can be obtained, the Commission, through its investigative powers, is in a better position to get this information; either from the customer or the other conspirator, than would Pickfords. Where the bid is won by Pickfords it would not be unfair to place the evidential burden on it, because it is in the best position to access its own records or staff to find this information.

[79] This has informed the order we have given in this matter.

[80] Before we do so, we have to consider the Commission's alternative argument that section 67(1) should not be read as a prescription period or that even if it is, it can be read to allow the Tribunal a discretion in appropriate circumstances to condone the failure to initiate within the prescribed time period. This amounts to a purposive interpretation of the provisions of section 67(1) to ensure, as the Commission argued that it is constitutionally compliant.

Commission's purposive argument

[81] The Commission made two distinctive arguments to support an interpretive approach to section 67(1). Both identify the same mischief created by a strict interpretation of the section, but have different juristic underpinnings and hence consequences for the relief sought.[27]

[82] Cartels are not easily detectable during their existence since frequently they operate covertly. Cartels that operate covertly leave no evidence – there are no dead bodies or smashed windows for the Commission to find. The only finger prints they leave behind are high prices or where competitors charge similar prices. But these pricing fingerprints are equally

[27] Neither solution is self-evident on the papers because the Commission has relied on the first initiation. However if we find that the Commission can have knowledge read into the section then the appropriate relief would be to stay the exception to permit the Commission to bring an application to amend its referral to this effect. If we accept the second leg of the argument that condonation of the time periods is a permissible discretionary power open to the Tribunal then again a stay would be appropriate but here it would be to allow the Commission to bring an application for condonation. As we go on to discuss both these forms of relief are unnecessary for us to further consider given how we have decided this case.

consistent with non-collusive economic behaviour. This means the most likely form of detection is when one of the participants confesses, typically as a result of the Commission's Corporate Leniency policy. But there is no guarantee that a confession will be made within the three year window period; between cessation of the practice to which it relates and the time the Commissioner has to initiate a complaint.

[83] Whilst some cartels may still be in existence at the time leniency is sought, or have died shortly before, this may not always be the case. In a single instance bid rigging conspiracy, as alleged in the present case, the time gap between the agreement to conspire and the cessation of the conduct may be brief. This means there is no way either the victim of the cartel or the Commission can detect the cartel's existence within the short time period between cessation and initiation provided for by the statute. This can prove fatal to any enforcement action against cartels. As the Commission points out the strict reading of section 67(1) has implications beyond the administrative enforcement of the Act. The Act provides for both criminal and civil enforcement in respect of cartel conduct. However, both are premised on a prior finding by the Tribunal or CAC, that there has been a prohibited practice.[28]

[84] The Commission argued that if section 67(1) is applied rigidly it will lead in many cartel cases such as the present one, to the extinction of both public and private rights of access to the courts, as laid out in section 34 of the Constitution.[29]

[85] The Commission has not brought a challenge to the constitutionality of section 67(1). We are therefore not required to consider that point. Rather, what the Commission does, is to advance two alternative arguments for how section 67(1) can be read in a manner consonant with section 34 of the Constitution.

[86] The first argument requires 'reading in' to section 67(1) the requirement that prescription runs only from the date that the Commissioner acquires knowledge of the existence of the prohibited practice. The second argument is that the Tribunal can invoke its power to condone non-compliance with any time period set out in the Act on *"...good cause shown."*

[87] Let us consider each of these in turn.

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[28] See section 65(6)(b) and section 73(A)(3(b).

[29] *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[88] The reading in the first argument is borrowed from the Prescription Act, which, inter alia, provides that the prescription period runs only from when the creditor acquires knowledge of the debt and the identity of the debtor:

> *"12(3) a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."* [30]

[89] But before one considers the constraints on reading in more generally one has to consider whether the analogy to the 'unknowing' debtor contemplated in the Prescription Act is apposite.

[90] The Commissioner does not easily fill the same shoes as the creditor, for whom, on the Commission's argument, the former serves as a proxy for the latter. The Commissioner is a public official clothed with public powers and resources – a creditor is a private person with neither. But this is not the only problem with having the Commissioner serve as the proxy for the creditor. What if one of the victims of the prohibited practice knew in good time, but did not timeously report this to the Commissioner? Must knowledge of the transgression be attributed not to the victim but the Commissioner?

[91] Secondly, the Prescription Act permits prescription to run also from when the creditor acquires knowledge of the identity of the debtor. However as indicated earlier, section 67(1) is less exacting in this regard than a claim in common law. It is knowledge of the existence of the cartel that suffices to found a valid initiation, not the identity of all its members.

[92] Third, the debt in the Prescription Act is typically an event, such as the commission of a delict or a breach of contract. The analogue to this in the Act, would be the agreement or understanding i.e. that is the event that leads to the existence of the prohibited practice. However section 67(1) does not mark the prescription period from the date of the occurrence of the event, unlike the Prescription Act, but from the end of the consequences of the event. This is an important difference.

