



competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: CR172Sep17/OTH199Oct18

In the matter between:

Competition Commission

Applicant

And

Beefcor (Pty) Ltd

First Respondent

Cape Fruit Processors (Pty) Ltd

Second Respondent

| | |
|-------------------|------------------------------------|
| Panel | : Yasmin Carrim (Presiding Member) |
| | : Andiswa Ndoni (Tribunal Member) |
| | : Anton Roskam (Tribunal Member) |
| Heard on | : 3 June 2019 |
| Decided on | : 17 October 2019 |
| Reasons issued on | : 17 October 2019 |

REASONS FOR DECISION

Introduction & background

- [1] On 3 June 2019, the Competition Tribunal (“Tribunal”) was tasked to determine whether or not the Competition Commission (“Commission”) should be allowed to reinstate its complaint referral (“the complaint) against Beefcor (Pty) Ltd (“Beefcor”) and Cape Fruit Processors (Pty) Ltd (“CFP”) after it had withdrawn it on 27 June 2018.
- [2] The Commission then attempted to reinstate the same complaint (“withdrawn complaint”) under a new case number¹ but was compelled to bring this application pursuant to a direction given by the Tribunal and objections raised by the respondents.

¹ CR178Sep18.

- [3] The Commission's essential argument in support of reinstatement was that its withdrawal merely amounted to a "removal from the Tribunal roll" and accordingly it was entitled to re-enrol the matter.
- [4] In summary the respondents' arguments in opposition are that the withdrawal had the effect of a settlement of the *lis* between the parties and amounted to completed proceedings under section 67(2) of the Competition Act 89 of 1998 ("the Act"). Hence the matter was *res judicata* and could not be referred to the Tribunal.
- [5] In our view the Commission has not made out a case to support reinstatement of the withdrawn complaint.
- [6] Our decision necessarily warrants a discussion of the relevant events leading up to the withdrawal and this application in some detail.

Events leading up to the withdrawal

- [7] On 12 September 2017, the Commission initiated a complaint in terms of section 49B(1) of the Act alleging that the respondents concluded an agreement to not compete in the market for the processing of wet peels and citrus peel pulp that are used as inputs in the production of livestock feed. The Commission alleges that this conduct amounts to a division of markets or allocation of customers in contravention of section 4(1)(b)(ii) of the Act. On 13 September 2017, one day after initiating its complaint, the Commission referred the matter to the Tribunal.
- [8] The hearing of the matter was set down to commence on 2 – 4 July 2018.
- [9] On 26 June 2018, a few days before the hearing of the matter the Commission approached the respondents seeking an agreement to postpone the matter in order to explore settlement discussions.²
- [10] CFP's legal representative, Mr Graeme Wickins ("Mr Wickins"), advised the Commission that the only basis on which CFP would settle was if the Commission were to withdraw this matter. If the Commission was amenable to their proposal, CFP would agree to pay its own costs.³

² Record page (pg.) 101.

³ Record pg. 142 – 143 (Annexure AA3 and AA4) (see also pg 118 CFP – Answering Affidavit).

- [11] On 27 June 2018, Mr Andre Croucamp (“Mr Croucamp”)⁴ acting for Beefcor, advised the Commission that Mr David Manley (“Mr Manley”) who was handling the matter was on leave and would only return on the date of the hearing, 2 July 2018. He suggested that possible settlement be discussed on the morning of the hearing when all parties were present.⁵ However he made it clear to the Commission that in his view the complaint was without merit and “*should the matter be withdrawn, the Commission should tender costs incurred by Beefcor*”.⁶
- [12] That same day, Ms Thandi Nkabinde (“Ms Nkabinde”) of the Commission advised Mr Wickins that the Commission had taken the decision to “*withdraw the matter in order to give the negotiations a fair chance*” and served CFP with the Notice of Withdrawal (“the withdrawal notice”).⁷ Immediately thereafter, Mr Wickins advised the Commission to “*hold off*” from serving the withdrawal notice as the discussions between them had not progressed to the point where a settlement had been reached.
- [13] A similar email was sent by Ms Nkabinde to Mr Croucamp and Mr David Manley; in which they were advised of the Commission’s withdrawal against Beefcor.⁸
- [14] The Commission thereafter and within minutes of sending these emails to the respondents filed its notice of withdrawal with the Tribunal.⁹
- [15] Beefcor accepted the Commission’s withdrawal. It, however, expressed no intention of entering into settlement negotiations with the Commission save in so far as it related to costs. It also stressed the fact that it had expended considerable costs and suffered direct and indirect reputational damage on account of the bad publicity the complaint attracted.¹⁰ Mr Croucamp reiterated Beefcor’s position regarding the proposed settlement. However, he pointed out that the Commission

⁴ Manley & Manley Inc.

⁵ Record pg. 101. See also Record pg. 102 – Annexure C.

⁶ Record pg. 59 - Beefcor’s answering affidavit.

⁷ Record pg. 145 – Annexure AA5.

⁸ Record pg. 104.

⁹ Record pg. 104 and pg. 149 – Annexure AA7.

¹⁰ Record pg. 109 – Annexure I.

had not yet put in writing any of its settlement proposals for its client to consider.¹¹ At 19:19, Mr Mfundo Ngobese (“Mr Ngobese”), a senior investigator at the Commission, in response to Mr Croucamp, reiterated the Commission’s reason to filing the withdrawal notice – namely to provide sufficient opportunity for the parties to engage it in settlement.¹²

[16] Mr Wickins on behalf of CFP, on the other hand, advised the Commission that if it wanted more time to engage in settlement discussions, it should have applied for a postponement of the matter in terms of Tribunal Rule (“CTR”) 50(2) rather than withdraw it. He advised the Commission that CFP did not find the settlement terms proposed by the Commission acceptable and asked that, “*the Commission revoke its withdrawal from the matter... so that the hearing can proceed on Monday*”.¹³

[17] In response to Mr Wickins the Commission expressed surprise and disappointment to CFP’s response. Mr Ngobese advised Mr Wickins that “*our view is that it should have been welcomed by your client that the Commission decided to withdraw instead of seeking a postponement as this clearly demonstrates the Commission’s intention to start discussions on settlement without a pending case that your client must answer to... the Tribunal*”.¹⁴

[18] CFP then requested a directive from the Tribunal asking that we confirm that the complaint referral has been fully and finally settled. It also asked that in the event the Commission objected to the directive, that we direct the Commission to revoke its withdrawal and proceed with the hearing on 2 July 2018. In this letter CFP also registered its opposition to any postponement application that might subsequently be brought by the Commission on the basis that the Commission would delay the conclusion of the matter to the prejudice of CFP.¹⁵

[19] The Commission in turn wrote to the Tribunal expressing surprise and disappointment regarding the respondents’ attitude towards the withdrawal notice.

¹¹ Record pg. 105 – Annexure E. Letter sent at 16:16.

¹² Ibid.

¹³ Record pg. 107 – Annexure G.

¹⁴ Record pg. 108 – Annexure H.

¹⁵ Record pg. 178 – 179.

The Commission seemingly understood from this that they did not intend to entertain settlement discussions and advised that it would proceed on that basis.¹⁶

- [20] The Tribunal attempted to convene an urgent pre-hearing between the parties either on 29 June or 2 July 2018 to ventilate and possibly resolve the issues that had been raised by each party.¹⁷ Due to the Commission's unavailability the Tribunal then wrote to the parties in which it: i) notified the parties that given the Commission's withdrawal notice, the matter had been removed from the roll ii) the Commission had not tendered costs and iii) that if the Commission in future wished to reinstate this matter, it was required to file an application for reinstatement.¹⁸