[93] Whilst the Commission makes the case for a knowledge based trigger for the prescription period as being fair in some cases – as discussed earlier - it is not necessarily fair or practical

[30] No. 68 of 1969.

in all cases. For instance in many cartel cases a long time period may have elapsed between the event i.e. the entering into of the agreement and the end of the practice. As part of its defence a respondent is entitled to deny the existence of an agreement or that it was a party to it. Since the clock in section 67(1) runs down from the end of the practice, not the entry date of the agreement, a long period between the two can be prejudicial to a respondent's ability to defend itself. Memories and documentation may both have faded away with time. Courts have frequently recognised this factor when upholding a strict interpretation of prescription periods, based on an equally compelling constitutional imperative of fairness.[31] Read in this way, the section 67(1) three year time period from the end of the practice, is arguably, a reasonable compromise between both interests.

[94] It is also not open to us to second-guess the choices of the legislature in this regard. The courts warn against adventurous reading in when interpreting statutes. For instance in *Gaertner*[32] the Constitutional Court warned that reading in should be resorted to sparingly, as it constitutes a possible encroachment by the judiciary on the terrain of the legislature. [33]

[95] In *National Coalition,* the Constitutional Court set out what principles should be applied by a court when deciding whether to employ reading in as a remedial measure. Of those applicable to the current case are that (i) the result achieved should interfere with the laws adopted by the legislature as little as possible; (ii) a court should be able to define with sufficient precision how the statute ought to be extended in order to comply with the Constitution and; (iii) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.[34]

[96] The interpretation the Commission seeks us to adopt would violate these principles because as we have demonstrated not only would the interpretation lack precision but it would also interfere with the legislature's schema for imposing a limitation on actions and have

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[31] *CIR v Pick 'n Pay Wholesalers (Pty) Ltd* 1987(3) SA 453 (A) at 469F-G.
[32] *Gaertner and Others v Minister of Finance and Others* (CCT 56/13) [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013).
[33] *Gaertner, supra,* par 82.
[34] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC); *Provincial Minister for Local Government, Environmental Affairs and Development Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* (CCT05/15) [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 (CC) at par 27.

consequences for the implementation of the investigative process, a vital component of the Act.

[97] We therefore cannot accept this first interpretive argument made by the Commission.

[98] The second argument made for flexibility is for the Tribunal to exercise its powers in the Act to condone non-compliance with any time limit set out in the Act.

[99] The Commission sought to rely on several sections of the Act for this authority. The one most favourable to this approach is 58(1)(c)(ii) which states as follows:

" 58(1) In addition to its other powers in terms of this Act, the Competition Tribunal may-

....

(c) 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."

[100] Does this section mean that the Tribunal has the power to condone any non-compliance with any time limit set out in the Act other than in the two expressly excluded provisions which deal with merger regulation?

[101] Here the Commission relied on a recent Constitutional Court decision concerning a time period for bringing a case in terms of the Labour Relations Act (LRA) in *Food and Allied Workers Union obo Gaoshubelwe.*[35] The LRA also has a 'good cause shown' condonation provision. In this case, the Court interpreted the LRA to allow the condonation of a late referral relating to unfair dismissal with regards to section 191 of the LRA. This, the Commission submitted granted a power of condonation for non-compliance with the LRA.

[102] The Commission conceded it has not yet brought an application for condonation. But it asks us only to make a finding that we have the power to condone, on good cause shown, the section 67(1) time period. If we do, it will bring the application.

[103] Pickfords argues that the condonation power cannot be invoked in respect of section 67(1). We agree.

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[35] *Food and Allied Workers Union obo Gaoshubelwe v Pieman's Pantry (Pty) Limited* (CCT236/16) [2018] ZACC 7; 2018 (5) BCLR 527 (CC); [2018] 6 BLLR 531 (CC); (2018) 39 ILJ 1213 (CC).

[104] The LRA may contain a condonation provision that has similar language to that in section 58(1) of our Act. But that is where the comparison ends. The right to bring an action in terms of the LRA, to which the court held the power to condone could be applied, is not similar to the complaint initiation contemplated in the Competition Act. The LRA provision is dealing with a private right to bring an action within a time period. Section 67(1) as we indicated deals with a limitation on the period for exercising a public power by a public functionary.

[105] A complaint initiation creates a jurisdictional fact. Once that jurisdictional fact is established the Commission is given its policing powers in respect of the complaint. These powers are set in Part B of the Act and are significant. They include the power to apply for a search warrant, to summons persons to appear before it to produce documents or undergo interrogation.

[106] Section 58(1) is only invoked after the requisite time period has expired.