The application for reinstatement

- [21] On 13 September 2018 the Commission referred a complaint against the respondents under a new case number.¹⁹ However the referral affidavit attached to the CT1 notice was identical to the one attached to the withdrawn complaint. This filing was met with immediate objection from the respondents on the basis that the notice of withdrawal filed on 27 June 2018 constituted a withdrawal of the complaint and a finalisation of the matter in its entirety. The Commission's attention was drawn to section 67(2) of the Act which states that a complaint may not be referred to the Tribunal against a firm that has been a respondent in completed proceedings before the Tribunal under the same conduct of the Act. Beefcor insisted that the Commission's "new" referral be read in conjunction with its notice of withdrawal.²⁰
- [22] The Commission thereafter filed its application for reinstatement on 12 October 2018 which was opposed by the respondents. The matter was heard on 3 June 2019.

¹⁶ Record pg. 111 – Annexure J.

¹⁷ Record pg. 205 – Annexure AA16.

¹⁸ On 29 June 2018.

¹⁹ CR178Sep18.

²⁰ Record pg 112 – Annexure K.

Respondents' arguments

- [23] Both respondents sought a dismissal of the application on the basis that the Commission was jurisdictionally barred from reinstating the complaint in terms of section 67(2). In essence the respondents argued that the Commission's withdrawal of the complaint in terms of CTR 50(1) amounted to a withdrawal of the entire complaint referral in the matter including the initiating documents. In other words, the withdrawal was a withdrawal of the complaint against the respondents on the *merits* and not simply an act of removing the matter from the Tribunal roll. Hence the effect of the withdrawal notice was to render the matter "*completed proceedings*" as contemplated in section 67(2) of the Act and the Commission was barred from reinstatement thereof under the guise of a new complaint referral.
- [24] CFP argued that by filing the withdrawal notice the Commission had effectively accepted a settlement of the matter. CFP had in the correspondence referred to above indicated to the Commission its willingness to settle the matter on the basis that if the Commission withdrew the matter CFP would agree to pay its own costs (as reflected in the correspondence traversed earlier in these reasons). By filing the withdrawal notice in terms of CTR 50(1) the Commission had effectively accepted the settlement offer and the matter was accordingly "completed" as contemplated in section 67(2).²¹ If the Commission had intended to enter into settlement negotiations it would have kept the referral viable by seeking a postponement of the matter rather than a withdrawal.²² Moreover the fact that the Commission elected not to accept the opportunity to revoke its notice of withdrawal offered by CFP, and decided against seeking a postponement of the matter, further supports the conclusion that the Commission intended to withdraw the matter in its entirety.
- [25] Finally, it was argued that a unilateral withdrawal and then a subsequent reinstatement in such circumstances, without explanation, amounted to an abuse of process. The Tribunal would be correct to dismiss the Commission's application as an indication of its disapproval of such abuse.²³

²¹ Para 11 - 12 of the second respondent's heads of argument.

²² *Ibid* para 19.

²³ *Ibid* para 20.5.

[26] Beefcor's arguments followed a similar vein.

Commission's argument

[27] The Commission contended that the first respondent failed to provide a legal basis to show how CTR 50(1) had the effect of finalising and settling a complaint before the Tribunal. According to the Commission, the withdrawal notice only has the effect of removing the matter from the Tribunal roll and did not amount to a withdrawal of the initiation itself.²⁴

[28] The Commission denied that its failure to withdraw the withdrawal notice amounted to an acceptance of CFP's settlement offer. When CFP objected to the notice of withdrawal, it indicated that the settlement negotiations had not progressed to a point where all the terms were agreed upon.²⁵ The Commission at all times maintained that the withdrawal was issued for the purpose of settlement negotiations and should not be taken as acceptance of any settlement proposal.

[29] With regards to the respondents' objection on the grounds of section 67(2), the Commission submitted that the operative words to be considered under this subsection are "*completed proceedings before the Tribunal*". In view of this, it is common cause that the Tribunal did not make any determination on the initial referral, therefore the respondents were not subject to completed proceedings before the Tribunal. Furthermore, the Commission argued that the respondents failed to establish a legal basis as to why a notice of withdrawal finalises the matter and why the initial referral cannot be accepted to be completed before the Tribunal. Based on the above, section 67(2) cannot apply.²⁶

Costs

[30] In relation to costs, it was conceded by all parties that costs could not be awarded against the Commission on the basis of *Competition Commission of South Africa v Pioneer Hi-Bred International Inc.*²⁷ However, Beefcor still persisted with some kind of costs order against the 'deponents' or officials of the Commission akin to an order of costs *de bonis propriis*. CFP argued that a dismissal of the

²⁴ Para 31 of the Commission's heads of argument.

²⁵ *Ibid* para 9.

²⁶ *Ibid* para 39.

²⁷ 2014 (2) SA 480 CC.

Commission's application for reinstatement would be more appropriate to address the inconvenience, costs and prejudice caused to the respondents.

Our analysis

[31] The issues we are asked to address in this matter distil into three essential enquiries –

[31.1] Did the Commission's withdrawal notice amount to a mere removal of the matter from the roll?;

[31.2] Did the withdrawal amount to a settlement of the *lis* between the parties? and;

[31.3] Did such withdrawal/settlement amount to completed proceedings contemplated in section 67(2)?

Did the Commission's withdrawal notice amount to a mere removal of the matter from the roll?

[32] CTR 50(1) and (3) states the following:

“Withdrawal and postponements

(1) *At any time before the Tribunal has determined a matter, the initiating party may withdraw all of part of the matter by –*

(a) serving a Notice of Withdrawal in Form CT 8 on each party; and

(b) filing the Notice of Withdrawal with proof of service.

....

(3) *Subject to section 57 –*

(a) a Notice of Withdrawal may include a consent to pay costs; and

(b) if no consent to pay costs is contained in Notice of Withdrawal the other party may apply to the Tribunal by Notice of Motion in Form CT 6 for an appropriate order for costs.”

[33] The above rule is similar to Rule 4(1) of the Uniform Rules of the High Court (URHC) albeit with some differences in its operation.

[34] URHC 4(1) states that a person who has instituted proceedings may withdraw them at any time before the matter has been set down. In the high court however, consent of the other party must be sought, and the court has a discretion whether or not to grant leave to withdraw the proceedings, and the question of injustice to

the other party is relevant to the exercise of its discretion.²⁸ A withdrawal notice may also contain a consent to pay costs. If no consent to pay costs is contained in the withdrawal notice, the other party may apply to court on notice for a cost order.²⁹ When a litigant withdraws an action, very sound reasons must exist why a defendant or respondent should not be entitled to costs.³⁰ Ordinarily, the court does not investigate the reasons for the litigant withdrawing or abandoning its case *subject to an appropriate order as to costs*, unless that withdrawal amounts to an abuse of the courts process or justice requires the finality should, if possible, be reached.³¹

[35] In criminal proceedings the position is slightly different as contemplated in section 6 of the Criminal Procedure Act³² (“the CPA”) where a person conducting a prosecution at the instance of the State or conducting a prosecution under section 8 of the CPA, may before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge.³³ After an accused has pleaded, the prosecutor may not withdraw the charges but may decide to “stop the prosecution” against the accused. In the criminal law context the prosecutor is not barred from reinstating charges against the accused for example in circumstances where the investigation was not complete and new evidence (or facts) comes to light as result of further investigation.³⁴

[36] In our proceedings, which are *sui generis* in nature, elements of both civil proceedings and criminal proceedings co-exist in the framework of the Act in the relevant rules.³⁵

²⁸ Harms *Civil Procedure in the Superior Courts* Vol 1 (LexisNexis) 2018 pg. 294.

²⁹ Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed Vol 1 (Juta) 2012 pg. 749.

³⁰ *Ibid.*

³¹ *Ibid* pg. 750.

³² Act 51 of 1977.

³³ Section 6(a) of the CPA.