[107] The Commission's interpretation would mean that these powers could be exercised initially unlawfully, but later be capable of subsequent restoration, if good cause is shown. Nor would it be clear when such condonation should be sought?

[108] The danger of this approach to the lawful exercise of public power is too obvious to need more elaboration.

[109] Whatever the ambit of section 58(1) to condone the non-compliance with time limits it should not be read to apply to section 67(1).

[110] We therefore find that we have no discretion to invoke the provisions of section 58(1)(c)(ii) to non-compliance with the time period for a valid initiation set out in section 67(1).

[111] The other provisions in the Act relied on by the Commission for its 'power to condone argument', either provide much weaker textual basis for the existence of such a power (section 27(1)) or do not provide such a power in relation to the Act itself (section 31(5)).[36] Thus if the

[36] Section 27(1) (d) is a general power given to the Tribunal to make orders incidental or necessary to the performance of its functions in terms of this Act. This discretion does not contemplate the power to condone a late initiation by the Commissioner without stretching its language beyond its ordinary meaning. Section 31(5) vests a single member to condone late performance of an Act subject to a period *prescribed* in terms of the Act. Since in terms of the Act *prescribed* means prescribed by regulation this power is confined to time periods set out in the Rules not the Act.

Commission cannot succeed in terms of its strongest case (section 58(1)), it follows that it cannot succeed under the other sections.

[112] Since we find we have no discretion in this regard it is not necessary for us to consider whether the Commission should be afforded an opportunity to bring an application for condonation.

Conclusion

[113] We therefore find that neither of the Commission's arguments justify a new reading of section 67(1) from the one we have always adopted.

[114] We further find that the complaint in this matter was initiated only on 1 June 2011.

Consequences of this finding

[115] The consequences of this finding are not yet decisive of the exception. Since we have found that the prohibited practice only ends when the last payment has been made in respect of that practice, we have to consider whether this fact is evident from the present pleadings.

[116] This turns on who bears the onus in establishing the endpoint? Pickfords argues that since the Commission bears the overall onus it is for it to allege this. The Commission argues that past precedent suggests the onus of prescription rests with the respondent who raises it

[117] Having considered both arguments fairness on the present facts requires a balanced approach. Where the last payment has been made by the respondent in respect of an alleged rigged bid it has the onus to prove when this payment was made.

[118] In respect of bids where a third party conspirator received the last payment the Commission must bear the onus.

[119] The Commission will be given an opportunity to file further particulars in respect of all those counts where it is alleged that Pickfords did not win the bid, but filed only a cover bid. These counts are set out in paragraph 2 of our order.

[120] In respect of all the remaining counts, set out in paragraph 1 of our order, Pickfords must include in its answering affidavit the date on which the last payment was received. If the Commission puts these dates in dispute, it must allege what date it relies on in its reply, failing which these counts will be deemed to have prescribed and will be dismissed.

[121] The dates for the filing of these papers are set out in the order and late filings will not be condoned unless condonation is sought prior to the expiration of the relevant period.

[122] The Commission is urged to drop those counts where the onus is on it and it does not have evidence that the date of payment takes place within the three year time period, prior to 1 June 2011, as contemplated in section 67(1) ('the requisite period').

[123] It should adopt the same approach in the cases where Pickfords has the onus and the latter can show that the payment date fell outside the requisite time period.

[124] If the Commission does not follow our recommendation then we will allow Pickfords to approach the Tribunal, on the same papers, to apply for the relevant counts to be dismissed, prior to the main hearing of the other counts.

ORDER

It is hereby ordered that:

1. The Commission furnish Pickfords with the last date of payment made by the customer/s in respect of the following counts (4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 36), within 10 business days of date of this order.
2. Pickfords must file its answering affidavit within 20 business days of receipt of the further particulars contemplated in paragraph 1. In its answering affidavit Pickfords must provide the last date of payment in respect of the following counts (1, 2, 3, 8, 29, 32, 33, and 34).
3. If the Commission disputes the dates of last payment as alleged by Pickfords and contemplated in paragraph 2, then it must file a replying affidavit within 15 days of receipt of Pickfords' answering affidavit.
4. In the event of the Commission failing to:
    a. Provide the particulars in paragraph 1;
    b. Failing to dispute the dates contemplated in paragraph 2; or
    c. Failing to comply with the time periods set out in this order,

then, Pickfords may apply to the Tribunal, based on the same papers used in this application, for those counts to be dismissed, prior to the hearing of the remaining counts.

28 June 2018

Mr Norman Manoim **DATE**

Mr Enver Daniels and Ms Andiswa Ndoni concurring.

Case Manager : Kameel Pancham and Hlumelo Vazi

For the Applicants : Adv. M Norton SC and Adv. F Pelser instructed by ENSafrica

For the Commission : Adv. T Ngcukaitobi, Adv. I Kentridge and Adv. C Tabata instructed by Ndzabandzaba Attorneys.