³⁴ *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA) at 33 and 34, Brandt J stated that charges withdrawn under section 6(a) can be reinstated at any time. The prosecution can only be recommenced by a different, original decision to reinstitute the proceedings. Unless and until it is revived in this way, the charge remains withdrawn.

³⁵ A further distinction to be drawn in forum is that section 57 of the Act precludes the Tribunal from granting costs in favour of or against the Commission, as decided in *Pioneer Hi-Bred*. An order of costs can however be made between private parties. Hence a reference to an award or tender of costs in the rules must be taken to mean costs between private parties and not against or for the Commission.

- [37] An important distinction between matters being withdrawn or postponed on the one hand and matters being struck off the roll on the other is to be found in the rules. While CTR 50 deals with matters withdrawn or postponed under one heading, matters that are struck off the roll are dealt with in CTR 52. Under CTR 50 a *party* may withdraw or postpone a matter. Under CTR 52 the *Tribunal* may strike a matter off the roll if the initiating party is not present. The consequences for parties differ when matters are withdrawn or postponed (under CTR 50) and those struck off the roll under CTR 52. Withdrawn or postponed matters can be set down again in terms of CTR 51. If struck off the Tribunal roll, they are to be dealt with in terms of CTR 52(2).
- [38] The rules, notwithstanding in practice the Tribunal has postponed matters where parties have agreed to do so. However, where there is no agreement a party seeking a postponement has been required to apply for such. In such cases the approach of the Tribunal has been similar to that of the high court but with an emphasis on fairness.³⁶ Likewise parties have in many cases before the Tribunal withdrawn parts of their cases, often in the course of a hearing, without serving a notice of withdrawal. A party simply puts on record those aspects of the case it no longer wishes to pursue.
- [39] A clear distinction can be drawn between postponed matters and withdrawn matters whether in the context of civil or criminal litigation. A withdrawal of all or part of a matter is usually considered a withdrawal of the case against the other side, and not a mere postponement. When a matter is withdrawn unilaterally and without agreement from the other side, it sends a clear message that the withdrawing side is not ready to proceed or not confident of its case. It doesn't matter whether the decision to withdraw is dressed up in the language of settlement negotiations or not, the fact that it is withdrawn suggests a signal of ill-preparedness or lack of confidence in the merits. In criminal proceedings prosecutors are known to sometimes withdraw charges for further investigation.³⁷
- [40] The Commission does not dispute that it has filed a notice of withdrawal in this matter. All that it disputes is the consequences that flow therefrom. The

³⁶ See *Competition Commission v Eldan Autobody CC and Precision and Sons (Pty) Ltd* (CR024May15/PPA259Feb19).

³⁷ See footnote 34 above.

Commission in argument suggests that the consequences of its notice are simply a removal of the matter from the Tribunal roll and not a withdrawal of its case (on the merits) against the respondents.

- [41] Yet when regard is had to the email correspondence between the Commission and the respondents, and the Commission's subsequent conduct, the only reasonable conclusion to draw is that the Commission itself understood the matter to be withdrawn on the merits notwithstanding its purported and oft repeated reason for the withdrawal, namely "*settlement negotiations*".
- [42] When the Commission unilaterally served its withdrawal notice, it was aware of two critical facts. The first of these is that both the respondents had indicated to it that they considered a withdrawal as a settlement or withdrawal of the matter on the merits. CFP went as far as advising the Commission to follow the postponement route if what it intended were settlement negotiations.
- [43] In other words, the lawyers for CFP, speaking against their own client's interests, advised the Commission that for it to retain some bargaining power in settlement negotiations it should keep the matter live rather than withdraw it. Thus, the Commission was asked to '*hold off*' its notice and later when the notice had already been served and filed, to revoke it. This was sound advice, after all a live matter on the roll could serve to incentivise a respondent to settle even if at the doors of court. A postponed matter could still serve to incentivise settlement because it bears the prospect of litigation which could be risky and expensive for both sides.
- [44] Of course, had the Commission sought a postponement of the matter at that late stage it would have had to motivate such application to the Tribunal and to the respondents. The respondents would certainly have been opposed to the postponement because of wasted costs and inconvenience. The Tribunal itself might not have granted the postponement. As we have stated before, a postponement is not there for the asking and in the framework of the Act, where wasted costs cannot be granted against the Commission, the Tribunal would in all probability have required a reasonable explanation for the postponement such as unavailability of witnesses or the like. The Commission has applied for many such postponements in the past and it is no stranger to the Tribunal's approach. Furthermore, the Commission's Cartel Division is experienced in running matters

of alleged contraventions of cartels. Mr Ngobese has appeared many times before us. One would have expected him, in his effort to promote settlement with the respondents to keep the matter on the roll which he has done at times.

[45] The Commission's response to CFP's advice is as much bewildering as it is telling.

[46] What is telling is that on 28 June 2018 Mr Ngobese in his response to CFP demonstrates that he fully, appreciates the difference between the effect of his withdrawal and a postponement when he states:³⁸

"Our view is that it should have been welcomed by your client that the Commission decided to withdraw instead of seeking a postponement as this clearly demonstrates the Commission's intention to start discussions on settlement without a pending case that your client must answer to... the Tribunal."

(Our emphasis)

[47] The Commission was thus clearly aware of the consequences of it withdrawing the matter namely that there would be no pending case before the Tribunal and elected to do so in full knowledge of the respondents' understanding of the act of withdrawal.

[48] This is confirmed by the Commission, when indicated on its withdrawal notice that it was withdrawing all the *initiating* documents in the complaint which must include the initiation under section 49B(1) itself. Were this not the case, the Commission would have simply elected to seek a postponement of the matter.

[49] On 13 September 2018, the Commission referred a "new" complaint to the Tribunal which had a different case number to the withdrawn complaint. But it filed an identical notice of motion and founding affidavit to the withdrawn complaint. We note that the Commission did not attach a new initiation statement to this "new" complaint.

[50] However, notwithstanding that the Commission attempted to refer the same withdrawn complaint under the guise of a new complaint, the fact that it referred a new complaint by filing a new complaint referral for which it obtained a new case number, demonstrates that the Commission itself understood its withdrawal notice

³⁸ Record pg. 108 – Annexure H.

to constitute a withdrawal on the merits. If it believed as it now avers, that the matter was merely removed from the roll by its withdrawal notice, it would not have seen it necessary to file a new complaint under a new case number.

[51] Hence, we find that the Commission's withdrawal notice had the effect of withdrawing the complaint referral against the respondents and not merely a removal of the matter from the roll.

Did the withdrawal amount to a settlement of the *lis* between the parties?

[52] Does this necessarily mean that the withdrawal at the same time amounted to a settlement of the *lis* between the parties?

[53] We say not. The fact that the complaint referral was withdrawn does not as a matter of fact and law amount to a settlement.

[54] Recall that the Commission's oft repeated rationale for the withdrawal was ostensibly to encourage settlement talks between the parties. The respondents in return were also pushing for settlement. But despite the positions expressed by the two respondents namely that they viewed the withdrawal of the matter as a "settlement", CFP's attorneys were alive to the fact that the Commission's decision to withdraw, rather than postpone, could result in confusion about the status of the complaint. Hence the advice given to the Commission that it ought to pursue the path of postponement and not withdrawal.

[55] What was anticipated by CFP has come to pass, this case being on point. The confusion notwithstanding, what is clear is that the withdrawal did not amount to a settlement. Indeed, this was why CFP asked the Commission to "*hold off*" the withdrawal notice, because the terms of settlement had not yet been received from the Commissioner.

[56] But more importantly, this matter does not concern a private civil dispute between the parties, but rather a matter in the public interest in which the Commission is required to enforce the provisions of the Act. While the Act is administrative in nature, the role of the Commission, as enforcer, is akin to that of a prosecutor. Unless there is some kind of written agreement which is confirmed as an order of

the Tribunal, whether this be in the form of a consent order under section 49D of the Act or a settlement arrived in the course of contested proceedings, the matter cannot be considered as being settled in all time.

[57] In other words, as a matter of law, while the complaint referral has been withdrawn by the Commission, this does not mean that the Commission cannot bring another complaint referral against the respondents, which would be equivalent to the reinstatement of charges in criminal proceedings. However, it will have to explain why this “new” complaint was different from the withdrawn complaint. For example, it will have to explain that new facts have come to light or the same evidence has been reviewed by the Commission’s investigators in a different light.³⁹

[58] However, no such explanation is given by the Commission.

[59] This then brings us to the question of whether the Commission is precluded from reinstating the withdrawn complaint and whether the withdrawal constituted “*completed proceedings*” before the Tribunal under section 67(2).

Did the withdrawal amount to completed proceedings contemplated in section 67(2)?

[60] Section 67(2) of the Act states:

“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.”

[61] Much reliance was placed by the respondents on the Competition Appeal Court's judgment in *Sappi Fine Paper (Pty) Ltd v the Competition Commission of South Africa and Another*⁴⁰ (“*Sappi*”) in support of their arguments that the Commission’s application should be dismissed.

[62] However, the facts of this case differ from those in *Sappi*. That case involved an *initiation* by the Commission of a complaint that had previously been initiated by a

³⁹ Whether or not the Commission would be required to initiate a new complaint under section 49B(1) is not a matter to be decided here.

⁴⁰ 23/CAC/Sep02.

private complainant, referred by the Commission then withdrawn and then subsequently became invalid due to the expiry of the one-year period in section 50(2) of the Act.

- [63] While the court in *Sappi* concluded, that the second complaint was based on substantially the same facts as the first complaint and therefore constituted "completed proceedings" under section 67(2) the invalid complaint and the new complaint had never constituted "completed proceedings before this Tribunal" contemplated in section 67(2). As confirmed by the CAC in *Omnia Fertilizer Limited v Competition Commission and Others; Sasol Chemical Industries Limited v Competition Commission and Others*⁴¹ ("Omnia") section 67(2) cannot apply to a matter that is not before the Tribunal. Nor is the Commission precluded from initiating its own complaint in the context of a third-party complaint.
- [64] In *Omnia*, Nutri-Flo ("the complainant") had filed a complaint to the Commission alleging that Sasol was guilty of contraventions of the Act. The Commission investigated the matter and issued a notice of non-referral. The complainants did not self-refer the matter. The complainant then lodged a fresh complaint which identified two additional firms alleged to have contravened the Act. In addition, the complainant sought interim relief pending the outcome of the investigation of its complaint. Nothing came of the interim relief proceedings. The second complaint was investigated and subsequently referred to the Tribunal. Sasol then sought to, *inter alia*, review the referral of the second complaint on the ground that it deals substantially with the same complaint the Commission had issued a certificate of non-referral in respect thereof (i.e. section 67(2) defence).
- [65] The CAC held that the first complaint had not been referred to the Tribunal nor had any proceedings against the respondents been completed before the Tribunal. Section 67(2), therefore, did not apply in that case.⁴² The court was of the view that where two complaints are substantially the same the Commission would be precluded from pursuing a second complaint and making a referral in circumstances where section 67(2) applied or where the complainant refers the complaint directly to the Tribunal in terms of section 51(1).⁴³ The Commission has,

⁴¹ (52/CAC/Jun05).

⁴² *Omnia* para 21.

⁴³ *Omnia* para 24.

however, no express power to refer a complaint that the complainant has abandoned by not referring it to the Tribunal. The only circumstance in which the Commission can do so would be where it initiates a complaint under section 49B(1) which it may refer to the Tribunal at any time (section 50(1)).⁴⁴

[66] While we are not concerned with the issue of an initiation by the Commission in this case it would be worthwhile to point out that the decision by the CAC in *Omnia* held that the Commission *could* initiate a new complaint of its own under section 49B(1). This was also confirmed by the SCA in the recent decision of *Competition Commission v Yara (South Africa) (Pty) Ltd and Others*⁴⁵ (“Yara”). In *Yara*, the SCA has found that the Commission is not precluded from initiating its own complaint even in the context of investigating a third-party complaint, even if such initiation was done tacitly. Both these cases refer to the same complaint referral initiated by Nutri-Flo and the Commission.⁴⁶

[67] Moreover, in order for completed proceedings contemplated in section 67(2) to amount to *res judicata*, a decision must have been made by the Tribunal in relation to that conduct. In *Competition Commission v South African Airways (Pty) Ltd*⁴⁷ the Tribunal ruled that to the extent that a respondent admits liability in a consent order made by the Tribunal in section 49D of the Act, the proceedings are completed and no person may refer a complaint to the Tribunal against the respondent under the same or another section of the Act relating substantially to the same conduct.⁴⁸

Conclusion

[68] In conclusion, we find that the effect of the Commission’s withdrawal notice was a withdrawal of the case against the respondents and not merely a removal of the case from the Tribunal roll and such withdrawal did not amount to a settlement of the case against the respondents. This does not mean that the Commission is precluded from reinstating a complaint against the respondents as result of further investigation, more evidence or a rethinking of the case. Whether or not the

⁴⁴ *Omnia* para 24.

⁴⁵ 2013 (6) SA 404 (SCA).

⁴⁶ See also *Power Construction and Another v Competition Commission* (145/CAC/Sep16); *Continental Tyres South Africa (Pty) Ltd v Competition Commission and Another* (150/CAC/Jun17).

⁴⁷ (83/CR/Oct04).

⁴⁸ SAA paras 59-60.

Commission would be required to initiate a new complaint under section 49B(1) in order to do so is not a matter for us to decide here.

[69] The Commission has however not adequately explained why it seeks to now reinstate the same complaint referral against the respondents and its application for reinstatement falls to be dismissed.

[70] While we do not seek to elevate form over substance, it appears to us that the Commission might have played fast and loose with the rules of the Tribunal, making use of different procedural mechanisms to achieve a purpose other than that for which the mechanism is designed which may well lead to confusion for parties and adjudicators alike. The Tribunal, as a *sui generis* body, has always been cautious about the application of rules without regard to its truth-seeking function. At the same time, at the core of our framework lies the Constitutional principle of fairness. Fairness in matters between the Commission and respondents becomes an even more important principle when the framework does not provide for the award of costs as a disciplining mechanism. In other words, had the issue been between private parties, the prejudice and inconvenience to the other could be addressed by an appropriate order of costs. But this is not the case here. Fairness requires us to have regard to the prejudice caused to the respondents and to the interests of justice. Had the Commission followed the route of postponement as opposed to withdrawal this entire dispute could have been avoided, a dispute that has no doubt come at considerable cost and inconvenience to the parties and the public purse alike.

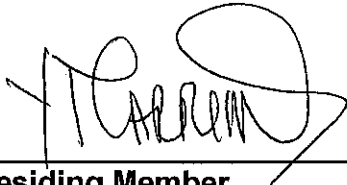
[71] The Commission, a public body tasked with the responsibility of promoting the objectives of the Act is required to conduct itself with decorum and accountability. In our view it has failed to do so in this case.

[72] In the circumstances we are inclined to dismiss the Commission's application to reinstate this case on the Tribunal roll.

Order

The Tribunal hereby orders the following:

1. The Commission's application to reinstate the complaint referral (CR172Sep17) withdrawn on 27 June 2018 is hereby dismissed.
2. There is no order as to costs.



**Presiding Member
Ms Yasmin Carrim**

17 October 2019
Date

Concurring: Ms Andiswa Ndoni and Mr Anton Roskam

Tribunal Case Manager : Ndumiso Ndlovu
For the Applicant : D Mashego and K Modise
For the First Respondent : GC Pretorius SC instructed by Manley Manley Inc.
For the Second Respondent : MM Le Roux instructed by Werksmans Attorneys